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IN THE SUPREME COURT OF FLORIDA

CHARLES C. PETERSON,

Appellant,

v. **CASE NO. SC12-1442**
L.T. No. CRC 00-05107 CFANO

STATE OF FLORIDA,

Appellee.
_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE SIXTH JUDICIAL CIRCUIT,
IN AND FOR PINELLAS COUNTY, STATE OF FLORIDA

ANSWER BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

References to the direct appeal record and the trial transcripts will be designated by "DA" and the record volume number and appropriate page number (DA Vol. #/page #). References to the instant post-conviction record on appeal will be designated by the record volume number and the appropriate transcript page number (Vol. #/page #).

STATEMENT OF THE CASE AND FACTS

Trial and Direct Appeal

During an armed robbery at a "Big Lots" store in St. Petersburg, Florida on Christmas Eve, 1997, the appellant/defendant, Charles Peterson, shot and killed one of the store employees. To conceal his identity, Peterson wore latex gloves and a nylon stocking over his face. On direct appeal, *Peterson v. State*, 2 So. 3d 146 (Fla. 2009), this Court summarized the evidence adduced at trial as follows:

> The evidence presented at the trial of appellant Charles C. Peterson established the following. Karen Smith testified that she worked as an assistant manager at a Big Lots in St. Petersburg, Florida, on the evening of December 24, 1997. She testified that while she and two other employees were in the store's office after the store closed at 6 p.m., she heard a "ruckus." She explained that when she opened the locked office door, she was immediately confronted by a man pointing a gun at her. Maria Soto, who also worked as an assistant manager at the Big Lots on December 24, 1997, testified that while she was in the office after closing, she heard a noise from the break room that sounded like furniture banging or firecrackers. Soto confirmed that when Smith opened the door to investigate the noise, "[w]e walked right into a man with a nylon stocking [covering his face] and a gun in his hand." Smith described the man as black, about five feet four inches or five feet six inches tall, weighing 130 to 140 pounds, with "pudgy cheeks." He wore a "nylon scarf" over his face and off-white latex gloves. Soto described the man as black, between five feet six inches and five feet eight inches tall, and noted that he wore latex gloves.
>
> Both witnesses testified that the man escorted the three employees from the office through the employee break room into the stockroom. The man held the gun to Smith's head as they walked. Smith testified that John Cardoso, another employee, was lying on the floor of the break room when they entered. Soto testified that the man forced her and the other employees to step over Cardoso.

Once in the stockroom, the three women and Josh McBride, another employee who had entered the stockroom, were made to get down on their hands and knees. Smith testified that the man repeatedly told them to "stay on your hands and knees you bitches and don't look at me." Soto testified that the man put the gun to her temple and told her not to look at him. After asking who was in charge, the man pulled Smith to her feet and told the others that "if [they] moved, he will kill her and anyone else." Smith explained that the robber used her to lure the remaining store employee, Wanda Church, to the back of the store, after which he took Church to the stockroom. The man then forced Smith to go into the office with him. The man took a backpack from the merchandise area of the store and had Smith fill it with money. He stated that he wanted "all of the large money." He told Smith to "hurry up you bitch" and demanded that she not look at him. Smith testified that after collecting money from the office, the man moved everyone into the break room and made them lie on the floor near Cardoso's body. The man then exited through the store's back emergency exit, which he previously had Smith unlock. After the man left, Soto and Church got up to seek help.

Smith testified that during the investigation of this crime, she identified the robber in a photopack shown to her by law enforcement officers. Although she could not previously identify the assailant, at trial Soto identified Peterson as the man she suspected of stealing from the Big Lots during operating hours on December 24, 1997, who she believed was the same man who later robbed the store because both men appeared to be wearing the same clothing that day. James Ronald Davis, who was a customer in Big Lots between 5:30 p.m. and 6 p.m. on December 24, 1997, testified that while shopping he encountered a black male pacing in the back aisle of the store. Davis testified that he observed the man for about five minutes and described him as five feet nine inches or five feet ten inches tall with a medium build and thin mustache. Davis stated that when he went to the front of the store to pay for his items two or three minutes after the last checkout announcement, the man remained in the back of the store. Davis testified that although he did not think he could identify that man from the store at the time of trial, in 1998 he identified Peterson from a photopack as the man he saw lingering in the back of Big Lots at closing on December 24, 1997.

Several law enforcement personnel associated with

the City of St. Petersburg Police Department testified about the search of two residences pursuant to search warrants. One residence was the home of Peterson's father, and the other was the home of Peterson's sister. Two pieces of grayish-black nylon stockings were seized from a dresser in a bedroom of his father's house. Three latex gloves were seized from a kitchen drawer in his sister's house. A gray nylon cap and a piece of nylon stocking were found in vehicles owned and operated by Peterson.

Janet Staples Hillman Gosha, Peterson's former girlfriend, testified that sometime between 1996 and September 1998, when looking for cleaning supplies, she found cash in bank wrappers in a box underneath the sink in their home. She testified that she saw money inside a safe at their residence that was not hers and that she once found a small, silver gun in a bedroom drawer with some of Peterson's belongings. She stated that the gun did not belong to her or her adult son. She explained that while she drove one of Peterson's vehicles when she lived with Peterson, she did not leave pantyhose in the car and that she did not recall Peterson wearing a wave cap or processing his hair in a manner that would require use of a wave cap.

In addition, pursuant to *Williams v. State,* 110 So.2d 654, 663 (Fla. 1959), the State presented evidence that Peterson had robbed a Family Dollar, a Phar-Mor, and a McCrory's in the greater Tampa/St. Petersburg area between February of 1997 and August 1998.

Mary Palmisano, an employee who worked at a Family Dollar in Tampa, Florida, on February 14, 1997, testified that after she locked the doors that evening, she went into the store's office and encountered a man with a gun. She stated that the man was black, about five feet eight inches or five feet ten inches tall and was wearing a mask that appeared to be made of thick stockings. Palmisano testified that the man asked for "big money," referred to her and her female coworker as "bitches," and repeatedly told them to not look at him. The man made her and her coworker lie face down on the floor and tied them up with cords from the office.

In order to avoid admitting unfairly prejudicial evidence of a sexual battery, the trial court read a stipulation that DNA was recovered in the Family Dollar crime. Testing revealed that this DNA matched Peterson's

known DNA sample.

Two employees of a St. Petersburg Phar-Mor testified about events in that store on May 12, 1998. Glendene Day testified that shortly after closing, she was confronted by a person in the storeroom who was not an employee. She described the person as a black male, about five feet six inches or five feet seven inches tall, medium build, wearing a mask, and carrying a gun. Day further described the mask as being made of black nylon that was "thin enough to see out of but thick enough that I couldn't see in." She stated that the man wore latex gloves, a black shirt, and tennis shoes. She explained that the man put the gun to her head, ordered her not to look at him, asked how many other employees were in the store, and told her she better not be lying. The man forced Day to call the other employees to the back room, where he ordered them to lie on the ground and used electrical tape, plastic strapping from boxes, and telephone cord to tie up two of the employees. Rather than bind Day, the man told her to walk him to where the money was kept. The man forced Day to unlock the office. He took manila envelopes from the office and directed Day to fill them with money. After gathering the money, she and the robber returned to the back room. The man made Day demonstrate that no alarm would sound when he opened the back exit and then bound Day with plastic strapping and telephone cord. The other employee to testify, Sirisone Vorasane, confirmed that after closing she was called to the warehouse, where she was confronted by an armed man who told her and her coworker to lie on the floor with their faces down and tied her hands and legs with plastic box ties. She described the man as "not that tall" with a petite build.

A hair was found on a piece of electrical tape used to bind a Phar-Mor employee. Testing of the hair established that mitochondrial DNA extracted from the hair was consistent with Peterson's known mitochondrial DNA profile. Shoe prints matching tennis shoes seized from a storage unit rented by Peterson were found in the Phar-Mor office. Gosha testified that in May 1998 she was asked by law enforcement officers to watch a surveillance video from the Phar-Mor robbery. At that time, she identified the person entering the store as Peterson. The surveillance tape was played for the jury, and Gosha again identified the person she saw in the tape as Peterson. Similarly, Ron T. Hillman, Gosha's brother, testified that he was previously asked by law enforcement

officers to watch part of the Phar-Mor surveillance tape and that he identified the person he saw as Peterson. While on the stand, Hillman was shown the tape and again identified Peterson.

Ann Weber, an employee who worked at a St. Petersburg McCrory's on August 29, 1998, testified that just before 6 p.m., she went to the back of the store to have a cigarette and throw out the trash. When she walked through the dark stockroom, a man wearing a stocking over his face came out of the employee bathroom. Weber described the man as having "high, pudgy cheek bones." She testified that the man held a small gun to her head and said, "Don't fucking look at me or I'll kill you." Weber explained that the man asked her to deactivate the buzzer on the office door and then made her enter the office, crawl up the steps to where the money was kept so that no one in the store would see her, and open the safe. When Weber began to take the money out of the bags in which it was kept, the man said, "No, you stupid bitch." Weber testified that the man asked her, "You close at six, right?" Upon being told that McCrory's was open until 8 p.m., the man became "aggravated." Weber testified that after collecting the money, the man took her to the employee bathroom, made her lie face down, and asked if there was any rope. He exited the store through the back door. Weber testified that she identified her assailant from a photopack during the investigation of the robbery and identified Peterson in the courtroom as the man who had robbed her. She explained that she was able to see his face through the stocking when she first encountered him because she was using a lighter to light her cigarette.

A law enforcement officer testified that when searching the home of Peterson's father, he found a green bank bag behind a refrigerator in the garage. Inside the bag, he found a white plastic McCrory's bag; about thirty documents including checks, a bank deposit slip, charge card receipts with McCrory's store number; an air freshener with a fifty-cent price tag; a McCrory's receipt for fifty cents; a $20 bill; and what appeared to be a firearm but was actually a pellet gun. Weber identified the green bank bag as the one kept in the McCrory's safe and all the recovered documents as things that would have been kept in the bag-except the McCrory's receipt for fifty cents. A latent print examiner testified that a fingerprint and a palm print matching Peterson's were found on a check and the receipt.

On July 27, 2005, the jury found Peterson guilty of first-degree murder by general verdict. The trial court conducted a one-day penalty phase during which the State and the defense presented evidence.

During the State's presentation, the parties stipulated that Peterson had been convicted previously of thirteen felonies involving the use or threat of violence, including multiple convictions for robbery with a firearm, sexual battery, and false imprisonment, resulting in nine life sentences. The parties also stipulated that Peterson was on life parole from March 3, 1992, through October 20, 1998, which included December 24, 1997, the date of the homicide. The State then presented the testimony of one witness. Dale Smithson testified that he was on duty at a Jimmy Spur gas station in St. Petersburg, Florida, on April 30, 1981. Smithson explained that after locking the door at closing, he was confronted by a man with a gun who demanded money. The robber was later proven to be Peterson.

The defense called two mental health professionals and three lay witnesses to testify. On direct examination, Michael Scott Maher, M.D., a physician and psychiatrist, testified that Peterson functioned at the level of a mid-teenager, fourteen to sixteen years of age. He opined that "Mr. Peterson does have some capacity to conform his behavior to the requirements of the law, but that capacity is less than an average adult, substantially less than an average adult." Based on Peterson's age and history of only minor infractions while in prison, Dr. Maher opined that Peterson is likely to be well-behaved in prison. On cross-examination, Dr. Maher testified that Peterson meets the criteria for antisocial personality disorder. He testified at length about the general characteristics of individuals with that disorder and whether Peterson displayed those characteristics. Dr. Valerie R. McClain, a forensic psychologist, testified that she performed IQ testing on Peterson and that his full-scale score on the Wechsler Adult Intelligent Scale was 77, placing him in the borderline range. On cross-examination, Dr. McClain testified that Peterson graduated from high school with a 2.0 grade point average.

Linda Dyer, a classifications supervisor and custodian of records for the Pinellas County Sheriff's Office, testified that Peterson had received only one disciplinary report since he came into the custody of the

Pinellas County Sheriff on January 19, 2001. She opined that one disciplinary report in that amount of time was a good record. Annie Peterson, Peterson's mother, testified that she never heard of Peterson getting in trouble in school and that after graduation he joined the Army. She testified that while paroled, Peterson worked in food and beverage service at the Marriott Hotel for seven years, part of that time as a manager. Laquanda Monique Peterson, Peterson's niece, testified that Peterson was like a father to her.

On July 29, 2005, the jury recommended the death sentence by an eight-to-four vote. After conducting a hearing pursuant to *Spencer v. State*, 615 So.2d 688 (Fla. 1993), and considering post-trial motions, the trial court followed the jury's recommendation and sentenced Peterson to death. *State v. Peterson*, No. CRC00-05107-CFANO-I (Fla. 6th Cir. order filed Jan. 6, 2006) (Sentencing Order). The trial court found and assigned weight to three aggravating factors,[FN1] one statutory mitigating factor,[FN2] and five nonstatutory factors.[FN3] *Id.* at 4-15.

FN1. The aggravating factors were: (1) Peterson was under a sentence of imprisonment at the time of the murder—life parole for three 1981 robberies (assigned great weight); (2) Peterson was previously convicted of a violent felony, based on thirteen convictions, resulting in a total of nine life sentences (assigned great weight); and (3) Peterson committed the murder during the commission of a robbery (assigned significant weight).

FN2. The trial court found the age statutory mitigating factor, despite Peterson's age of thirty-eight at the time of the offense, based on expert testimony that he functioned at the emotional level of a fourteen-to sixteen-year-old. This factor was given little weight.

FN3. The nonstatutory mitigating factors were: (1) Peterson had a low to normal IQ (assigned little weight); (2) Peterson had some limited mental impairment (assigned little weight); (3) Peterson had a good relationship with at least two family members (assigned some weight); (4) Peterson had a consistent work history (assigned some weight); and (5) Peterson had an exemplary disciplinary record in jail and likely will behave properly when placed

in prison (assigned little weight).

Peterson, 2 So. 3d at 148-152.

On January 29, 2009, this Court affirmed Peterson's conviction and death sentence. *Peterson*, 2 So. 3d 146, 152. This Court ruled, *inter alia*, that (1) the trial court did not err in allowing evidence of the three collateral robberies because they were sufficiently similar to the charged crime to be probative of identity, which rendered the evidence relevant and admissible; (2) the sentence of death was not disproportionate; (3) the majority of the State's cross-examination of Dr. Maher properly focused on Peterson's state of mind at the time of the offense (relating to the proposed statutory mitigating factor of substantially impaired capacity to appreciate the criminality of his conduct) and any questioning which arguably solicited testimony about remorse was harmless beyond a reasonable doubt; (4) Peterson's *Ring v. Arizona* claim was procedurally barred and also without merit, (5) Peterson's challenge to the standard penalty-phase jury instruction was without merit, and (6) Peterson's conviction for first-degree murder was supported by competent, substantial evidence of felony murder. *Peterson*, 2 So. 3d at 153-161.

On June 25, 2009, Peterson filed a petition for writ of certiorari in the United States Supreme Court, Case No. 09-5057. The petition alleged two grounds: (1) the admission of collateral crime evidence as an alleged due process violation and (2) lethal

injection as alleged cruel and unusual punishment. On October 5, 2009, the United States Supreme Court denied the petition for writ of certiorari. *Peterson v. Florida*, 130 S. Ct. 208 (2009) (table).

Post-Conviction Proceedings

On September 21, 2010, Peterson filed a Rule 3.851 Motion to Vacate. (V1/35-130). The State filed its Response on January 2, 2011. (V1/140-88). A Case Management Conference was held April 11, 2011 (V8/1134-1233); and, on April 21, 2011, the State filed a Supplemental Response. (V2/279-88). A second Case Management Conference was held on June 8, 2011. (V8/1234-72). An evidentiary hearing was granted on claims 1-3 of the Rule 3.851 motion. (V2/377-81). The evidentiary hearing was held on December 12-14, 2011 (V9/1306-V14/2032) and the following witnesses testified:

Dr. Jack Brigham

Dr. Brigham, a research psychologist, testified that his opinions were based at least in part on meta-analyses. (V9/1345, 1353-54; 1424). He acknowledged that one of the problems of a meta-analysis can be flaws in the constituent studies themselves, and that he was one of three individuals who chose the criteria determining which studies would be included in his meta-analyses. (V9/1349-51). Dr. Brigham's opinion on Anne Weber's identification was based upon his belief that she testified that she saw a composite photograph in the media. (V9/1402-03). However, Weber did not offer such testimony at trial, and she stated in a deposition

that she never saw a composite photo prior to her initial identification. (V9/1403-05). Apparently, Dr. Brigham's testimony in this regard was based not upon Weber's trial testimony or deposition, but upon a single mention in a police report. (V11/1534).

Dr. Brigham did not perform any studies or experiments concerning the facts in the instant case. (V9/1410). Dr. Brigham acknowledged that, other than eyewitness testimony, he did not review any other inculpatory evidence presented in this case. (V9/1411-13). He acknowledged that his potential testimony might rely upon terms such as "more probable than not." (V9/1419-20). Dr. Brigham was not permitted to testify in *State v. [Mc]Mullen*. (V9/1423). He has not done studies considering all of the different factors affecting his opinion and has never done a study with actual crime victims. (V9/1424-25). Dr. Brigham never had any contact with any of the witnesses in this case -- Davis, Smith, Weber or Soto -- and had no knowledge about how the factors he described would apply to any of those particular individuals. (V9/1425-26, 1446-47). Dr. Brigham could only speak in generalities; he could not give any statistical probability as to whether the eyewitness identifications in this case were right or wrong. (V9/1426-27, 1448). If called at trial, Dr. Brigham would not have commented on the individual witnesses; he would not have said any of the witnesses misidentified Peterson as the

perpetrator. (V9/1427). Dr. Brigham admitted that trial counsel presented much of the same information to the jury that he offered in post-conviction and that he would have offered to trial counsel if he had been hired as a consultant. (V9/1431-46).

Dr. Glenn Caddy

Dr. Caddy is a psychologist and testified that he is board certified by the American Academy of Forensic Examiners and the American Academy of Sexology. (V10/1469-70). Dr. Caddy testified that approximately seven or eight hours of his ten to twelve hour meeting with the Defendant in prison was devoted to a clinical interview, with the balance comprised of testing. (V10/1495-1500). Part of the clinical interview involved the Defendant supplying a detailed background to Dr. Caddy. (V10/1500-03). Dr. Caddy acknowledged that a death sentence may motivate someone to malinger and that there were tests available to investigate malingering that were not used during his time with the Defendant. (V10/1506). Dr. Caddy did not adjust the Halstead Category Test to contemplate the Defendant's race, age, or education. (V10/1508). He did not use the most current Wechsler Memory Scale when examining the Defendant. (V10/1511).

Lily Johnson and Sallie Dennis

Ms. Johnson, the Defendant's aunt, recognized that the Defendant's mother knows the Defendant better than she does. (V11/1540). During the entire period that Peterson was in prison,

Ms. Johnson visited him only once. (V11/1540-41). She does not know how he behaves when she is not around and only knows how he treats members of his family. (V11/1541).

Ms. Dennis, who is also the Defendant's aunt, also agreed that the Defendant's mother knows him better than she does. (V11/1547). Over the span of a decade when the Defendant was not incarcerated, Ms. Dennis only saw him only three or four times. (V11/1547). She never corresponded with him through the mail, and she was not aware that the Defendant was going to trial, much less when the trial began. (V11/1547-48). She does not know how he treats people when she is not around him. (V11/1548).

Melinda Clayton

As a preliminary matter, the State notes that Ms. Clayton was prompted to give testimony on an issue [the post-trial recommendations regarding fingerprint identification testimony/Simon Cole affidavit] that the trial court deemed was likely irrelevant. (V11/1555). During that testimony, the defense raised the "Brandon Mayfield" case and Ms. Clayton testified that she believed that case was an example of an erroneous identification rather than an example of two different people having the same fingerprints. (V11/1559, 1574). Ms. Clayton expressly rejected the defense's contention that the two individuals in that case had the same fingerprints. (V11/1596). As to her examination here, she knew that one of the known prints was

from the Defendant, but he was not the only person whose fingerprints she analyzed for this case. (V11/1575-80).

Ms. Clayton is aware of Simon Cole, but has never been involved in a case where he was called by the defense. (V11/1564). Simon Cole is not a fingerprint examiner; he is essentially a historian. (V11/1581). The issues addressed after the Brandon Mayfield case and in publications released in 2009 and 2011 were not available in 2005, at the time of the Peterson trial. (V11/1586, 1591). The fingerprint standards in effect at the time of trial suggested that an examiner either testify to an identification or exclusion. (V11/1590-91). She abided by those standards in her testimony during the instant trial. (V11/1591-95).

Ms. Clayton has never been presented with any evidence that her identification of the Defendant in this case was incorrect. (V11/1594). On redirect examination, Ms. Clayton agreed that her 2005 testimony did not include the qualifying language from the resolution adopted after this trial and, therefore, if offered today, it could be deemed conduct unbecoming a member of the IAI. (V11/1597-98). Ms. Clayton's response on redirect examination was based upon an excerpt of a resolution read by the defense. (V14/2008). Ms. Clayton later clarified her previous statement after having been given the opportunity to review the entirety of the resolution. (V14/2012, 2019). Ms. Clayton explained that the testimony she gave at the time of trial was fully correct and

consistent with the regulations existing at that time. (V14/2012). Ms. Clayton further testified that because she arrived at an identification and she had sufficient information to arrive at a conclusion, she did not need to qualify her testimony. (V14/2014).

Richard Watts

Trial co-counsel, Richard Watts, has practiced law since 1980. (V13/1779). Since 1987, he has focused primarily on violent crimes. (V13/1779-80). He has attended approximately 20 death penalty seminars in that time which covered many topics including jury selection and mitigation. (V13/1780, 1791). He has handled about eighty murder trials since 1987, most of which were death cases. (V13/1790-91). In the majority of those cases he was responsible for the penalty phase. (V13/1792-93). He was familiar with the state of the law in regard to *Williams* Rule cases at the time of the instant trial. (V13/1795-96). He was also familiar with search and seizure law. (V13/1779-80). He works hard to develop a good rapport with his clients. (V13/1803-04).

Co-counsel McDermott is deceased; Mr. Watts was familiar with Mr. McDermott for at least 25 years. (V13/1799-1800). Mr. McDermott practiced law for 47 years. (V13/1800). Mr. Watts worked ten death penalty cases with Mr. McDermott and they worked well together. (V13/1800, 1802-03). Mr. Watts respected Mr. McDermott's abilities and had no reason to question him. (V13/1801). Mr. McDermott attended the same seminars as Mr. Watts. (V13/1802).

Mr. Watts is familiar with Elizabeth Loftus, whose books on eyewitness identification are substantially similar to the beliefs of Dr. Brigham. (V13/1783-84). He is aware of aspects of DNA testimony and how to challenge it. (V13/1784-85). He has been involved with numerous cases in which Melinda Clayton testified as a fingerprint expert and she was always qualified to testify and render an opinion. (V13/1786). At the time of trial, it was his understanding that there are no two fingerprints the same. (V13/1786). The report in the Mayfield case was not released until 2006, or the year after the instant trial. (V13/1787-88). The defense trial strategy was to focus on the weaknesses of the main case, rather than the relatively strong *Williams* Rule cases. (V13/1811). There was no reason to encourage or force the State to present more *Williams* Rule cases than they did. (V13/1812).

The Defendant did not want to talk with Mr. Watts about a possible death penalty. (V13/1817). He was not cooperative with either Mr. McDermott or Mr. Watts. (V13/1818). The Defendant did not want to talk about his childhood, family background, or medical history. (V13/1818). Mr. Watts made attempts to encourage the Defendant to open up with him, but they were unsuccessful. (V13/1818-19, 1853). Nevertheless, Mr. Watts did find family members to assist, including a favorite niece. (V13/1820). The Defendant's family was uncooperative for the most part. (V13/1820-21). They were more cooperative by the time of the penalty phase

and the defense did present family members to testify. (V13/1821-22). They were unable to find a teacher to testify on Peterson's behalf. (V13/1824).

The Defendant did not discuss the facts of the case and denied involvement in any of the offenses. (V13/1825). Nor did the Defendant assist with developing any type of affirmative defense. (V13/1827-28). The Defendant did not offer any explanation for the inculpatory physical evidence. (V13/1828-29). Peterson did not want to testify; he took the position that he was framed and trial counsel did not think Peterson would be a good witness. (V13/1831-32). On the issue of failing to make an opening statement, the defense had nothing to offer the jury to exonerate Peterson and they were left with attacking the State's evidence. (V13/1832).

The Defendant did state that Darrell Sermons was lying and would not come to testify. (V13/1825-27). Mr. Watts utilized his investigator to follow up on Mr. Sermons. (V13/1849-51).

Dr. Maher was one of Mr. Watts' preferred mental health experts. (V13/1817). Mr. Watts has had a 25 year relationship with Dr. Maher and still uses him today. (V13/1833-34). Dr. Maher's examinations did not reveal any brain impairment or injury. (V13/1835-36). The defense did not receive any such information from the Defendant's family either. (V13/1836-37). The mitigation strategy with Dr. Maher was to focus on the Defendant's emotional immaturity. (V13/1838-46). Mr. Watts also hired Dr. McClain and she

determined that the Defendant had low-intellectual functioning, but the Defendant was not retarded. (V13/1846). Dr. Maher also utilized that in his testimony. (V13/1847-48).

Mr. Watts has never been presented with a "perfect" jury. (V13/1854). When considering jurors, Mr. Watts' believes it is more important to focus on the penalty phase sentencing recommendation. (V13/1854-55). Due to this preference, in previous cases and in this case, Mr. Watts has chosen jurors he believed would be better in the penalty phase even when he knew those jurors may not be as helpful in the guilt phase. (V13/1855-56). Race is also a positive factor in selecting a juror. (V13/1857-58). Concessions have to be made in jury selection. (V13/1858). Juror A.J. was African-American and ambivalent about the death penalty. (V13/1858-59). Marilyn Breen was pro-defense as far as the death penalty was concerned. (V13/1859). As to juror Walbolt, the information he provided to another juror was "not incorrect." (V13/1860). In addition, Mr. Walbolt was applying a pro-defense standard for sentencing. (V13/1861). Juror Necole Tunsil was also African American and pro-defense as far as the death penalty was concerned. (V13/1860-61). Juror Tunsil may have initially stated she wished to hear the Defendant testify, but she later clarified that she would presume him to be innocent and would follow the law. (V13/1867). She expressed beliefs that are natural, but also agreed to follow the law. (V14/1937-38). Juror Christine Salgado was also pro-defense

for sentencing. (V13/1861). Even though some of these jurors may have had some "baggage," Mr. Watts believed them, on balance, to be good choices for the jury. (V13/1861). All of the jurors addressed in the post-conviction motion had defense-favorable feelings about the death penalty. (V13/1861). Moreover, Mr. Watts did not believe that he had any legal reason to excuse them for cause and there was no indication that they were biased in fact. (V13/1862). Mr. Watts generally believed that they would follow the law given by this Court. (V13/1862).

Mr. Watts, Mr. McDermott, and the Defendant discussed who they wished to be seated on the jury. (V13/1868). The Defendant wanted to keep jurors Johnson and Tunsil. The defense exercised every challenge for cause for which they had a legal basis and used all ten peremptory challenges and one extra that was granted by the trial court. (V13/1868-70). In doing so, they followed their strategy of weighing each juror's attributes, but focusing in each case on their benefit during the penalty phase. (V13/1869-70). The Defendant participated throughout jury selection. (V13/1870-71).

Mr. Watts saw no legal objection when the State commented that the Legislature defines the aggravating circumstances that support a death recommendation. (V13/1871-72). The defense did not present an opening statement at the guilt phase and, at the time, the defense did not know if the State would be presenting three or all six *Williams* Rule cases. (V13/1871-72). If Mr. McDermott had

discussed six such cases in opening statements and the State had only eventually presented three [*Williams* Rule] cases, that would have looked unfavorable to the jury. (V13/1873-74). It is a "cardinal rule" to deliver what you promise. (V13/1874). The defense decided that there was nothing that they had to offer to "promise" that they could discuss in an opening statement. (V13/1874-76). Moreover, cross-examination did not need to be previewed to the jury and an opening statement would have revealed their strategy to the State. (V13/1875). At the time of the trial, if the defense had presented evidence other than the Defendant's testimony, they would have had to give up first and last closing, something they would not give up lightly. (V13/1876-77). The defense did in fact "sandwich" the State's argument in this case. (V13/1894-95).

At trial, defense counsel cross-examined the Big Lots' eye-witnesses based on their opportunity to see, the level of stress, the presence of a gun, and the passage of time, in accordance with their training and the treatises of Elizabeth Loftus. (V13/1878). The defense also continued to oppose the *Williams* Rule evidence and minimize the impact of the DNA evidence presented at trial. (V13/1878-79).

As to witness Gosha, the Defendant's girlfriend who found money hidden under the sink and tried to volunteer Peterson's self-serving hearsay statement (that he had gained money not from

robbery but from gambling), Mr. Watts saw no legal basis to object to the State preventing her from doing so. (V13/1879-81). Even if the defense had objected at trial and the Court had allowed Gosha to repeat the Defendant's self-serving hearsay, the State then would have been permitted to impeach the Defendant with his thirteen prior convictions. (V13/1881-83). Mr. Watts believed that the absence of the prior record was more important than the testimony Gosha would have offered. (V13/1882). In addition, Mr. Watts saw no legal objection to the State suggesting that gambling debts could be a motivation for the Defendant's robberies. (V13/1884-87). Mr. Watts believed there was no legal basis to seek Gosha's opinion about whether or not the Defendant was involved in the robberies. (V13/1887).

As to witness M.P., Mr. Watts indicated that she was properly referred to as a victim or at least a victim of the robbery. (V13/1888). Raising the issue of her failure to make a photo-pack identification in the Hillsborough case on cross-examination at trial, since it was not raised on direct, would likely have drawn an objection by the State as outside the scope of direct examination. (V13/1888-90). Mr. Herren's sole role in the Pinellas case was in the chain of custody for the blood evidence. (V13/1890). There was no legal basis to attack his truthfulness based upon a specific isolated act. (V13/1890-92). The defense attacked the witness identifications as tainted throughout the

trial. (V13/1892-94). In choosing which objections to make, Mr. Watts testified that counsel should be concerned about alienating the jury with frivolous objections. (V13/1894).

Dr. Michael Gamache

Dr. Gamache is a psychologist. (V14/1946). He testified that the American Academy of Sexology and the American Academy of Forensic Psychology are not recognized or approved by the Florida Board of Psychology. (V14/1947-48, 1951). If a psychologist's board certifications are not approved by the State of Florida, they should not hold themselves out as board certified. (V14/2003).

Dr. Gamache was present at the evidentiary hearing; he did not hear any testimony presented or view any records suggesting that the Defendant had suffered a traumatic brain injury; in fact, Dr. Gamache heard testimony that the Defendant had not suffered such an injury. (V14/1957, 1959). Dr. Gamache did not hear any testimony or view any records suggesting that the Defendant suffered any neuro-toxic exposure or neurological disease that would cause brain impairment. (V14/1958-59). None of the evidence Dr. Gamache heard or reviewed suggested that the Defendant suffers from a brain abnormality. (V14/1960). Dr. Gamache concluded that the data he reviewed does not support a conclusion that the Defendant qualifies for the statutory mitigators that he was under the influence of an extreme emotional disturbance or that his capacity to appreciate the criminality of his conduct was substantially impaired.

(V14/1961-62). Dr. Gamache testified that the Defendant scored in the low average IQ range consistently, except for the testing done by Dr. McClain just prior to the *Spencer* hearing in this case; that testing he referred to as an outlier. (V14/1965-67). According to Dr. Gamache, you cannot "fake good" on an IQ test. (V14/1967). There is no evidence that the Defendant is intellectually impaired and he is well within the normal range. (V14/1967).

Dr. Gamache testified that there are measures and testing available to confirm the validity of neuropsychological testing, and validity testing is especially important when the subject is a criminal defendant due to their obvious motivation to malinger. (V14/1970). Dr. Caddy did not administer any validity tests and none of the tests that he did administer had built-in measures of validity. (V14/1971). One of the tests administered by Dr. Caddy, the Wide Range Achievement Test, is a measure of academic aptitude and there is no reason for such a test when the referral question is brain impairment or when determining one's ability to conform their conduct to the law. (V14/1971-74). The Wechsler Memory Scale Revised administered by Dr. Caddy is outdated, having been first published twenty-four years ago based on thirty year old norms. (V14/1974). Two revisions have been published since that time, and the revised scale was no longer recommended by the publisher when they released the next version in 1997. (V14/1975-77). That version also was replaced around 2008. (V14/1977). The versions were

updated due to concerns about validity and reliability, and if he were called to testify about results from an earlier version, he would address those limitations in his testimony. (V14/1997-2000). Of the ten raw scores that go into calculating the index scores, there was no raw data for three of them. (V14/1980). Without that data, the resulting score is invalid and it is improper and misleading to suggest a result. (V14/1981-82). The Halstead Category Test evaluates executive functioning. (V14/1983). The Halstead test is very sensitive to the person's age and educational level so it is very important to adjust the score based upon those factors. (V14/1986-88). When adjusted for Peterson's age and education, his Halstead scores are normal. (V14/1988-89).

Dr. Gamache testified that a standard neuropsychological battery would address at least five domains of cognitive functioning. (V14/1967-68). The tests administered by Dr. Caddy only contemplated two of those areas. (V14/1983-84). Neither the data nor testimony of Dr. Caddy made any attempt to correlate the test results with Peterson's state of mind at the time of the offense. (V14/1990).

The trial court denied Peterson's Motion to Vacate on June 12, 2012. (V5/748-94). This appeal follows.

SUMMARY OF THE ARGUMENT

The trial court correctly denied Peterson's claims of ineffective assistance of counsel (IAC) at the guilt and penalty phase under *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052 (1984). The trial court set forth detailed factual findings which are supported by competent, substantial evidence. Inasmuch as no procedural or substantive errors have been shown with regard to the factual findings or the trial court's application of the relevant legal principles, no relief is warranted and this Court should affirm the trial court's order denying post-conviction relief.

THE *STRICKLAND* STANDARDS AND STANDARDS OF REVIEW

The issues raised in this appeal involve claims of ineffective assistance of trial counsel and these IAC sub-claims were denied after the multi-day evidentiary hearing proceedings. In *Bradley v. State*, 33 So. 3d 664, 671 (Fla. 2010), this Court summarized the following standards of review applicable to these IAC claims:

> . . . the test when assessing the actions of trial counsel is not how, in hindsight, present counsel would have proceeded. *See Cherry v. State*, 659 So.2d 1069, 1073 (Fla. 1995). On the contrary, a claim for ineffective assistance of trial counsel must satisfy two criteria. First, counsel's performance must be shown to be deficient. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Deficient performance in this context means that counsel's performance fell below the standard guaranteed by the Sixth Amendment. *Id.* When examining counsel's performance, an objective standard of reasonableness applies, id. at 688, 104 S.Ct. 2052, and great deference is given to counsel's performance. *Id.* at 689, 104 S.Ct. 2052. The defendant bears the burden to "overcome the

> presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" *Id.* (quoting *Michel v. Louisiana*, 350 U.S. 91, 101, 76 S.Ct. 158, 100 L.Ed. 83 (1955)). This Court has made clear that "[s]trategic decisions do not constitute ineffective assistance of counsel." *See Occhicone v. State*, 768 So. 2d 1037, 1048 (Fla. 2000). There is a strong presumption that trial counsel's performance was not ineffective. *See Strickland*, 466 U.S. at 669, 104 S.Ct. 2052.
>
> Second, the deficient performance must have prejudiced the defendant, ultimately depriving the defendant of a fair trial with a reliable result. *Strickland*, 466 U.S. at 689, 104 S.Ct. 2052. A defendant must do more than speculate that an error affected the outcome. Id. at 693, 104 S.Ct. 2052. Prejudice is met only if there is a reasonable probability that "but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694, 104 S.Ct. 2052. Both deficient performance and prejudice must be shown. *Id.* Because both prongs of the *Strickland* test present mixed questions of law and fact, this Court employs a mixed standard of review, deferring to the circuit court's factual findings that are supported by competent, substantial evidence, but reviewing the circuit court's legal conclusions de novo. *See Sochor v. State*, 883 So.2d 766, 771-72 (Fla. 2004).

Bradley, 33 So. 3d at 671.

In sum, as emphasized in *Porter v. McCollum*, 130 S. Ct. 447, 456 (2009), to demonstrate prejudice, the defendant must establish "a probability sufficient to undermine confidence in [the] outcome." *Strickland*, 466 U.S., at 693–694, 104 S. Ct. 2052. The above-cited standards apply to all of the claims of ineffective assistance of counsel (IAC) in the Appellant/Defendant's Initial Brief.

ARGUMENT

ISSUE I

THE IAC/JURY SELECTION CLAIM

In his first issue, Defendant Peterson alleges that trial counsel was ineffective during jury selection for not exercising either cause or peremptory challenges to five jurors – jurors A.J., Marilyn Breen, Thomas Walbolt, Necole Tunsil and Christine Salgado. The only claim cognizable within this issue is the IAC claim; any substantive claim based on juror competency was available for direct appeal and is procedurally barred. See, *Spencer v. State*, 842 So. 2d 52, 68 (Fla. 2003).

In this case, the twelve jurors (and alternates) were seated after almost three days of *voir dire* in which counsel questioned in excess of 120 prospective candidates. This exhaustive process, which consumed almost 1,000 pages of the trial transcript, was completed only after over 50 challenges for cause had been sought and granted by the trial court and after both parties had exercised 20 peremptory challenges. At trial, the defense fully exhausted its original ten peremptory challenges and an eleventh peremptory challenge granted by the trial court in an abundance of caution.

This IAC claim was denied after an evidentiary hearing. The trial court denied the defendant's IAC claim under *Strickland* and in light of several of this Court's precedents, including *Carratelli v. State*, 961 So. 2d 312, 324 (Fla. 2007), *Owen v.*

State, 986 So. 2d 534, 550 (Fla. 2008)[1], *Lusk v. State*, 446 So. 2d 1038, 1041 (Fla.), *cert. denied*, 469 U.S. 873 (1984), and *Phillips v. State*, 894 So. 2d 28 (Fla. 2005). The trial court addressed trial counsel Watts' testimony, as well as the specific allegations as to each of the five jurors, and determined that Peterson failed to show deficient performance and prejudice under *Strickland*. In denying relief, the trial court painstakingly explained:

> Peterson argues that counsel was ineffective for failing to strike jurors AJ,[fn3] Marilyn Breen, Thomas Walbolt, Necole Tunsil, and Christine Salgado, either for cause or have them excused by exercising a peremptory challenge, and that any strategy or lack thereof used in deciding not to challenge these jurors is absent from the record.
>
> "Where a post-conviction motion alleges that trial counsel was ineffective for failing to raise or preserve a cause challenge, the defendant must demonstrate that a juror was actually biased." Carratelli v.State, 961 So.2d 312, 324 (Fla. 2007). To be entitled to relief, the defendant must show that the juror "was actually biased, not merely that there was doubt about her impartiality." Owen v. State, 986 So.2d 534. 550 (Fla. 2008). The test for juror competency is "whether the juror can lay aside any bias or prejudice and render his [or her] verdict solely upon the evidence presented and the instructions on the law given to him [or her] by the court." Lusk v.State, 446 So.2d 1038. 1041 (Fla.), cert. denied, 469 U.S. 873 (1984).
>
> fn 3. Initials are used for Juror AJ to avoid the necessity of excision of her full name due to her status as the victim of a sexual assault.

[1]In *Owen v. Fla. Dept. of Corr.*, 686 F.3d 1181, 1201 (11th Cir. 2012), the Eleventh Circuit concluded that it did not need to decide whether the *Carratelli* actual-bias test for prejudice imposed a higher burden or contradicts the governing *Strickland* prejudice standard. Even if habeas review were *de novo*, Owen still could not prevail on his IAC/jury selection claim.

In this case in excess of 120 prospective candidates were questioned during almost three days of *voir dire*. The defense fully exhausted the 10 peremptory challenges provided by law as well as an 11th peremptory challenge granted by this court in an abundance of caution. At the post-conviction evidentiary hearing, Mr. Watts testified that he has never been presented with a "perfect" jury. (*Evidentiary Hearing Transcript, p. 549*). He further testified that when considering jurors, he believes it is more important to focus on the penalty phase sentencing recommendation. (*Evidentiary hearing Transcript, pp. 549—50*). Mr. Watts also testified that he has chosen jurors he believed would be better in the penalty phase even when he knew those jurors may not be as helpful in the guilt phase due to this preference. (*Evidentiary Hearing Transcript, pp. 550-51*). In addition, he testified that race is a positive factor in selecting a juror and that concessions must he made in selecting a jury. (*Evidentiary Hearing, pp. 552-53*).

Peterson fails to specify how the exercise of peremptory challenges fell below the standard of constitutional adequacy and has made no attempt to show prejudice under Strickland. Moreover, as the Florida Supreme Court noted in Phillips v. State, 894 So.2d 28 (Fla. 2005), no statute, rule or case law requires a defense attorney to exercise peremptory challenges and their exercise is not a right of constitutional dimension. Nor has Peterson made the required showing that an impartial jury was not obtained.

Peterson fails to demonstrate prejudice by showing that any of these jurors were actually biased against him. See Carratelli, 961 So.2d at 324 (Fla. 2007). Because Peterson has not shown that the jurors were actually biased, confidence in the outcome is not undermined. The transcript of the *voir dire* demonstrates thoughtful inquiry by experienced trial counsel who made an intelligent decision in selecting the jury. And, the record shows that trial counsel repeatedly discussed the decisions with Peterson, who expressed his personal satisfaction with the jurors chosen. (*Jury Trial Transcript, p. 918*). As set out below, Peterson fails to show that counsel was deficient during *voir dire* and that such deficiency created a jury that was not impartial.

Juror AJ

Peterson argues that there are several troubling issues surrounding Juror AJ and that she should not have

served on the jury in this case. Specifically, Peterson argues that Juror AJ was a rape victim when she was 16 years old, that the assault took place in Pinellas County, and that she did not believe that the sentence for the person convicted, Cedrick Bailey, was severe enough. Peterson claims that based on a 2006 booking photo, Juror AJ's attacker, Cedrick Bailey, very closely resembles Peterson, and that Williams [fn4] rule evidence presented by the State circumstantially implicated Peterson in a Hillsborough County rape at a Family Dollar. Peterson next alleges that Juror AJ stated that she had family in law enforcement including a brother-in-law who worked at the jail, in the prison system, and as a probation officer. Finally, Peterson claims that a relative of Juror AJ, her husband's cousin, was recently shot.

fn 4. Williams v. State, 110 So.2d 654 (Fla. 1959).

Although Mr. Watts testified that he could not recall whether the fact that Juror AJ was African-American was the only reason, he did remember that he and Mr. McDermott chose to keep Juror AJ, that she was African-American, and she was equivocal about the death penalty. (*Evidentiary Hearing Transcript, pp. 304-305 553-554*). As a young, African-American female with ambivalent feelings about the death penalty, she was not challengeable for cause by either the State or the defense and a was [sic] reasonable defense choice to be seated as a juror.

As to the allegation that Juror AJ was a poor choice because she was the victim of a sexual attack at age 16, because her attacker, Cedrick Bailey resembled Peterson and because Juror AJ felt that Bailey did not receive a harsh enough sentence, Peterson fails to show either deficiency of counsel or prejudice. **The defense fails to establish that Peterson resembled Bailey or that Juror AJ's dissatisfaction with Mr. Bailey's sentence was prejudicial.**

Peterson relies on a 2006 booking photo, which would not have been available to the defense at the time of Peterson's 2005 trial, to demonstrate that Mr. Bailey possessed the same allegedly "high, fleshy cheeks" as Peterson. The State accurately points out that the record in Mr. Bailey's 1998 case shows that Bailey was charged with unlawful sex with a minor when he was 26 years old and the victim was 16. No physical force was alleged to have been used. Mr. Bailey was a co-worker who was well known to the victim, and the sexual activity occurred on

repeated occasions over time. The victim in that case has the same first name as juror AJ, but a last name different from her last name at trial or her current last name.

The State argues that although photographs relating to Bailey's 1998 arrest were available through Pinellas County Sheriff's Office archives and were obtained easily by the State, Peterson failed to present them. Even assuming Mr. Bailey's victim to be Juror AJ, the photo provided to the court disproves the alleged resemblance to Peterson who was nearly 46 years old at the time of the trial, shorter and noticeably thinner than Mr. Bailey. Even if the defense provided a photograph from a relevant time frame, it would still have failed to substantiate Peterson's claim. However, the photograph used to support Peterson's allegation of a similar appearance was taken seven years after the crime and after Peterson's conviction in the instant case.

Furthermore, no direct testimony concerning the rapes committed by Peterson was introduced in the guilt phase. And, Juror AJ's dissatisfaction with her own assailant's sentence of two years became irrelevant and non-prejudicial when she became aware during the penalty phase that Peterson received nine life sentences for his crimes. In addition, Juror AJ's attachment to law enforcement is exaggerated. It was her brother-in-law who was a corrections officer at the jail. Juror AJ had no blood relationship with this individual and he was not a law enforcement officer who investigates crime. Likewise, it was her husband's cousin who was shot in St. Petersburg and it is unclear if the shooting was being investigated or prosecuted as a crime but it had not resulted in her having any contact whatsoever with the police. Juror AJ was clear and convincing in her certainty that her past victimization would have no effect on her determination of Peterson's case and that she would accord law enforcement officers no special credibility. (*Jury Trial Transcript, pp. 789-97*).

And, as accurately pointed out by the State, the defendant's reliance on *McKenzie v. State*, 29 So.3d 272. 280 (Fla. 2010) is misplaced. In McKenzie, a direct appeal case, the Florida Supreme Court upheld the striking of a potential juror for cause in a first-degree murder case when her child had been murdered the same year as the trial. The McKenzie juror was not only married to a police officer but the mother of two police officers. The court in McKenzie decided to strike the juror for cause after concerns were raised by the State;

the State agreed and the defendant did not object. The Florida Supreme Court ruled that it was not fundamental error for the court to have stricken the juror. Here, Juror AJ was a victim of a separate crime than the crime with which Peterson was charged, seven years had passed since her case had been resolved through a plea, and she had relatively minimal ties to law enforcement.

Juror Marilyn Breen

Peterson argues that Juror Marilyn Breen was not a suitable juror because she admitted to being very emotional. In addition, Juror Breen was upset because the police failed to do more after her eight-year-old son was knocked off his bike, breaking his arm and collar bone, and requiring 12 stitches in his head.

Juror Breen's *voir dire* responses, which Mr. Watts conceded at the post-conviction evidentiary hearing showed her to be "a faint heart," were made in response to the possibility of the introduction of gory photographs or other gruesome evidence. The record reflects that for a murder case, the evidence introduced in Peterson's case was relatively minor in that there were no autopsy photographs and only five crime-scene photographs of the murder victim who had been shot once. (*Jury Trial Transcript, p. 1200*). The record does not reflect any overly emotional reaction by any juror to the testimony or evidence. "Many prospective jurors would undoubtedly prefer to avoid viewing autopsy photos or, for that matter, serving on the jury" and this is not grounds to disqualify a juror for cause. Bartee v. State, 849 So.2d 12, 14 (Fla. 3d DCA 2003).

The fact that Juror Breen's son was knocked off his bike and Juror Breen was unhappy with the follow-up by police did not disqualify her as a juror in a murder case. And, Juror Breen's dissatisfaction with police did not make her pro-prosecution, since presumably the State would bear any malice she continued to bear against law enforcement. **Juror Breen stated that the prior incident would not impact her decision in Peterson's case.** (*Jury Trial Transcript, p. 256*).

Juror Thomas Walbolt

Peterson argues that Juror Thomas Walbolt was not a suitable juror in the above-styled robbery and murder case because he had been the victim of a robbery, his wife had been the victim of two attempted robberies, and he owned guns, presumably for his personal protection to ward off future robbery attempts. Peterson argues that this shows that Juror Walbolt sympathizes with robbery victims. In addition, Juror Walbolt worked on events with

Clearwater Police and with the Pinellas County Sheriff's Office. Also, his brother and his nephew run a jury consultant company, "Best Evidence," and his sister-in-law is a lawyer who serves on the Florida Bar Association Committee on jury instructions. Moreover, Juror Walbolt had two separate incidents which Peterson characterizes as improper discussions of the case. First, during a lunch break in the jury selection he had a conversation with Judge Peters regarding the death penalty. Second, later during *voir dire*, after having been warned by the court about his conversation with Judge Peters, Juror Walbolt instructed potential jurors regarding the degree of murder charged in this case. Peterson contends that trial counsel should have sought a mistrial after Juror Walbolt's second improper discussion of the case tainted the jury pool.

As pointed out by the State, since lawyers are not exempt from jury service, knowing a lawyer or being related to one is not grounds for disqualification for cause. There is no indication that Juror Walbolt's brother, nephew, or sister-in-law handle any criminal matters. The defense exaggerates Juror Walbolt's "friendships" with law enforcement. His contact stemmed mainly from his job handling events for the City of Clearwater for which police are presumably required to provide security. Juror Walbolt was not involved in their efforts to investigate and prosecute crime. And, his "good friendship" with a crime scene technician with the Pinellas County Sheriff's Office likewise did not warrant disqualification since he clearly stated that he would treat all witnesses with the same trustworthiness and not accord officers any special credibility. (*Jury Trial Transcript, pp. 407-8*). The "Best Evidence" business run by his brother and nephew is not a State or law enforcement entity. And, Peterson makes no clear allegation how this business, which is not owned by the juror, has any relationship to his qualifications as a juror.

Peterson fails to show that ownership of firearms predisposes a potential juror to believe that a defendant charged with a crime involving a firearm is guilty. As argued by the State, Juror Walbolt's ownership of guns could make him more sympathetic to interpreting the evidence of Peterson's possession of a weapon in his home as being non-criminal. **Furthermore, Juror Walbolt's feelings on the death penalty would have made him a desirable choice for Peterson. He stated that while in theory he was in favor of the death penalty he did not see himself voting for it unless it was somebody on death**

row who had killed a corrections officer. (*Jury Trial Transcript, p. 498*).

As to Peterson's claim that Mr. Walbolt improperly discussed the case, Peterson fails to meet the two-prong test of Strickland. In Spencer v. State, 842 So.2d 52 (Fla. 2003), the Florida Supreme Court dealt with a claim of ineffective assistance of counsel for failing to address improper comments. In Spencer, the Court noted that the comments were immediately brought to the court's attention, and after inquiry by the judge, the jurors were reminded to not say anything to the lawyers or witnesses until the trial was over. The Florida Supreme Court found that counsel was not deficient for failing to conduct a *voir dire* of the jurors about these incidents, and that there was no reasonable probability that the outcome of the trial would have been different had counsel done so.

Peterson acknowledges that the two incidents were brought to the trial court's attention immediately. In both instances this court brought Juror Walbolt before the court, in the presence of the State and defense counsel, and inquired about what had occurred. (*Jury Trial Transcript, pp. 124-125, 929-930*). **After conducting an inquiry, defense counsel consulted with Peterson and decided that the only action necessary was for the court to re—address with the jury the issue of talking about the case and that Peterson was not seeking to remove Juror Walbolt.** (*Jury Trial Transcript, pp. 930-931*).

The questioning by the court and counsel revealed that no violation of the Court's instructions had occurred. Juror Walbolt's first comment to Judge Peters, that the number of people on the venire not in favor of the death penalty seemed to exceed that in the general community, is likely accurate and unrelated to Peterson's case. The second comment involved an explanation of the two forms of first—degree murder. This same explanation was provided to each venire panel by both the State and the defense. Consequently, Juror Walbolt's broad discussion of the lawyers' comments in *voir dire*, when the jurors were repeatedly told that it would he the court that would be instructing them on the law, is neither a substantive discussion of the case nor a comment indicating bias toward either side. While the court may not have discussed in detail at that point the instructions on felony murder, both the State and defense counsel described felony murder during *voir dire*. (*Jury Trial Transcript, pp. 433-436, 859-860*).

The failure to attempt to strike a juror for cause

when the challenge is not legally justified is not grounds for a claim of ineffective assistance of counsel. There is no basis for Peterson's argument that "we don't know what was said" since an adequate inquiry was made. Nor is there any basis to support Peterson's speculation that Juror Walbolt instructed other jurors that the instant case constituted first degree murder. There was no legal or factual issue that the crime was first-degree murder.

Juror Necole Tunsil

Peterson argues that Juror Necole Tunsil, the jury foreperson, was not a suitable juror in this case because certain statements she made during *voir dire* showed that she would require Peterson to deny the offense at trial. And she told the press, post—verdict, that she might have voted differently if Peterson had testified. In addition, Peterson argues that in her job working with juvenile delinquents at a special school, Juror Tunsil worked closely with the St. Petersburg Police Department and the State Attorney's Office and had a bias towards law enforcement. Peterson also alleges that a statement made by Ms. Tunsil was proof of prejudice and bias towards law enforcement. Specifically, Ms. Tunsil stated that she would hope that her family was never arrested because it would give her a bad name. Peterson contends this comment evidences that she was closed-minded to the possibility that someone could be falsely accused of a crime and that she would form a presumption of guilt based on an arrest.

At the evidentiary hearing on this matter Mr. Watts testified that Juror Tunsil agreed to follow the rules but was surprised when he read the trial transcript that Juror Tunsil did not specifically articulate that, although she wanted to hear from Peterson, she could follow the law. (*Evidentiary Hearing Transcript, p. 328*). **However, as a young African-American female who had mixed feelings about the death penalty, Juror Tunsil was a good defense choice to serve on the panel. Juror Tunsil's *voir dire* responses demonstrated a defense-friendly attitude in suggesting there would have to be "no doubt" in her mind that Peterson was guilty before she would vote to convict and that she would only consider recommending the death penalty if she was "totally convinced" that it was appropriate.**

Peterson fails to show that Juror Tunsil's experience as a counselor at the Pinellas Marine Institute is akin to being in law enforcement. Ms. Tunsil answered affirmatively when asked if she would like to hear from both sides before making a decision, reflecting

receptiveness toward both parties before making a determination and demonstrating a perspective of fairness, not prejudice. **Juror Tunsil was responding to ambiguous questions about her "feelings" which were not framed in terms of her ability to follow the law. When informed by the court of the presumption of innocence and burden of proof applicable to criminal trials, she unequivocally agreed that she would hold the State to its burden, had no difficulty affording Peterson the presumption of innocence, and would not hold a defendant's failure to testify against him.** (*Jury Trial Transcript, pp. 483-89, 555, 558-59*).

Finally, the issue of Juror Tunsil's comments as quoted by the *St. Petersburg Times* after the conclusion of the trial was addressed by the Florida Supreme Court on direct appeal. Peterson v. State, 2 So.3d 146, 160, fn. 6 (Fla. 2009). The Florida Supreme Court specifically referred to Juror Tunsil's purported speculation as to whether the outcome might have been different had Peterson testified and found that this matter inheres in the verdict and held that under Devoney v.State, 717 So.2d 501, 504-05 (Fla. 1998), it could not consider the alleged comments by the jury forewoman in deciding whether Peterson was entitled to a new penalty phase.

Since this testimony is inadmissible to attack the verdict, it is equally inadmissible to vicariously prove ineffective assistance by speculating that a juror may have considered a defendant's right not to testify. As such, it is law of the case and a procedural bar to use this same complaint as a basis for post—conviction relief. Peterson cannot rely on these ambiguous comments to establish an after-the-fact basis to exercise a strike of Juror Tunsil or to meet its burden of alleging prejudice under Strickland.

Juror Christine Salgado

Peterson argues that Juror Christine Salgado was not a suitable juror in this case because she stated during jury selection that she needed the defense to present "some" evidence. Peterson contends that failing to strike Juror Salgado prejudiced him in light of the facts that trial counsel did not present opening arguments, did not present any physical or testimonial evidence, and presented insufficient closing arguments.

As pointed out by the State, Peterson misconstrues Juror Salgado's statements which indicated a desire to listen to both sides before making a decision, a statement which in context indicates Juror Salgado's receptivity to hear any evidence or arguments of the

> defense prior toward rendering a decision.
>
> The record indicates that the State objected to Mr. McDermott's questions because he was asking the potential jurors about their feelings, not whether they could honor the presumption of innocence, follow the burden of proof instructions, and whether they would follow the court's direction not to draw any inference from a defendant's exercise of his right to remain silent. **Any attempt to have Juror Salgado removed for cause would have been futile**, just as it was in Peterson's attempt to strike Beverly Dooris for similar responses. (*Jury Trial Transcript pp. 885-887*).[fn5] **Furthermore, Juror Salgado commented she was "on the fence" when it came to the death penalty.**
>
> Peterson fails to demonstrate prejudice by showing that any of the listed jurors were actually biased against him. Accordingly, he fails to establish either prong under Strickland and Claim I is denied.
>
> fn 5. This court later granted an extra peremptory challenge based on the denial of the Juror Dooris challenge for cause; not because the court changed its mind that "feelings" like those expressed by Juror Salgado were not sufficient for cause but because the court was unsure of whether this is what Juror Dooris had said and felt that reading back the record was too time consuming. (*Jury Trial Transcript, pp. 909—912*).

(V5/751-59) (e.s.)

Petitioner's IAC complaint essentially is based on his obvious disagreement with trial counsel's contemporaneous jury selection strategy -- to focus on the penalty phase. Trial counsel may validly select jurors he believes are open to life imprisonment or are receptive to a particular mitigation defense. See, *Harvey v. State*, 656 So. 2d 1253, 1256 (Fla. 1995) (holding that defendant failed to demonstrate that counsel's performance was deficient during *voir dire* and finding competent and substantial evidence to support the trial court's finding that defense counsel made a

reasonable decision not to challenge juror based on strategy of attempting to find jurors likely to recommend a life sentence instead of the death penalty); *Harvey v. Warden, Union Corr. Institution*, 629 F.3d 1228, 1244 (11th Cir.), (denying habeas relief and addressing Harvey's IAC/jury selection claim previously denied by this Court), *cert. denied*, 132 S. Ct. 577 (2011).

Peterson does not seriously dispute that trial counsel made a strategic decision regarding jurors that he believed would be better in the penalty phase, even when those jurors may not be as helpful in the guilt phase. Race was also a positive factor in selecting a juror in this case and Mr. Watts agreed that concessions often have to be made in jury selection. At the post-conviction hearing, Mr. Watts addressed the five specified jurors. Juror A.J. was African-American and ambivalent about the death penalty. Marilyn Breen was pro-defense as far as the death penalty was concerned. As to juror Walbolt, the information he provided to another juror was "not incorrect." In addition, Mr. Walbolt was applying a pro-defense standard for sentencing. Juror Necole Tunsil was also African American and pro-defense as far as the death penalty was concerned. From the defense view, Juror Tunsil expressed beliefs that are natural, but also agreed to follow the law. Juror Christine Salgado was also pro-defense for sentencing. Even though some of these jurors may have had some "baggage," Mr. Watts believed them, on balance, to be good choices for the jury.

All five had defense-favorable feelings about the death penalty. Moreover, Mr. Watts did not believe that he had any legal reason to excuse them for cause and there was no indication that they were biased in fact. Mr. Watts generally believed that they would follow the law given by the trial court. Mr. Watts, Mr. McDermott, and the Defendant discussed who they wished to be seated on the jury. The Defendant participated throughout jury selection and he wanted to keep jurors A.J. and Tunsil. The defense exercised every challenge for cause for which they had a legal basis and used all ten peremptory challenges and the one extra challenge that was granted by the trial court. In doing so, they followed their strategy of weighing each juror's attributes, but focusing in each case on their benefit during the penalty phase.

To the extent Peterson suggests that if trial counsel could not recall specific discussions about particular jurors, then, *ipso facto*, there was no reasonable strategy involved, any such claim must fail. *Strickland* is an objective standard. First, the defendant must show that his counsel's performance was deficient, which means that it "fell below an objective standard of reasonableness" and was "outside the wide range of professionally competent assistance." *Strickland*, 466 U.S. at 688, 690. Peterson had very experienced defense attorneys, who are "strongly presumed to have . . . made all significant decisions in the exercise of reasonable professional judgment." *Strickland*, 466 U.S. at 690.

Peterson also must demonstrate that he was prejudiced by his counsel's deficient performance. To establish prejudice, he must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." "The likelihood of a different result must be substantial, not just conceivable." *Harrington v. Richter*, -- U.S. --, 131 S. Ct. 770, 792 (2011).

The transcript of *voir dire* demonstrates focused inquiry by experienced trial counsel who made strategic decisions in selecting a jury. Trial counsel repeatedly discussed these decisions with the Defendant, who expressed his personal satisfaction with the jurors chosen. (DA V23/918). The record provides no valid legal basis to excuse the named jurors for cause or any reason to exercise a peremptory challenge against them as opposed to the jurors who were challenged. Counsel was not ineffective for pursuing this reasonable strategy. See, *Dillbeck v. State*, 964 So. 2d 95, 103 (Fla. 2007) ("Dillbeck's trial counsel adopted a reasonable trial strategy of avoiding a death sentence by attempting to seat jurors likely to recommend a life sentence."); *Johnston v. State*, 63 So. 3d 730, 738 (Fla. 2011) (counsel was not deficient in keeping a juror because defense counsel was following its strategy of seeking a young and minority jury).

In *Peterka v. State*, 890 So. 2d 219, 239 (Fla. 2004), this Court explained that, with regard to challenging jurors for cause,

> [t]he test for determining juror competency is whether the juror can set aside any bias or prejudice and render a verdict solely on the evidence presented and the instructions on the law given by the court. A juror must be excused for cause if any reasonable doubt exists as to whether the juror possesses an impartial state of mind... In a death penalty case, a juror is only unqualified based on his or her views on capital punishment, if he or she expresses an unyielding conviction and rigidity toward the death penalty.

In *Carratelli v. State*, 961 So. 2d 312, 324 (Fla. 2007), this Court held that a defendant failed to demonstrate actual prejudice where the challenged juror explained during *voir dire* that he could be fair, listen to the evidence, and follow the law. In *Lugo v. State,* 2 So. 3d 1, 13 (Fla. 2008), this Court denied another IAC claim, finding that the defendant could not demonstrate actual bias where, after the trial court's specific discussion on improper bias, the juror simply did not indicate that his ability to be impartial was affected by a prior experience. 2 So. 3d at 16. And, in *Johnston v. State*, 63 So. 3d 730, 745 (Fla. 2011), this Court found that Johnston failed to demonstrate actual bias where one juror, like the juror in *Carratelli*, indicated that he retained the ability to be impartial, and the other juror, like the one in *Lugo*, simply declined to respond to specific discussion on bias during *voir dire*. To the extent Peterson suggests that peremptory challenges should have been used differently, he made no attempt

below to allege which challenged jurors were better suited to serve than those who were selected or that there was a likelihood that the outcome of the case would have been different. See, *Phillips v. State*, 894 So. 2d 28 (Fla. 2005) (Failure to exercise peremptory challenges is not a right of "constitutional dimension," . . . but "are a means of assuring an impartial jury." Phillips' claim fails to demonstrate that the jury was not impartial.)

The trial court properly denied Peterson's claim of ineffective assistance of counsel during jury selection. As detailed above, the trial court set forth detailed factual findings which are supported by competent, substantial evidence. Inasmuch as no procedural or substantive errors have been shown with regard to the factual findings or the trial court's application of the relevant legal principles, no relief is warranted and this Court should affirm the trial court's order denying post-conviction relief.

ISSUE II

THE IAC/GUILT PHASE CLAIMS: ALLEGED FAILURE TO (1) OBJECT TO PROSECUTOR'S COMMENTS DURING VOIR DIRE, (2) MAKE PROPER OBJECTIONS AND REQUEST CURATIVE INSTRUCTIONS AND A MISTRIAL, AND (3) PRESENT AFFIRMATIVE EVIDENCE OF INNOCENCE

Peterson next alleges that trial counsel was ineffective at the guilt phase in failing to (1) object to the prosecutor's statements during *voir dire* (about the Legislature's role in setting the parameters of the death penalty), (2) make proper objections and request curative instructions and a mistrial and (3) present affirmative evidence of innocence. Any substantive claim of alleged improper prosecutorial comment is procedurally barred in post-conviction. See, *Krawczuk v. State*, 92 So. 3d 195 (Fla. 2012); *Rogers v. State*, 957 So. 2d 538, 547 (Fla. 2007). The only claims properly before this Court are the IAC/guilt phase claims, which were denied after an evidentiary hearing. For the following reasons, the trial court's order should be affirmed.

IAC/failure to object during *voir dire*

In denying Peterson's claim that trial counsel was ineffective in failing to object during *voir dire*, the trial court found that Petitioner failed to establish deficient performance and resulting prejudice. The trial court found that a complete reading of the *voir dire* demonstrates that the State's comments were not improper, and thus trial counsel was not deficient for failing to object. In post-conviction, Mr. Watts confirmed that he saw no legal objection

when the State commented that the Legislature defines the aggravating circumstances that support a death recommendation. (V5/760). In finding no prejudice, the trial court elaborated,

> Furthermore, Peterson fails to meet his burden of proving prejudice because he fails to show how the comments would have affected the fairness and reliability of the penalty phase proceedings so that confidence in the outcome is undermined. In this case, the jury recommended the death penalty by a vote of eight-to-four. Peterson v. State, 2 So.3d 146, 153 (Fla. 2009). Four jurors were not compelled to vote for death and, thus. the defense fails to show that Peterson was prejudiced. **Moreover, as explained by the Florida Supreme Court in Krawczuk v. State, a defendant is "not prejudiced by the improper statements of the prosecutors [where] the juries were given the proper instructions for analyzing aggravating and mitigating circumstances.**" Krawczuk v. State, 37 Fla.L.Weekly S270 (Fla. 2012) quoting Anderson v. State, 18 So.3d 501, 517 (Fla. 2009). **Here, the prosecutors and the defense counsels' comments, and this court's repeated instructions before, during and after *voir dire*, made it clear that the jury was not required to return any specific verdict and that they were free to consider not only specifically listed mitigating circumstances, but any other facts presented which they deemed mitigating. The State repeatedly stressed following the law as detailed in the court's instructions. In light of the instructions and the entirety of the State and Peterson's *voir dire* comments, this court finds that no juror would have concluded that he or she was required to make a specific recommendation of death under any circumstances.** (*Jury Trial Transcript, pp. 20-914, 1740-1758, Penalty Phase Transcript, pp. 161-170*).
>
> Because counsel was not deficient for failing to object and Peterson fails to show that he was prejudiced this claim is denied.

(V5/760) (e.s.)

In faulting the trial court's rejection of this IAC claim, (Initial Brief at 64-65), Peterson neglects to mention the trial

court's reliance on this Court's decision in *Krawczuk,* the propriety of the jury instructions below, or the conclusion that, "[i]n light of the instructions and the entirety of the State and Peterson's *voir dire* comments, this court finds that no juror would have concluded that he or she was required to make a specific recommendation of death under any circumstances." (V5/760).

The State reiterates that a fair reading of the prosecutor's entire *voir dire* shows that he was addressing the Legislature's role in setting forth and defining the aggravating circumstances, at least one of which the jury must find beyond a reasonable doubt, before the defendant could be considered eligible for death. The prosecutor appropriately stressed that the Legislature had defined terms in articulating the aggravating circumstances and that the jury would be restricted to the aggravating circumstances as defined by the Legislature, rather than applying their own idiosyncratic interpretations.

In this case, the prosecutor repeatedly stressed the necessity of the jury engaging in a weighing process in the abstract without reference to the specific facts of Peterson's case. The prosecutor did not opine, as condemned in *Ferrell v. State,* 29 So. 3d 959 (Fla. 2010), that since "the aggravating circumstances clearly outweigh the mitigating circumstances and if the **number** of aggravating circumstances exceeded the **number** of mitigating circumstances" death was the appropriate penalty, nor when his

comments are read as a whole did he imply that the jury was required to return a recommendation of death. In *Ferrell*, this Court did not grant a new penalty phase because of the single comment quoted in the defense argument. (Initial Brief at 34). Rather, this Court affirmed the post-conviction court's ruling, as being supported by competent substantial evidence, that Ferrell's waiver of the presentation of mitigating evidence was not voluntary and that counsel's shortcomings resulted substantial mitigating evidence going undiscovered. In *Ferrell*, counsel failed to make any objection to repeated improper comments in closing argument. Unlike this case, the comments in *Ferrell* were made in closing argument and made about the defendant and the facts of his case, rather than being general comments about adhering to the legislative scheme. In fact, this Court has faulted prosecutors who urge jurors to disregard the law as intended by the legislature. *Urbin v. State*, 714 So. 2d 411 (Fla. 1998).

Peterson's reliance on *Brooks v. State*, 762 So. 2d 879 (Fla. 2000) is also misplaced. In *Brooks*, a direct appeal case, this Court found that there were numerous, overlapping improprieties in the prosecutor's penalty phase closing argument and the comments were strikingly similar to the comments by that same prosecutor that were condemned in *Urbin.* In *Brooks*, the prosecutor impermissibly inflamed the passions and prejudices of the jury with elements of emotion and fear, used the same "mercy" argument which

was classified as "blatantly impermissible" in *Urbin;* tended to cloak the State's case with legitimacy as a *bona-fide* death penalty prosecution, much like an improper "vouching" argument; misstated the law regarding the jury's recommendation of a death sentence by stating "[a]nd if sufficient aggravating factors are proved beyond a reasonable doubt, you must recommend a death sentence, unless those aggravating circumstances are outweighed, outweighed by the mitigating circumstances" (notably, if the prosecutor's initial misstatement of the law was viewed in isolation, this Court stated that it would find that such misstatement was harmless error, *Brooks*, 762 So. 2d at 902); misstated the law regarding the merged robbery and pecuniary gain aggravating circumstances; urged the jury to "do your duty;" characterized the mitigating circumstances as "flimsy," "phantom" excuses, which were an improper denigration of the defense mitigation; and made comments that were construed as a personal attack on defense counsel.

As the trial court concluded, the prosecutor's and Mr. Watts' comments and the trial court's repeated instructions before, during and after *voir dire*, made it clear that the jury was not required to return any specific verdict and that that they were free to consider not only specifically listed mitigating circumstances, but any other facts presented which they deemed to be mitigating. The prosecutor repeatedly stressed following the law as detailed in the trial court's instructions. In light of these instructions and the

voir dire comments of the prosecutor and Mr. Watts, when taken as a whole, no juror would have concluded that they were required to make a specific recommendation of death under any circumstances. Nor could the comments be construed as an effort to understate the importance of the jury's recommendation. Since there was no error in the prosecutor's comments and since any possible misinterpretation was cured by the defense and by the Court's repeated instructions and the final written instructions, the trial court correctly denied relief. See, *Krawczuk, supra*.

IAC/failure to file motions in limine and object during the State's case-in-chief

Janet Gosha lived with Peterson until his arrest and Peterson argues that her testimony about the money she found hidden in their home and Peterson's possession of money was prejudicial and irrelevant and trial counsel was ineffective for failing to object. Peterson also claims that after Janet Gosha testified about finding the hidden money, defense counsel should have elicited from her that Peterson told her that the money came from poker winnings.

In denying this IAC claim, the trial court found no deficient performance and no prejudice. As the trial court described, Mr. Watts testified at the post-conviction hearing that he saw no legal basis to object to Ms. Gosha's testimony that she found money hidden under the sink. And, had the defense objected at trial and the Court allowed Ms. Gosha to repeat Peterson's self-serving hearsay (that the money he'd hidden under the sink was poker

winnings), the State would have been permitted to impeach Peterson with his 13 prior convictions. From the defense perspective, the absence of Peterson's prior record was more important than the testimony Ms. Gosha would have offered. Mr. Watts also believed there was no legal basis to seek Janet Gosha's opinion about whether or not Peterson was involved in the robberies. (V5/761).

In faulting the trial court's order (Initial Brief at 65-66), Peterson claims that the State was required to admit his hearsay statement to Ms. Gosha. The trial court rejected the claim that the State had a duty under the rule of completeness to present Peterson's hearsay statement. As the trial court explained:

> The State has no duty to present a defendant's explanation of events. Evidence of unexplained funds in an amount inconsistent with a defendant's income or assets is admissible even if it cannot be directly connected to the specific theft or robbery. See Astrachan v. State, 28 So.2d 874, 875 (Fla. 1947). As in Astrachan the testimony of Ms. Gosha showed that Peterson, with whom she lived from mid-1996 through September 1998, worked as a chef, was poor, had little money, and was in debt. Although they had a safe in which he kept a small amount of cash, **Ms. Gosha found a large cache of bills under the kitchen counter, which she estimated as approximately 25 bundles of ones and fives secured with bank bands. This is consistent with the petty cash Peterson seized in the Phar-Mor robbery, one of the Williams rule cases presented at trial, which consisted of bills strapped in bundles, and with the money taken in the instant case.** (*Jury Trial Transcript, pp. 1444-1446*).
>
> And, as pointed out by the State, it would have been a double-edged sword for the defense to elicit testimony from either Ms. Gosha or Mr. Hillman explaining that the money under the sink was the proceeds of gambling since this explanation could also provide a reason that Peterson was in debt and provide a motive for the robbery in the instant case or the three Williams rule robberies

> presented at trial. **Peterson's explanation that 25 strapped currency bundles of ones and fives hidden under the sink were the winnings from Friday night poker games was a risky strategy since it potentially opened the door to testimony regarding the Defendant's 13 prior convictions.**
>
> (V5/761-62) (e.s.)

Peterson's suggestion that counsel should have elicited the defendant's explanation to Janet Gosha would have required defense counsel to unethically attempt to introduce self-serving and inadmissible hearsay. And, bringing out Peterson's highly suspect "explanation" (that 25 strapped currency bundles of ones and fives, representing perhaps $2500 to $12,500) would have been a double-edged sword. Even if the trial court erroneously allowed Peterson's self-serving hearsay statements into evidence, it would have allowed the State to impeach him with his 13 prior felony convictions. See, V5/761, citing Section 90.806, Florida Statutes; *Huggins v. State*, 889 So. 2d 743 (Fla. 2004).

Trial counsel was effective in not "opening the door." Indeed, if counsel had opened that door, Peterson likely would be alleging that conduct as an IAC complaint instead. See, *Mendoza v. State,* 87 So. 3d 644, 660 (Fla. 2011) (alleging that trial counsel was ineffective at the penalty phase for opening the door for the State to present evidence of pending charges against the defendant). Trial counsel's failure to object to admissible evidence or attempt to introduce inadmissible evidence that might have subjected his

client to damaging impeachment does not establish any deficient performance and prejudice.

IAC/failure to object during State's closing and failure to make available opening statement and closing argument

In this IAC claim, Peterson alleges that the State mischaracterized evidence during opening and closing argument and that counsel failed to argue points at closing argument that would have created reasonable doubt. Again, any substantive claims based on a prosecutor's on-the-record comment are procedurally barred in post-conviction. See, *Krawczuk*, *supra*.

In faulting the trial court's order, Peterson alleges that James Davis was "absolutely certain" he could not identify Peterson in court and that Peterson's statements to the co-workers of the murder victim did not sound intimidating, but were expressions of remorse. (Initial Brief at 66-67). In denying relief on the IAC claim/failure to object to the State's closing argument that Mr. Davis had "some doubt" about making an in-court identification, the trial court ruled that trial counsel was not ineffective because "it was clear from both Mr. Davis's testimony and the State's closing arguments that Mr. Davis was "99 to 100" percent sure of his identification of Peterson from a photo—pack in 1998, but that at the time of the 2005 trial of the case he could not make an in-court identification of Peterson as the person he saw at the Big Lots store on December 24, 1997." (V5/763). As such, trial counsel was not ineffective for failing to object to the State's

characterization of Mr. Davis's testimony. As to Peterson's statements (whether intimidating or remorseful), the trial court found that the State's characterization of Ms. Smith's testimony shows a logical inference in light of Peterson's repeated threats to Big Lots employee Maria Soto that he would kill the robbery victims and do what he had done to their co-worker, John Cardoso. In addition, the State's characterization accurately argued a logical inference drawn from the testimony that the employees better comply because Peterson had nothing to lose by shooting them since he had already killed someone. Consequently, there was no error in counsel's failure to object. (V5/764).

In denying the IAC claim based on failure to cross-examine M.P. about her inability to make a photo-pack identification of Peterson (in the Family Dollar *Williams* rule case), the trial court noted that Mr. Watts testified that raising that issue on cross-examination likely would have drawn an objection by the State as outside the scope of direct examination. And, as to the IAC claim regarding Officer Herren, his only role was in the chain of custody for the blood sample. Mr. Watts saw no legal basis to attack Officer Herren's truthfulness based upon a specific isolated act. Finally, trial counsel did attempt to cross-examine M.P. and Officer Herren regarding pressure to make an identification; however, the information was ruled irrelevant and inadmissible at trial. (V5/764-65). In faulting the trial court's order, Peterson

claims that the defense "did not go far enough to introduce this evidence." (Initial Brief at 67). However, trial counsel cannot be deemed ineffective for raising a claim which is rejected by the trial court, both at the time of trial and in post-conviction. As the trial court pointed out:

> At the evidentiary hearing in this matter Mr. Watts testified that defense counsel repeatedly tried to interject statements by MP that Officer Herren pressured her to make an identification. (*Evidentiary Hearing Transcript, pp. 587-588*). **Because MP did not give in to any alleged pressure and was instead unable to make an identification, either before or at trial, and since Officer Herren worked for a separate department in a separate jurisdiction, this court correctly limited the scope of the inquiry.** (*Jury Trial Transcript, pp. 986-990; 1001-1005*).

(V5/764) (e.s.) Essentially, Peterson seeks to challenge the trial court's evidentiary ruling at trial; however, that issue is procedurally barred in post-conviction.

Next, Peterson repeats that trial counsel was ineffective for failing to argue that the State failed "to prove the collateral crimes beyond a reasonable doubt." (Initial Brief at 44). First, any substantive challenge to the *Williams* rule evidence is procedurally barred. Peterson challenged the admission of the *Williams* rule evidence on direct appeal and this Court affirmed the admission of that evidence. *Peterson v. State*, 2 So. 3d 146, 153 (Fla. 2009). Second, Peterson's reference to a "beyond a reasonable doubt" standard is misleading and incorrect. Instead, the trial court must determine that clear and convincing evidence supports

the claim that the defendant did commit the collateral crime. See, *Kopsho v. State*, 84 So. 3d 204, 212 (Fla. 2012), citing *McLean v. State*, 934 So. 2d 1248, 1262 (Fla. 2006). In denying this IAC claim, the trial court meticulously explained:

> At trial the State presented collateral crimes evidence that Peterson had robbed a 1)Family Dollar store, 2)a Phar-Mor, and 3)a McCrory's, in the Tampa/St. Petersburg, Florida, area between February, 1997, and August, 1998. Peterson was convicted of the Family Dollar store robbery but not charged in the Phar-Mor and McCrory's robberies. Peterson alleges that there was reasonable doubt as to whether he actually committed the Williams rule crimes and that trial counsel was ineffective for failing to argue in closing arguments that the State failed to prove those cases beyond a reasonable doubt. Peterson argues counsel should have done more than focus on the homicide in this case and claims that counsel should have asked for a special jury instruction directing the jury not to consider the Williams rule evidence unless the State proved those offenses beyond a reasonable doubt.
>
> As correctly argued by the State, any substantive challenge to the admission of the Williams rule evidence in this case is procedurally barred. Peterson challenged the admission of the Williams rule evidence on direct appeal and the Florida Supreme Court affirmed the admission of the Williams rule evidence. Peterson v. State, 2 So.3d 146, 153 (Fla. 2009). Furthermore, if Peterson is asserting a claim of ineffective assistance of appellate counsel for not disputing that Peterson committed the collateral robberies and informing the Florida Supreme Court that Peterson was either convicted or pled guilty to each collateral robbery, such a claim is not cognizable in a rule 3.851 proceeding. See Cook v. State, 792 So.2d 1197, 1201 (Fla. 2001); Griffin v. State, 866 So.2d 1, 21 (Fla. 2003).
>
> It was not necessary for the jury to find any or all of the collateral crimes to be proven beyond a reasonable doubt in order for them to have circumstantial value in proving Peterson guilty of the charged offense. **Under the Williams rule, before evidence of a collateral act can be admitted at trial, the State must prove by clear and convincing evidence that the defendant committed the collateral act.** Acevedo v. State, 787 So.2d 127, 129-30 (Fla. 3d DCA 2001) citing State v. Norris, 168 So.2d 541

(Fla. 1964); Smith v. State, 743 So.2d 141, 143 (Fla. 4th DCA 1999); and Audano v. State, 641 So.2d 1356 (Fla. 2d DCA 1994).

In addition, proof of Peterson's identity as the perpetrator of the three collateral crimes was overwhelming. As demonstrated during the penalty phase, Peterson had previously been found guilty by a jury of the Hillsborough County Family Dollar store crimes beyond a reasonable doubt. And, Peterson's identity as the perpetrator of the Hillsborough Family Dollar store crimes was shown in the instant case by a conclusive DNA match of multiple samples from the crime scene leaving a random match probability of between one in 3.85 billion African Americans to one in 621 billion African Americans. (*Jury Trial Transcript, p. 1028*).

In the Phar-mor collateral crime, Peterson was identified by mitochondrial DNA from a hair stem found on tape used to bind the victims, by identification of people who knew him well as being the individual on a surveillance tape entering the store before the robbery, and by the fact that shoes seized from his storage locker matched shoeprints left at the crime scene by the assailant. (*Jury Trial Transcript, pp. 1031-1047, 1055-1056, 1072-1075, 1236-1238, 1240-1241, 1255-1257, 1421-1422, 1484-1491. 1495-1504, 1514-1515, 1525-1532; ROA 3386-3435*). **In the third collateral crime involving the McCrory's store, he was identified by the victim both by photo—pack and by in-court identification, and by the fact that some of the stolen items were found hidden behind a refrigerator in Peterson's garage, including the store's bank deposit bag and receipts and checks dated the same day as the robbery. Fingerprint technicians were able to match one of Peterson's fingerprints and his palm print with latent prints developed from the stolen items hidden in Peterson's garage.** (*Jury Trial Transcript, pp. 1555-1565, 1568-1588, 1592-1599*).

The identical *modus operandi* and language used in the three robberies further reinforced Peterson's guilt. Recitation of the facts by defense counsel in an attempt to deny Peterson's involvement would have been futile, and would only serve to emphasize the evidence. Mr. Watts confirmed this strategy at the evidentiary hearing on this matter, testifying that the defense trial strategy was to focus on the weaknesses of the main case, rather than the relatively strong Williams rule cases. (*Evidentiary Hearing Transcript, p. 506*).

(V5/769-70) (e.s.)

Next, Peterson summarily asserts that counsel was ineffective for failing to make an opening statement. (Initial Brief at 44). There is no argument on this issue and, as a result, it is waived. See, *Reynolds v. State*, 99 So. 3d 459, 485 (Fla. 2012), citing *Duest v. Dugger*, 555 So. 2d 849, 851–52 (Fla. 1990). However, Peterson does refer to the absence of an opening statement in his description of "problems with the lower court's order." At that point, Peterson alleges that the trial court gave "too much credit" to the defense. (Initial Brief at 70). Mr. Watts testified that the defense had nothing to offer the jury to exonerate Peterson and the defense was left with attacking the State's evidence. As the trial court noted, at the time of trial, the defense did not know how many of the six *Williams* rule cases the State would be presenting. Thus, if counsel had commented on all six cases in opening statements and the State had only presented three *Williams* rule cases, it would have been unfavorable to the defense. Furthermore, cross-examination did not need to be previewed to the jury and an opening statement would have revealed the defense strategy to the State. At the time of trial, if the defense had presented evidence other than Peterson's testimony, they would have had to give up the first and last closing, which the defense considered advantageous. In this case, the defense was able to present both the first and last closing argument. Trial counsel's reasoned strategic decision

is unassailable under *Strickland.* Furthermore, although Peterson criticizes trial counsel for not presenting evidence, Peterson does not identify any such evidence. (See Initial Brief at 70-71).

IAC/Family Dollar DNA and the "Ineffective Stipulation"

In this IAC sub-claim, Peterson alleges that trial counsel should have filed a pre—trial motion *in limine* to prevent a State witness from referring to M.P. as the "victim" in the Hillsborough Family Dollar *Williams* rule case.

At the post-conviction hearing, Mr. Watts testified that M.P. was properly referred to as a victim in the Family Dollar case. As the trial court noted, "[t]here was little doubt that M.P. was the victim of a robbery as her testimony was unimpeached regarding this issue. The only issue was the identity of the perpetrator. It is purely speculative that the jury inferred that M.P. was the victim of a rape. Trial counsel was not ineffective for failing to file a motion or failing to request a mistrial," because no violation of the DNA stipulation occurred. (V5/771). The trial court also noted that as to Peterson's claim that testimony of DNA comparisons between Peterson and M.P. "indicated that M.P. was raped during this robbery," Peterson offered no facts or evidence to substantiate his interpretation of this testimony. Furthermore,

> The trial transcript reveals that precautions were taken to avoid making any references to a rape committed by Peterson. Counsel was faced with the choice of entering a stipulation or insuring that evidence of the tape would he admitted as the source of the DNA. (*Jury Trial Transcript, pp. 963-68, 1023-1026, 1052-55, 1064-1072*). The State fashioned its questioning and

introduction of physical evidence to honor the stipulation.

> **Counsel was not ineffective for falling to object to a "violation" of the stipulation to preclude the introduction of evidence of rape, as no such violation occurred; trial counsel cannot he faulted for failing to make a meritless objection.** See Ferrell v. State, 29 So 3d 959 (Fla. 2010).

(V5/771) (e.s.)

As this Court noted on direct appeal, "[i]n order to avoid admitting unfairly prejudicial evidence of a sexual battery, the trial court read a stipulation that DNA was recovered in the Family Dollar crime. Testing revealed that this DNA matched Peterson's known DNA sample. *Peterson v. State*, 2 So. 3d 146, 150 (Fla. 2009). Inasmuch as the trial court found there was no violation of this stipulation, Peterson failed to demonstrate any deficient performance and resulting prejudice under *Strickland*.

IAC/failure to object to and challenge the fingerprint evidence

No fingerprints identified Peterson as the perpetrator of the Big Lots murder. Instead, the fingerprints concern the McCrory's robbery. In that *Williams* rule case, Peterson was identified with 90% certainty from an investigative photo-pack, identified by the victim with certainty at the instant trial, and the checks and receipts stolen from McCrory's were found hidden behind a refrigerator in the garage. Peterson's prints were located on the stolen check and McCrory's receipt.

Peterson alleges that trial counsel was ineffective in failing

to object to the testimony of fingerprint analyst Melinda Clayton and that trial counsel should have consulted with an expert such as Simon Cole. At trial, Ms. Clayton testified that she analyzed the known fingerprints of Peterson, and compared them with prints located on a cash register receipt and a check that were stolen from McCrory's. Ms. Clayton testified that the latent print from the receipt was his left index-left middle finger, that the latent print from the check was his right palm print and that the prints were located on the recovered stolen items.[2]

In finding that Peterson failed to establish deficient performance and resulting prejudice, the trial court noted that in *Johnston v. State*, 70 So. 3d 472, 483-484 (Fla. 2011), this Court rejected a claim that counsel was ineffective in failing to call an expert witness, Simon Cole, to testify that fingerprinting is unreliable science. And, as to the Brandon Mayfield case, the trial court noted,

> . . . Ms. Clayton testified that she believed that the Mayfield case was an example of an erroneous identification rather than an example of two different people having the same fingerprints. (*Evidentiary Hearing Transcript, pp. 254, 269*). Ms. Clayton rejected the defense's contention that the two individuals in that case had the same fingerprints. (*Evidentiary Hearing Transcript, p. 291*). As to her examination in the instant

[2]Peterson also alleges that Ms. Clayton's testimony was improper under *Ramirez v. State*, 810 So. 2d 836 (Fla. 2001), a direct appeal case which held that a new and novel knife mark identification procedure did not reach the threshold for admissibility under *Frye* and, therefore, was unreliable and inadmissible. Once again, any substantive challenge to the record evidence presented at trial is procedurally barred in post-conviction.

case, Ms. Clayton knew that one of the known prints was from Peterson but he was not the only person whose fingerprints she analyzed for this case. (*Evidentiary Hearing Transcript, pp. 274-75*).

Ms. Clayton further testified that the issues addressed after the Mayfield case and in publications released in 2009 and 2011 were not available at the time of the Peterson trial in 2005. (*Evidentiary Hearing Transcript, pp. 281; 286*). The fingerprint standards in effect at the time of trial suggested that an examiner either testify to an identification or exclusion. (*Evidentiary Hearing Transcript, p. 285-86*). She abided by those standards in her testimony during the trial in the instant case. (*Evidentiary Hearing Transcript, p. 286-90*).

Ms. Clayton agreed on redirect by the defense that her 2005 testimony did not include the qualifying language from the resolution adopted after Peterson's trial and, therefore, if offered today, it could be deemed conduct unbecoming a member of the IAI. (*Evidentiary Hearing Transcript, pp. 292-93*). Ms. Clayton's response was based upon an excerpt of a resolution read by the defense but she later clarified her previous statement after having been given the opportunity to review the entirety of the resolution. (*Evidentiary Hearing Transcript, pp. 703, 707, 714*). Ms. Clayton explained that her trial testimony was fully correct and consistent with the regulations existing at that time. (*Evidentiary Hearing Transcript, p. 707*).

The controlling case law at the time of the trial, as well as the continued consensus of expert opinion, make it clear that Simon Cole's testimony would not have been admissible at trial. Mr. Cole is not a fingerprint comparison expert and Peterson has never alleged, nor shown, that expert Melinda Clayton was incorrect in her comparison of Peterson's prints with the latent prints in question. The allegation that trial counsel was ineffective for failing to introduce testimony that was inadmissible, irrelevant and of no significant probative value fails to satisfy both the deficiency and prejudice prongs of Strickland.

(V5/772-73)

In faulting the trial court's order, Peterson criticizes the trial court's reliance on Ms. Clayton's testimony on recall and

Peterson insists that an expert like Simon Cole should have been called. (Initial Brief at 72-73). Again, Simon Cole is not a fingerprint comparison expert and the defense has never shown that expert Melinda Clayton was incorrect in her comparison of Peterson's prints with the prints in question. As in *Johnston*, 70 So. 3d at 483-84, the trial court's order should be affirmed.

IAC/failure to raise an *Apprendi* challenge to *Williams* rule cases

Next, Peterson cites to *Apprendi v. New Jersey*, 530 U.S. 466, 491, 120 S. Ct. 2348 (2000) and alleges that trial counsel was ineffective in failing to raise an *Apprendi*-based challenge to the clear and convincing standard for the admission of collateral crime evidence at the *guilt phase*. In denying post-conviction relief, the trial court ruled that (1) any substantive challenge to the admission of the *Williams* rule evidence is procedurally barred, (2) any substantive claim, based on *Apprendi*, is procedurally barred, and (3) Peterson raised a companion *Ring* claim on direct appeal and this Court found no merit to it, and any further argument or claim with regard to the penalty phase is procedurally barred, as it was already considered and found to be without merit on direct appeal. (V5/774), citing *Griffin v. State*, 866 So. 2d 1 (Fla. 2003), *cert. denied*, 125 S. Ct. 413 (2004); *Allen v. State*, 854 So. 2d 1255, 1258, n.4 (Fla. 2003). In faulting the trial court's order, Peterson argues that a *Williams* rule claim and *Apprendi/Ring* claim should not be deemed procedurally barred in post-conviction.

(Initial Brief at 73). However, the principle is well-settled that issues which either were or could have been litigated at trial and on direct appeal are not cognizable through collateral attack. *Vining v. State*, 827 So. 2d 201, 218 (Fla. 2002).

The trial court ultimately rejected the IAC claim because trial counsel cannot he deemed ineffective for failing to pursue meritless actions. As the trial court explained:

> In support of his argument, Peterson points out that Mr. Watts testified at the evidentiary hearing that he did not consider that Apprendi and Ring might have some legal effect on the determination of the admissibility of the Williams rule evidence. (*Evidentiary Hearing Transcript, p. 416*). However, trial counsel cannot he deemed ineffective for failing to pursue meritless actions. Ferrell v. State, 29 So.3d 959 (Fla. 2010). Peterson's suggestion that Apprendi and Ring apply to a preliminary determination of the admissibility of Williams rule evidence during the guilt phase is misplaced. As correctly pointed out by the State, there is no legal, statutory, or case law authority to support this new Apprendi theory.
>
> As to the defense's claim that counsel failed to adequately challenge Williams rule evidence regarding the unindicted Phar—Mor and McCrory offenses, the clear and convincing proof necessary for the court to admit relevant Williams rule evidence required more than mere suspicion. State v Norris, 168 So.2d 541 (Fla. 1964). The evidence had to create a firm belief in the truth of the allegations. Acevedo v. State, 787 So.2d 127 (Fla. 2001); See also Smith v. State, 743 So.2d 141 (Fla. 4th DCA 1999). Thus, the court was required to not only determine the legal relevance but to some degree evaluate the strength or credibility of the evidence as well. Here, Peterson fails to demonstrate that a full hearing with testimony from witnesses would have resulted in a different outcome. At the evidentiary hearing Mr. Watts testified that the defense trial strategy was to focus on the weaknesses of the main case rather than on the relatively strong Williams rule cases. (*Evidentiary Hearing Transcript, p. 506*).
>
> The jury was repeatedly given the requested Williams rule instruction. Standard Instruction 2.4 was repeated

> preceding the testimony of each witness relating to the three episodes of Williams Rule Evidence (*see. e.g. Jury Trial Transcript, pp. 963, 991*); Instruction 3.8(a) and Standard Instruction 3.7 on reasonable doubt were given in the final instruction. (*Jury Trial Transcript, pp. 1753, 1762, 1757*).
>
> (V5/774-75)

Peterson has not cited to any decision from any court extending the *Apprendi* sentencing principles to the presentation of evidence of collateral crimes *to the jury* at the guilt phase. Peterson failed to demonstrate any deficiency of counsel and resulting prejudice based on his unilateral extension of *Apprendi*.

IAC/failure to file a motion to suppress in-court identifications

In this IAC claim, Peterson argues that counsel should have done more to challenge the in-court identification testimony and should have introduced expert witness testimony, such as that of Dr. Jack Brigham,[3] regarding identification in the instant case and in the *Williams* rule cases. Again, any substantive challenge to the in-court identification testimony presented at trial is procedurally barred in post-conviction.

Peterson raised two intertwined IAC claims below regarding the eyewitness identification testimony and the trial court addressed, and rejected, both claims in fact-specific detail, finding no

[3]Peterson contends that Dr. Brigham, whose testimony as an expert in eyewitness memory and eyewitness identification was tendered at the post—conviction hearing, could have testified at trial that identifications are sometimes inaccurate and that certain factors, like traumatic and stressful events, can increase the risk of an inaccurate eyewitness identification.

deficient performance and no resulting prejudice. (See Order at V5/765-68 and V5/775-78). At the post-conviction hearing, Mr. Watts confirmed that he was familiar with Elizabeth Loftus, whose books on eyewitness identification are substantially similar to the beliefs of Dr. Brigham. At trial, defense counsel cross-examined the witnesses in accordance with counsel's training and the treatises of Elizabeth Loftus. In addition, Mr. Watts confirmed that the defense trial strategy was to focus on the weaknesses of the main case, rather than the relatively strong *Williams* rule cases. See, V5/766-67, citing *Perry v. New Hampshire*, -- U.S. --, 132 S. Ct. 716 (2012) and finding that the safeguards addressed in *Perry* were also "at work" in this case and utilized by counsel.

The trial court noted that this Court has ruled that testimony of eyewitness experts, like that of Dr. Brigham, should not be admitted because it does not constitute scientific, technical or specialized knowledge that will assist the trier of fact. See, *Pietri v. State*, 935 So. 2d 85, 86 (Fla. 2006) (Trial court did not err in excluding eyewitness identification expert testimony concerning how factors such as age, lighting and passage of time affect the ability of witness.); *Simmons v. State*, 934 So. 2d 1100, 1116—17 (Fla. 2006) (direct appeal concluding that the trial judge did not abuse his discretion in excluding Dr. Brigham's testimony). In faulting the trial court's order, Peterson asserts that the trial court failed to "embrace" the separate concurring opinion in

Simmons (for the proposition that eyewitness identification testimony is not *per se* inadmissible). (Initial Brief at 69). However, as the trial court pointedly observed, "[c]onsidering the repeated lack of success of defense attorneys in introducing such expert testimony, counsel cannot be deemed deficient in failing to employ a strategy that has proved an almost universal failure." (V5/767), citing, *inter alia*, *Green v. State*, 975 So. 2d 1090, 1108 (Fla. 2008) (affirming summary denial of a claim of ineffective assistance of counsel for not hiring an expert to testify concerning cross-race identifications); *McMullen v. State*, 714 So. 2d 368, 372 (Fla. 1998); *Armstrong v. State*, 862 So. 2d 705 (Fla. 2003). In addition, as the trial emphasized, "the in-court identifications were bolstered in the instant case by the photo-pack identification of Peterson by another black male, Mr. Davis, who placed Peterson in the store just prior to the robbery; by Maria Soto who identified Peterson in court, both by facial features and by clothing as being the robber and as a person who had been in the store just prior to the robbery; and by Karen Smith's photo-pack identification of Peterson after the crime and in court. Finally, the three *Williams* rule cases involving a signature *modus operandi* support the identification. The identification of Peterson in the collateral crime cases were also supported by his possession of the stolen property, fingerprints, mitochondrial DNA and nuclear DNA examinations and not based solely

or even primarily on eyewitness identification." (V5/768). In sum, the trial court found that Peterson failed to establish any deficient performance, and, in light of the cross-examination at trial and Florida courts' repeated acknowledgement of the jury's capability of making such decisions without the aid of "expert testimony," Peterson failed to establish the prejudice required under *Strickland*. (V5/768).

In rejecting Peterson's claim that trial counsel was ineffective in failing to file a motion to suppress the in-court identifications of Big Lots store employees Karen Smith and Maria Soto, Big Lots store customer James Davis, and McCrory's employee, Ann Weber, the trial court found that Peterson failed to establish any deficient performance and resulting prejudice under *Strickland*. With regard to Detective Herren, who was involved in the chain of custody of the blood sample in the Hillsborough Family Dollar store investigation, the trial court ruled at trial that the actions of Detective Herren were largely irrelevant. The only testifying victim in that Hillsborough County case (M.P.) did not identify Peterson either when shown a photo-pack or during trial. Instead, identity was established through DNA comparison. Furthermore, there was no legal basis to attack his truthfulness based upon a specific isolated act and the defense repeatedly attacked the witness' identifications as tainted throughout the trial. The trial court addressed the post-conviction claims regarding each of the

witnesses and explained:

> Ann Weber identified Peterson in the McCrory's case. Review of her deposition and trial testimony shows no basis for suppression because her identification was supported by strong circumstantial evidence, including the fact that police located items stolen in the robbery hidden in the defendant's garage, with his fingerprint and palm-print on the stolen items. Peterson was identified in the Phar-Mor robbery by DNA evidence and by a surveillance tape which showed him entering the store before the robbery. Because identification was made on a surveillance tape by people who knew Peterson, there was no impropriety and no basis for a motion to suppress.
>
> Likewise, there was no impropriety in Karen Smith's photo-pack identification of Peterson as the robber in the instant Big Lots store case, nor in the photo-pack identifications by James Davis and Maria Soto of Peterson of being a customer they observed in the store shortly before the robbery. Ms. Soto testified that the customer was wearing the same clothing as the person who later robbed them. The fact that Ms. Smith coincidentally saw Peterson briefly in profile on a news report, not attributable to State action or misconduct does not prevent her from attempting an in-court identification. Her testimony at trial, that Peterson "resembled" the robber and that she was more sure than she had been in the photo-pack identification, was not suppressible. (*Jury Trial Transcript, p. 1306*). Trial counsel effectively cross-examined all three witnesses. And, as previously discussed, Mr. Watts confirmed that the defense strategy at trial as to focus on the weaknesses of the main case, rather than the relatively strong Williams Rule cases. (*Evidentiary Hearing Testimony, p. 506*).
>
> (V5/776-77)

In conclusion, the trial court reiterated that Mr. Watts testified that he was familiar with Elizabeth Loftus, whose theories on eyewitness identification are similar to the theories of Dr. Brigham. At trial, defense counsel cross-examined the Big Lots store eye-witnesses based on their opportunity to see, the

level of stress, the presence of a gun, the passage of time, and the treatises of Elizabeth Loftus. And, defense counsel continually opposed the *Williams* Rule evidence and minimized the DNA evidence presented at trial. (V5/777). Again, Peterson has failed to demonstrate any deficiency of counsel and resulting prejudice under *Strickland*.

IAC/Admissibility of Williams Rule Evidence

Lastly, Peterson alleges that trial counsel was ineffective for failing to demand a hearing to assess the credibility and motives of a prospective State witness, Darrell Sermons, or move for reconsideration of the admissibility of the *Williams* rule evidence when defense counsel received the grand jury testimony of Sermons. The admissibility of the *Williams* rule evidence was the subject of extensive pretrial discovery, legal memoranda, and argument. The court's ruling on the *Williams* rule evidence was made on a written proffer supported by sworn depositions (where defense counsel participated) and by police reports. Again, any substantive claim regarding the admission of the *Williams* rule evidence is procedurally barred in post-conviction.

In denying this post-conviction claim, the trial court found that Peterson overemphasizes the importance of Sermons to the court's pretrial consideration of *Williams* rule evidence. And, "while the State relied on Sermons to some degree to tie several *Williams* rule cases together, it is clear that there were numerous

similarities between the *Williams* rule cases and it was not necessary to rely on Sermons' proposed testimony. In fact, the State did not present Sermons at trial." (V5/779). As the trial court explained,

> The defense does not deny that the materials submitted in support of the State's memorandum of law show that Sermons changed his story several times between his deposition and police statements. Additionally, while the State relied on Sermon to some degree to tie several Williams rule cases together, it is clear that there were numerous similarities between the Williams rule cases and it was not necessary to rely on Sermons' proposed testimony. In fact, the State did not present Sermons at trial.
>
> As to the State allegedly vouching for Sermon's credibility, a review of the April 5, 2004, Williams rule hearing shows that the State asserted that Sermons was "a low intelligence individual who is capable of giving coherent and quite believable testimony, but also capable of [sic] cross-examination of being confused." (*April 5, 2004 Motions Transcript, p. 34 ROA p. 2405*). Peterson admits that the State later transcribed Sermons' grand jury testimony and provided it to defense counsel and that it showed that Sermons vacillated. Peterson fails to point out any specific equivocation which would have resulted in the court's exclusion of the Williams rule evidence. The fact that Sermons later recanted to trial counsel's investigator and, again, to the State's investigator, apparently prompted the State's decision not to call Sermons at trial. The Court denied the State's motion to use Sermons' grand jury testimony instead of his live testimony and the State effectively presented the Williams rule evidence without the benefit of Sermons' testimony. Peterson fails to show that the State withheld Brady material or that he was prejudiced by the delay in having Sermons' grand jury testimony transcribed.
>
> Finally, Peterson fails to show that counsel was deficient or that he suffered prejudice when the State failed to admit evidence of the three additional Williams rule cases that the State initially relied upon to convince the motion court to allow the admission of most of the Williams rule evidence. The State initially sought introduction of all six Williams rule cases as well as cases from the 1980s, which were excluded. The State

> contends it was proper to allow the State flexibility in presentation of their case depending on witness availability, including Sermons. However, had the State presented all six Williams rule cases at trial, the plethora of Williams rule evidence could easily have become a feature of the trial. Counsel was not deficient for failing to ensure that the State presented more evidence of other crimes committed by Peterson. Nor can Peterson show that he was prejudiced by the State's failure to present all six Williams rule cases at trial.
>
> (V5/779-80)

Peterson also claims that the defense was ineffective for failing to "fully exploit" Sermons' lack of credibility. However, Peterson cannot demonstrate deficient performance and resulting prejudice at trial where Sermons did not even testify at trial. As detailed above, the trial court set forth detailed factual findings which are supported by competent, substantial evidence. Inasmuch as no procedural or substantive errors have been shown with regard to the factual findings or the trial court's application of the relevant legal principles, no relief is warranted and this Court should affirm the trial court's order denying post-conviction relief.

ISSUE III

IAC/PENALTY PHASE CLAIM

In this issue, Peterson alleges that trial counsel was ineffective at the penalty phase. In *Conahan v. State*, 2013 WL 1149736, 7-8 (Fla. 2013), this Court reiterated the following standards that are applied to claims of ineffective assistance of counsel at the penalty phase:

> As explained earlier, this Court has described the two prongs of *Strickland* as follows:
>
> First, the claimant must identify particular acts or omissions of the lawyer that are shown to be outside the broad range of reasonably competent performance under prevailing professional standards. Second, the clear, substantial deficiency shown must further be demonstrated to have so affected the fairness and reliability of the proceeding that confidence in the outcome is undermined.
>
> *Bolin*, 41 So.3d at 155 (quoting *Maxwell*, 490 So.2d at 932).
>
> Regarding the second prong,
>
> [the defendant] must show that but for his counsel's deficiency, there is a reasonable probability he would have received a different sentence. To assess that probability, we consider "the totality of the available mitigation evidence — both that adduced at trial, and the evidence adduced in the [postconviction] proceeding" — and "reweig[h] it against the evidence in aggravation."
>
> *Porter v. McCollum*, 558 U.S. 30, 130 S.Ct. 447, 453–54, 175 L.Ed.2d 398 (2009)(quoting *Williams v. Taylor*, 529 U.S. 362, 397–98, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000)). "A reasonable probability is a 'probability sufficient to undermine confidence in the outcome.'" *Henry*, 948 So.2d at 617 (quoting *Strickland*, 466 U.S. at 694, 104 S.Ct. 2052).
>
> *Conahan v. State*, 2013 WL 1149736, 7-8 (Fla. 2013)

IAC/consideration of guilt phase evidence at the penalty phase

Peterson alleges that trial counsel was ineffective for failing to object when the Court agreed to instruct the jury during the penalty phase that they could consider any facts adduced at trial, which included the *Williams* rule evidence presented during the guilt phase. In addition, Peterson alleges that counsel was ineffective for failing to object to allegedly leading questions posed by the State to Dale Smithson.

As to the claim that counsel was deficient for not objecting to the standard jury instruction allowing the jury to consider all testimony from the guilt phase, the trial court noted that this instruction allows the jury to consider guilt phase evidence that is relevant or probative of a permissible sentencing phase issue after considering its accuracy and credibility. The trial court found that the State did not suggest that the Phar-Mor and McCrory's robberies were convictions which could be used to supply the prior violent felony crime aggravator. The State introduced certified copies of 13 prior violent felony convictions, which were not disputed by the defense at trial and were not disputed by CCRC in post-conviction. The trial court also noted that prior felonies not resulting in a conviction may nonetheless be relevant and admissible in sentencing proceedings to counter the presentation of certain mitigating factors, including statutory mental mitigation. Peterson faults the trial court's citation to *Sochor v. State*, 580

So. 2d 595 (Fla. 1991) (*Sochor* I), for this proposition because that case was remanded by the U. S. Supreme Court on other grounds (error regarding the CCP aggravator). See, *Sochor v. Florida*, 504 U.S. 527, 112 S. Ct. 2114 (1992) (*Sochor* II). However, the proposition that prior felonies not resulting in a conviction may nonetheless be relevant and admissible in sentencing proceedings to counter the presentation of certain mitigating factors was not affected by that decision. Indeed, on remand, *Sochor v. State*, 619 So. 2d 285, 293 (Fla. 1993) (*Sochor* III), this Court included the same finding from its original opinion -- that the penalty phase testimony regarding a Michigan rape (for which there was no conviction) was relevant to rebut a mitigating factor offered by the defense (no significant history of prior criminal activity).

In sum, on direct appeal in *Sochor* I, this Court ruled that there was insufficient evidence to establish the CCP aggravating circumstance, but affirmed the convictions and sentence of death. In *Sochor* II, the U.S. Supreme Court granted certiorari, vacated the sentence, and remanded to this Court to reconsider the error concerning the CCP aggravator. On remand, *Sochor* III, this Court issued a revised opinion to reflect that this Court performed a harmless error analysis in deciding that eliminating an invalid aggravating circumstance had no effect on the validity of Sochor's death sentence. *Sochor* III, 619 So. 2d at 291.

In denying Peterson's IAC/penalty claim based on the alleged

failure to object, the trial court found that trial counsel was not ineffective because there was no legal basis to make an objection and succeed. (V5/782). As the trial court reasoned, "Peterson introduced testimony during the penalty phase to establish both statutory and non-statutory mitigation through Dr. Maher, Dr. McClain, an employee of the Pinellas County Sheriff's Office, and defendant's mother and niece. This presentation by the defense allowed the State to raise the *Williams* rule evidence to counter claims of statutory mental mitigation during the penalty phase and was not raised to show bad character. Because the State had a legitimate reason for using *Williams* rule evidence during the penalty phase, there was no legal basis for defense counsel to make an objection and succeed. Consequently, counsel was not ineffective for failing to make such a meritless objection." (V5/782).

In denying Peterson's IAC claim based on the failure to object to alleged leading questions to Dale Smithson, the trial court found (1) there was no leading question to which defense counsel could object and (2) Peterson also failed to demonstrate that counsel was ineffective or that he was prejudiced under *Strickland*. (V5/782-83). Peterson's current criticism of the trial court's order (Initial Brief at 96), merely insists that the questions were leading, despite the trial court's contrary determination on this evidentiary matter.

IAC/failure to object to the State arguing facts not in evidence

In denying this IAC claim, the trial court found that the "State accurately summarized the facts established by the autopsy and expressed a reasonable inference of how Peterson, a much smaller man, could shoot Mr. Cardoso in the upper back from a distance of less than one foot with the bullet going downward, front to back and left to right within Mr. Cardoso's body. The State's comment is simply a description of the medical examiner's testimony and not a mischaracterization of testimony. (Jury Trial Transcript, p. 1381). This interpretation is supported by Peterson's repeated threats throughout all the robberies to kill victims who failed to comply with his directions and with his specific threat to the other victims in the instant case to kill them like he had their colleague." (V5/783-84). In faulting the trial court's order (Initial Brief at 97), Peterson simply disagrees with the trial court's assessment. However, as the trial court emphasized, fair comment on evidence or inferences arising from evidence is not improper and not a valid basis for an ineffective assistance of counsel claim. (V5/784), citing *Franqui v. State,* 59 So. 3d 82, 96-97 (Fla. 2011).

The trial court found that the State's inference in this case was reasonably based on the circumstance of the crime and the information revealed by the autopsy, was not improper, and

> . . . since the closing argument was proper, counsel was not ineffective for failing to make a meritless objection. See Ferrell v. State, 29 So.3d 99 (Fla. 2010)

citing Mungin v. State, 932 So.2d 986, 997 (Fla. 2006); Jones v. State, 949 So.2d 1021 (Fla. 2006).

(V5/784)

Once again, Peterson has not demonstrated any deficient performance and resulting prejudice under *Strickland*.

IAC/failure to present additional lay witnesses

Peterson claims that trial counsel was ineffective in failing to present additional witnesses in support of the mitigating factor that Peterson had close relationships with friends and family and did good deeds. In post-conviction, Peterson presented the testimony of two additional lay witnesses: Ms. Lily Johnson and Ms. Sally Dennis. In denying this IAC claim, the trial court set forth a fact-specific synopsis of the testimony presented by Ms. Johnson and Ms. Dennis and found that their testimony would have been cumulative to the testimony presented at trial by Peterson's mother and niece. (V5/785-86). As the trial court explained, "Peterson's family members testified at the penalty phase that he never got into trouble at school; he graduated from high school; went to the military; held a job for seven years; and had a close relationship to his niece. In addition, he threw birthday parties and cookouts for family; tried to be helpful to family members; and was active in the lives of family members. (Penalty Phase Transcript, pp. 111-18). Counsel is not ineffective for failing to present cumulative testimony. *Connor v. State*, 979 So. 2d 852, 865 (Fla. 2007); see also, *Pietri v. State*, 885 So. 2d 245 (Fla. 2004). Peterson fails

to show how he was prejudiced by the jury not hearing cumulative testimony." (V5/785-86).

Peterson's criticism of the trial court's order does not dispute the trial court's finding that the testimony of Ms. Johnson and Ms. Dennis was cumulative. (Initial Brief at 97). Instead, Peterson argues that trial counsel was ineffective for failing to call more witnesses because the State's closing noted that the defense presented just two lay witnesses. In rejecting Peterson's claim of prejudice, the trial court found that the State's argument was proper and Peterson did not suffer any prejudice by counsel's failure to present more character witnesses and stated:

> Peterson claims he was prejudiced because the State argued that "of all the people that Charles Peterson has encountered in his 45 years on earth, you heard from two." Peterson argues that this comment shifted the burden of proof from the State to the defense. However, the record refutes this claim. The State explained that if Peterson wanted the jury to consider mitigating circumstances, there must be "reasonably convincing evidence" that the mitigation exists, consistent with case law setting out the weight of evidence necessary for the jury to accept that a mitigating factor is proven. (*Penalty Phase Transcript, p. 145*). See Walls v State, 641 So.2d 381 (Fla. 1994). The State pointed out that mitigating factors allow "you to consider any aspect of the defendant's background or record or the circumstances of the offense, if you determine them to be mitigating, in order to weigh that in the process." (*Penalty Phase Transcript, p. 145*). **The State is permitted to comment on the weight that mitigating factors should be accorded. There is no reasonable probability that the State's brief comment affected Peterson's sentence. Therefore, Peterson did not suffer any prejudice by counsel's failure to present more character witnesses.** See Bowles v. State, 979 So.2d 182, 194 (Fla. 2008).
>
> (V5/786) (e.s.)

IAC/Peterson's low intellect & anti-social personality disorder

Next, Peterson asserts that trial counsel was ineffective at the penalty phase in presenting evidence in support of mitigation, failing to present all available mitigation, and failing to refute the State's case in favor of a death sentence. Peterson also alleges that the penalty phase testimony of defense expert, Dr. Michael Maher, did not support mitigation.

The aggravating factors in this case were: (1) Peterson was under a sentence of imprisonment at the time of the murder—life parole for three 1981 robberies (assigned great weight); (2) Peterson was previously convicted of a violent felony, based on thirteen convictions, resulting in a total of nine life sentences (assigned great weight); and (3) Peterson committed the murder during the commission of a robbery (assigned significant weight). The trial court found the age statutory mitigating factor, despite Peterson's age of thirty-eight at the time of the offense, based on expert testimony that he functioned at the emotional level of a fourteen-to sixteen-year-old and gave this statutory mitigating factor little weight. The non-statutory mitigating factors were: (1) Peterson had a low to normal IQ (assigned little weight); (2) Peterson had some limited mental impairment (assigned little weight); (3) Peterson had a good relationship with at least two family members (assigned some weight); (4) Peterson had a consistent work history (assigned some weight); and (5) Peterson

had an exemplary disciplinary record in jail and likely will behave properly when placed in prison (assigned little weight). *Peterson v. State*, 2 So. 3d 146, 152 (Fla. 2009).

In evaluating this IAC claim, the trial court provided a comprehensive summary of the testimony of Dr. Caddy and Dr. Gamache at the post-conviction hearing. (V5/788-91). Thereafter, the trial court set forth a detailed legal analysis, finding no deficient performance and no resulting prejudice under *Strickland*. (V5/791-93). In denying this IAC/penalty phase claim, the trial court recognized that a criminal defendant cannot establish that trial counsel was ineffective in obtaining and presenting mental mitigation merely by the testimony of a new expert who has a more favorable report. See, *Wyatt v. State*, 78 So. 3d 512, 532-33 (Fla. 2011). In addition, as the trial court emphasized, "[p]enalty phase prejudice under the *Strickland* standard is measured by whether the error of trial counsel undermines this Court's confidence in the sentence of death when viewed in the context of the penalty phase evidence and the mitigators and aggravators found by the trial court." *Stewart v. State*, 37 So. 3d 243, 253 (Fla. 2010) (quoting *Hurst v. State*, 18 So. 3d 975. 1013 (Fla. 2009). Finally, it is well-settled that "*Strickland* ... permits counsel to 'make a reasonable decision that makes particular investigations unnecessary.'" *Harrington v, Richter*, -- U.S. --, 131 S. Ct. 770, 788 (2011) (quoting *Strickland,* 466 U.S. at 691).

In finding no deficient performance and no prejudice under *Strickland*, the trial court cogently explained:

> The court finds that counsel was not deficient; neither was Peterson prejudiced since he fails to show that counsels' actions undermine confidence in the sentence of death when viewed in the context of the penalty phase evidence and the mitigators and aggravators. As correctly argued by the State, a "capital defendant does not have an independent right to be examined by a neuropsychologist." Pace v. State, 854 So.2d 167 (Fla. 2003). Furthermore, counsel "cannot he deemed ineffective for failing to request a neuropsychological evaluation where at the time of the penalty phase neither a well-known 'death penalty mitigation expert' nor experienced trial counsel had reason to believe further testing was warranted." Stewart v. State, 37 So.3d 243, 252 (Fla. 2010).
>
> Dr. Caddy did not do a "full battery" of testing and Peterson has not provided any support for his claim that results from a full battery of testing would show he "suffered from brain damage." At the time of trial, Peterson was examined by at least two mental health professionals: Dr. Michael Maher, a licensed psychiatrist, and Dr. Valerie McClain, a forensic psychologist, and neither of these mental health professionals gave any indication that defendant suffered brain damage. (*ROA Addendum Vol. 4, pg. 3583-3633*). Nor does Peterson assert that he actually incurred a head injury or suffered from any other condition that would cause brain damage.
>
> Mr. Watts testified at the post—conviction evidentiary hearing that Peterson was not cooperative with either Mr. McDermott or Mr. Watts, and did not want to talk about his childhood, family background, or medical history. (*Evidentiary Hearing Transcript, p. 513*). Mr. Watts encouraged Peterson to open up with him but Mr. Watts' attempts were unsuccessful. (*Evidentiary Hearing Transcript, pp. 513—514, 548*). However, Mr. Watts was able to locate family members to assist. (*Evidentiary Hearing Transcript, p. 515*).
>
> The evidence presented at trial showed that Peterson entered the Big Lots store wearing a mask and gloves, indicating that he knew his actions were wrong and was trying to hide his identity. Peterson v. State, 2 So.3d

146, 161 (Fla. 2009). Peterson's crimes were not the result of explosive, uncontrolled impulse. It is merely speculative that brain damage was a causative factor in Peterson's repetitive criminality since no significant evidence was presented to substantiate this claim.

The defense's claim that calling Dr. Maher as a penalty phase witness was prejudicial to him because Dr. Maher's admission that Peterson met the criteria for Antisocial Personality Disorder allowed the State to elicit negative information about this diagnosis lacks merit. Mr. Watts explained at the post-conviction evidentiary hearing that Dr. Maher's examinations did not reveal any brain impairment or injury and the defense did not receive any such information from Peterson or his family. (*Evidentiary Hearing Transcript, pp. 530-32*). Mr. Watts testified that the mitigation strategy with Dr. Maher was to focus on Peterson's emotional immaturity. (*Evidentiary Hearing Transcript, pp. 533-34*). The defense also hired Dr. McClain, who determined that Peterson had low-intellectual functioning, but was not retarded. (*Evidentiary Hearing, p. 541*). Dr. Maher used this information in his testimony. (*Evidentiary Hearing, pp. 542-43*). Dr. Maher reached his conclusion after a detailed clinical interview with Peterson and a review of his records. The fact that no specific record was introduced into evidence that Peterson's issues began before the age of 15 does not mean the information did not exist. As pointed out by the State, Peterson did not embark on armed robberies in late adolescence without having first developed and displayed serious behavioral problems. More importantly, since Dr. Maher's thesis was that Peterson's inability to empathize with victims on a normal level and his reckless disregard for their safety was related to his low intelligence, the underlying cause could not suddenly begin in adolescence. Regarding the remaining diagnostic criteria, the record clearly establishes "a failure to conform to social norms with respect to lawful behaviors as indicated by repeatedly performing acts that are grounds for arrest," a reckless disregard for the safety of others, "deceitfulness" and "indifference to or rationalizing having hurt, mistreated, or stolen from another."

As to Peterson's claim that counsel should have elicited an explanation of the cause of Antisocial Personality Disorder as a combination of genetic and environmental influences (as the Defense claims is suggested by the Mayo Clinic website), as pointed out by

> the State, while many researchers have found "correlations" between certain types of behaviors and social or genetic conditions, science does not definitively know the causes of antisocial personalities. There is no evidence linking low intelligence with antisocial personality disorder, and for this reason the State challenged Dr. Maher as to whether this could be an alternative explanation for Peterson's inability to empathize with his victims and whether this would be a reason not to trust the accuracy of his responses in a forensic clinical interview. **The suggestion that a newly-retained expert might find a claim of "brain damage," when two widely used experts did not is facially insufficient to meet either prong of Peterson's burden under Strickland. In light of the strong aggravating circumstances presented in this case, the mitigation presented at the penalty phase, the additional testimony of Peterson's post—conviction evidence, as well as the State's rebuttal evidence, Peterson cannot demonstrate a reasonable probability sufficient to undermine confidence in the sentence of death.**
> (V5/791-93) (e.s.)

In faulting the trial court's order denying this IAC/penalty phase claim, Petitioner asserts that Dr. Caddy concluded that Peterson "met the criteria for the two major statutory mental health mitigators." (Initial Brief at 98). On this point, the trial court's order actually states:

> Dr. Caddy was familiar with the mitigating factors that the defendant was under the influence of an extreme emotional disturbance or that his capacity to appreciate the criminality of his conduct was substantially impaired. Dr. Caddy found that **Peterson's neuropsychological condition was some evidence in support of these mitigating factors because everything Peterson does is being mediated by a very inefficient brain system,** and the limitations of Peterson's functioning needs to be taken into account with respect to everything he does. Dr. Caddy explained that Peterson's low intellectual functioning influenced his capacity to function at everything in life including any aspect of criminal conduct.
> (V5/789) (e.s.)

Notably, Peterson's closing argument below admitted that "Dr. Caddy never stated that he found these two [statutory mental health] mitigating factors present." (See, V3/564, citing EH 184-85). Peterson recognizes that the trial court also noted that Dr. Gamache concluded that the data he has reviewed does not support a conclusion that Peterson qualifies for the statutory mitigators (that he was under the influence of an extreme emotional disturbance or that his capacity to appreciate the criminality of his conduct was substantially impaired). (V5/790). See also, *Butler v. State*, 100 So. 3d 638, 666-67 (Fla. 2012) (noting that Dr. Caddy did not connect these deficiencies to the crime itself or explain how they would have affected the defendant's actions at the time of the murder), citing *Rutherford v. State*, 727 So. 2d 216, 224 (Fla. 1998) (finding mental health testimony to be of limited mitigating value where experts failed to connect the defendant's deficiencies to the murder).

Essentially, Peterson second-guesses trial counsel's contemporaneous decision to rely on the defense-preferred mental health experts. Mr. Watts has had a 25-year relationship with Dr. Maher and still uses him today. Dr. Maher's examinations did not reveal any brain impairment or injury. The defense did not receive any such information from Peterson's family either. The mitigation strategy with Dr. Maher was to focus on Peterson's emotional immaturity. Mr. Watts also hired Dr. McClain and she determined

that Peterson had low-intellectual functioning, but he was not retarded. Dr. Maher also utilized that in his testimony. In this case, Dr. Maher reached his conclusion after a detailed clinical interview with the defendant and a review of his records; the fact that no specific record was introduced into evidence that Peterson's problems began before the age of fifteen does not mean the information did not exist. As the oft-quoted rubric states: "The absence of evidence is not evidence of absence."

As addressed above, the trial court found each individual claim of error without merit. Accordingly, the trial court also found that Peterson's claim of cumulative error did not warrant relief. (V5/780-93), citing *Schoenwetter v. State*, 46 So. 3d 535, 562 (Fla. 2010). Again, the trial court set forth detailed factual findings which are supported by competent, substantial evidence. Inasmuch as no procedural or substantive errors have been shown, no relief is warranted and this Court should affirm the trial court's order denying post-conviction relief.

ISSUE IV

CUMULATIVE ERROR CLAIM

In his final issue, Peterson repeats his claim that the alleged cumulative effect of errors throughout the proceedings denied him his constitutional rights. The trial court denied Peterson's claim of cumulative error (V5/794) and explained that "[a]ny claim of alleged trial error could have been raised at the time of trial and on direct appeal. As such, any claim of cumulative trial or judicial error is procedurally barred. See Occhicone v. State, 768 So. 3d 1037, 1040 (Fla. 2000). Furthermore, where each individual claim of error has been found without merit, a claim of cumulative error does not warrant relief. See Schoenwetter." (V5/794).

In *Butler v. State*, 100 So. 3d 638, 668 (Fla. 2012), this Court reiterated that "[w]here, as here, the alleged errors urged for consideration in a cumulative error analysis 'are either meritless, procedurally barred, or do not meet the *Strickland* standard for ineffective assistance of counsel[,] . . . the contention of cumulative error is similarly without merit.'" *Bradley v. State*, 33 So. 3d 664, 684 (Fla. 2010) (alteration in original) (quoting *Israel v. State*, 985 So. 2d 510, 520 (Fla.2008))."

CONCLUSION

Based on the foregoing facts, arguments and citations of authority the decision of the lower court should be affirmed.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing ANSWER BRIEF OF THE APPELLEE has been furnished by e-mail to David D. Hendry, Assistant CCRC, Law Office of the Capital Collateral Regional Counsel, Middle Region, 3801 Corporex Park Dr., Suite 210, Tampa, Florida 33619-1136, hendry@ccmr.state.fl.us [and] support@ccmr.state.fl.us, on this 5th day of April, 2013.

CERTIFICATE OF FONT COMPLIANCE

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

Respectfully submitted,

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