IN THE SUPREME COURT OF FLORIDA

QUAWN M. FRANKLIN,

Appellant,

v.

STATE OF FLORIDA,

Appellee.
_____/

CASE NO. SC12-205
L.T. No. 2002-CF-217-A-02
DEATH PENALTY CASE

ON APPEAL FROM THE CIRCUIT COURT
OF THE FIFTH JUDICIAL CIRCUIT,
IN AND FOR LAKE COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

PAMELA JO BONDI
ATTORNEY GENERAL

STEPHEN D. AKE
ASSISTANT ATTORNEY GENERAL
Florida Bar No. 14087
Concourse Center 4
3507 East Frontage Road, Suite 200
Tampa, Florida 33607-7013
Telephone: (813) 287-7910
Facsimile: (813) 281-5501
Stephen.Ake@myfloridalegal.com

COUNSEL FOR APPELLEE

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Federal Cases

State Cases

Other Authorities

STATEMENT OF THE CASE AND FACTS

This Court summarized the relevant facts in its direct appeal opinion affirming Franklin's convictions and sentences:

> Quawn M. Franklin was charged with attempted armed robbery and first-degree murder in the shooting death of Jerry Lawley in Lake County in December 2001. Lawley's murder was the third violent crime committed by Franklin in the span of two weeks.
>
> Franklin was sixteen years old when he was sentenced to ten years in prison for the robbery of Clarence Martin in 1993. He was granted conditional release from prison on October 1, 2001. On December 18, 2001, Franklin ambushed pizza delivery man John Horan in Leesburg. Franklin bound Horan with duct tape, drove him to another location, and then shot Horan in the back, killing him. [fn1] On December 27 or 28, Franklin and codefendant thirteen-year-old Pamela McCoy committed a forced invasion of the home of Alice Johnson in Leesburg. Franklin struck Johnson in the head with a hammer and stole her Toyota Camry. Johnson suffered severe injuries from this attack when pieces of her skull imbedded in her brain. Following the attack, Johnson was unable to live on her own or participate in civic and volunteer activities. [fn2]
>
> On December 28, Franklin drove Johnson's stolen vehicle from Leesburg to St. Petersburg to visit relatives. Franklin was accompanied by McCoy and cousins Antwanna and Adrian Butler. Late in the evening, the Butler cousins told Franklin that they wanted to return to Lake County. However, none of the group had money and Franklin had to borrow ten dollars from one of his relatives in order to buy gas for the return trip. While driving back to Lake County, Franklin showed Antwanna Butler a .357 magnum revolver he had obtained from one of his relatives in St. Petersburg. In Leesburg, Franklin stopped at the Elberta Crate and Box Factory and asked directions from the security guard, Jerry Lawley. Franklin then took the Butler cousins to an apartment building near their home. He told Antwanna Butler that he was going to return to St. Petersburg. He also stated that he

was going “to get” the security guard.

Franklin returned to the crate factory in the early morning hours of December 29, 2001. He ordered Lawley out of his vehicle at gunpoint. While Lawley was complying and on his knees in the factory parking lot, Franklin shot Lawley once in the back. In statements made by Franklin after his apprehension, he stated that he shot Lawley because he “didn’t have no other choice. . . . What I did, I wanted to do it at the time.” Franklin rifled Lawley’s pockets and also searched Lawley’s car. However, Franklin found nothing of value and was unable to get Lawley’s car to move. Franklin left the scene and fled to St. Petersburg.

After being shot, Lawley sought help from a company truck driver, Edward Ellis. Ellis had arrived at the crate factory earlier in the evening, parked his truck in the lot, and gone to sleep in the truck cab. Lawley drove his car a short distance across the crate factory grounds to where Ellis’s truck was parked. Lawley pounded on the cab of Ellis’s truck and shouted that he had been shot. Lawley told Ellis that a tall black male wearing a knit cap had shot him. Lawley also told Ellis that the man was driving a relatively new blue car and had tried to rob him. Ellis called 911 at 5:44 a.m., and Leesburg Police Officer Joseph Iozzi responded to the scene. [fn3] Lawley also told Officer Iozzi that a thin black male, approximately six feet tall and wearing a knit cap, had ordered him from his car at gunpoint, told him to lie on the ground, and then shot him in the back while he was doing as told. Lawley also told the officer that the man had left the scene in a newer model blue, four door car, possibly a Pontiac.

During the early morning hours of December 30, a St. Petersburg police officer came upon a blue 2000 Toyota Camry in which Franklin was asleep in the driver’s seat and codefendant McCoy was asleep in the passenger seat. Franklin was wearing gloves, and the officer found a revolver under the driver’s seat. Crime scene technicians found a spent .357 caliber shell casing and five rounds of live ammunition in the revolver. They also located a black knit skull cap in the trunk of the car. The St. Petersburg officer took

Franklin and McCoy into custody. After being informed of his rights, Franklin agreed to give a statement to the police, in which he admitted shooting Lawley. Franklin also stated that he had intended to rob Lawley, but Lawley had nothing of value he could take, that he shot Lawley because he "wanted to," and that he wore gloves so that he would not leave any fingerprints. In his statement to the St. Petersburg police, Franklin said that all of the companions who had made the original trip to St. Petersburg were in the car at the time of the shooting. However, Franklin later contradicted this statement in an interview with a reporter when he stated that only McCoy was with him during the shooting. Antwanna Butler also testified that she and her cousin had been dropped off at their home by Franklin and that they were not present during the shooting of Lawley.

While awaiting trial in the Lake County jail, Franklin contacted a newspaper reporter from the Orlando Sentinel and gave an interview in which he incriminated himself in Lawley's murder. While parts of the taped interview were redacted, the trial court overruled Franklin's objections to three other passages, which were played at trial. The objectionable portions included Franklin's statements that he had decided to confess because he was "tired of life" and "tired of being treated just like an animal"; that he saw a helicopter looking for the car he was in and that he was hiding from the helicopter; and that he had committed the crime, but that "the people, the world, life" were the cause of his actions and that he was tired of people watching him and hating him and that he hated life. Defense counsel posed a relevance objection to the statements about Franklin's motivation in confessing and objected that the statements about hiding from the helicopter could be interpreted as evidence that the car had been stolen or that the police were looking for Franklin for some other reason. Defense counsel renewed these objections at trial when the tape was introduced into evidence.

Franklin filed a number of pretrial motions. These motions included a challenge of Florida's death sentencing scheme in light of *Ring v. Arizona*, 536

U.S. 584, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002); a request for a statement of particulars as to the aggravating circumstances and the State's theory of prosecution; a request that the jury be required to render a unanimous verdict as to penalty; challenges to the constitutionality of Florida's death penalty statute on a number of grounds, including that the admission of hearsay evidence during the penalty phase violated the constitutional right to confront witnesses; challenges to the constitutionality of several aggravating factors; a challenge to the constitutionality of victim impact evidence and, in the alternative, a request that the court limit its introduction; a proposed modification to the standard jury instructions based on *Ring* and *Caldwell v. Mississippi*, 472 U.S. 320, 105 S. Ct. 2633, 86 L. Ed. 2d 231 (1985); a request to limit certain prosecutorial arguments and "misconduct"; a motion to prohibit challenges to prospective jurors based on their personal reservations about the death penalty; a motion for the exclusion of evidence creating sympathy for the victim; and a request for a special verdict form indicating whether the jury found Franklin guilty of premeditated or felony murder. After hearing argument on the various motions, the trial court denied most of them. The court did grant Franklin's motion for a special penalty phase verdict form that would indicate the jury's vote as to the applicable aggravating factors.

During the State's case in chief, defense counsel made a hearsay objection to the testimony of truck driver Ellis and Officer Iozzi, who related Lawley's statements to them after he was shot. The trial court overruled defense counsel's objections and permitted both witnesses to testify about what Lawley had said to them. The trial court ruled that the statements were admissible as either spontaneous statements, excited utterances, or an existing physical condition under the hearsay exceptions contained in section 90.803, Florida Statutes (2001). Both witnesses testified that Lawley stated he had been shot by a tall, thin black man wearing a knit cap and driving a blue, four-door car; that the shooter had searched through Lawley's pockets and car; and that Lawley was in a great deal of pain and having difficulty

breathing after being shot.

Antwanna Butler testified that Franklin showed her a big silver or chrome revolver on the trip back to Leesburg from St. Petersburg and that Franklin stated his intent to go back and "get" the security guard after dropping off Butler and her cousin in the early morning hours of December 29. The jury also heard Franklin's audiotaped confession to the police and his audiotaped interview with the newspaper reporter. On each tape, Franklin admitted that he killed Lawley and that he had intended to rob him. In the newspaper interview, Franklin also stated that he had intended to take Lawley's car, but had been unable to move it.

The State's other guilt phase witnesses included crime scene technicians, forensic experts, the medical examiner, and various law enforcement officers who either were involved in the investigation or had contact with Franklin while he was in custody. The experts testified that the bullet recovered at the crime scene contained Lawley's DNA and had been fired from the revolver found under the driver's seat of the car in which Franklin was apprehended. The experts also testified that Lawley was shot in the back while kneeling on the ground and died from the injuries inflicted by this single gunshot. The gun was fired from at least five and a half feet away from Lawley. The medical examiner testified that the bullet entered Lawley's left back below his lower rib cage, injured the lower portion of his left lung, bruised the surface of his heart, passed through his diaphragm, passed through his liver, and exited his left upper abdomen. The medical examiner also noted that both of Lawley's knees were scraped and that the exit wound was not "supported" or "shored," indicating that Lawley was not lying on the ground when shot. The jury found Franklin guilty as charged of first-degree murder and attempted armed robbery with a firearm.

During the penalty phase, the State presented a videotaped deposition by the victim of Franklin's 1993 robbery; the testimony of an officer who was at the scene of the Horan murder on December 18, 2001, and the home invasion and attack on Johnson on December

28, 2001; the testimony of Johnson recounting Franklin's attack on her; and the testimony of the officer who investigated Horan's murder. Defense counsel objected to the testimony relating to these previous crimes and to several photos that depicted the earlier crime scenes and the victims, arguing that the testimony and evidence were prejudicial and inflammatory. Defense counsel also stated that Franklin would stipulate to the aggravating factor of prior violent felony convictions in lieu of the State presenting evidence relating to these previous crimes. The trial court overruled the defense objections and refused to accept Franklin's stipulation.

Codefendant McCoy testified that Franklin had obtained a big silver gun while in St. Petersburg; Franklin stated it was going to "hurt a little, but it will only take a second" before he exited his vehicle and ordered Lawley to get on the ground; Lawley asked Franklin not to shoot him; and Franklin shot Lawley in the back while Lawley was kneeling on the ground with his hands behind his head.

Two of Lawley's relatives testified that he was a good and loving person who helped family members and neighbors and that his murder had devastated the family. Lawley's coworker and friend Ellis also testified that Lawley was liked by everyone at work and had no enemies. Defense counsel objected to the presentation of this victim impact evidence, but the trial court overruled the objection.

Defense counsel had subpoenaed Minnie Thomas, the woman who raised Franklin until he was eight years old and whom he called Mom. However, Thomas was either unavailable or unwilling to testify at trial. The court permitted the defense to present Thomas's deposition in lieu of her live testimony. The parties also stipulated to other facts that Thomas would have presented about Franklin's background and family history. The other defense penalty phase witness was Franklin himself who testified about his background and child. Franklin described the trauma of being forcibly removed from the only family he knew when he was eight years old, being taken to St. Petersburg by his biological mother, and his failed attempts to

return to the Thomas family in Leesburg by stealing bikes, cars, and money. Franklin also testified about his experiences in juvenile facilities from age nine, including being physically and sexually abused by older boys in the facilities, and his imprisonment in adult prison at age fifteen.

At the conclusion of the penalty phase, the jury returned a unanimous recommendation of a death sentence. The jury also unanimously agreed that four aggravating factors were present: (1) the murder was committed while Franklin was serving a prison sentence because he was on conditional release at the time of Lawley's shooting; (2) Franklin had previous violent felony convictions, including another capital felony for the murder of Horan; (3) Lawley's murder was committed for pecuniary gain; and (4) the murder was cold, calculated, and premeditated (CCP). The trial court followed the jury's recommendation and imposed a death sentence. In its sentencing order, the trial court found the same four aggravating factors, rejected Franklin's age as a statutory mitigating factor, and found a number of nonstatutory mitigating factors. [fn4] The trial court concluded that the aggravating factors outweighed the mitigating factors. The trial court also sentenced Franklin to a consecutive life sentence for the attempted armed robbery of Lawley.

[fn1] Franklin pled guilty to first-degree murder, kidnapping, and armed robbery in Horan's shooting. He was sentenced to three consecutive life sentences.

[fn2] In the middle of trial for the attack on Johnson, Franklin accepted a plea bargain. Franklin pled guilty to burglary, robbery with a deadly weapon, and attempted felony murder and was sentenced to life imprisonment.

[fn3] The record is silent as to how long it took Officer Iozzi to arrive at the scene.

[fn4] The trial court found ten nonstatutory mitigating factors: (1) there were deficiencies in Franklin's upbringing which included being

> forcibly removed by his biological mother from the only mother and father he had known for eight years (given some weight); (2) Franklin had been sentenced to adult prison at a young age and served eight years of a ten-year sentence, which was a severe sentence in light of his prior record (given little weight); (3) Franklin had cooperated with law enforcement after his arrest (given some weight); (4) Franklin took responsibility for his crimes by confessing to the police and a newspaper reporter (given some weight); (5) Franklin had offered to plead guilty in return for a life sentence without possibility of parole that would run consecutive to his other life sentences (given little weight); (6) Franklin apologized to the victim's family, showed remorse, and confessed to other offenses which were used as aggravating circumstances (given some weight); (7) Franklin apologized and showed remorse for his other crimes (given little weight); (8) Franklin had entered pleas in his related cases and had been sentenced to life (given some weight); (9) there was no one available to testify on Franklin's behalf in the penalty phase (given some weight); and (10) codefendant McCoy received a thirty-five-year sentence for her role in the crimes (given little weight).

Franklin v. State, 965 So. 2d 79, 83-88 (Fla. 2007).

On November 7, 2008, collateral counsel filed an unverified postconviction motion raising thirteen issues and simultaneously filed a motion for competency determination pursuant to Carter v. State, 706 So. 2d 873 (Fla. 1997), and Florida Rule of Criminal Procedure 3.851(g). (PCR V3:437-570). The court appointed Drs. Glenn Caddy and James Hogan to conduct competency evaluations on Franklin, and after these two experts issued

their reports, the court appointed Dr. Ava Land. (PCR V3:596-600; PCR V4:636-40).

On January 20, 2010, the court conducted a competency hearing wherein these three experts testified regarding their evaluations and findings. (PCR V22:3959-4093). Dr. Glenn Caddy testified that he interviewed Franklin on November 27, 2007, and on October 7, 2008. (PCR V22:3967). Dr. Caddy was retained by Franklin's collateral counsel and was initially asked to examine Franklin because Dr. Caddy had previously done work in religious delusion cases. Dr. Caddy reviewed a number of records in this case, including two reports from Dr. Land and three reports from Dr. Hogan. (PCR V22:3969-70). Dr. Caddy testified that Franklin would not submit to any psychological testing because that would go along with the desires of his attorneys and Franklin did not want his attorneys to do anything for him. Rather, Franklin expressed a desire to allow God to plan his participation in his collateral proceedings, and as of yet, Franklin had not received any indication from God that he should participate. (PCR V22:3978-80, 4022). Franklin was not on any types of antipsychotic medication as Franklin did not feel they were necessary and he did not like their effect on him. (PCR V22:3983).

Dr. Caddy testified regarding Franklin's dedication to his

biblical studies and opined that Franklin is engaging in "religious delusions" when Franklin describes his communications with God. At times, Franklin reports that the devil, or "Leviathan," shocks him to get his attention and attempts to distract Franklin from his religious beliefs. (PCR V22:3981-82). Dr. Caddy ultimately concluded that Franklin's unwillingness to sign his verification on his postconviction motion was the result of his mental illness, specifically, his delusional disorder related to religion. (PCR V22:3986-87). Dr. Caddy acknowledged that Franklin's religious beliefs have allowed him to better cope with his current legal situation. Although a review of Franklin's records contained numerous accounts of malingering, Dr. Caddy testified that a more accurate description would be "manipulative" behavior. (PCR V22:3991-93, 4022-23).

On the issue of Franklin's competency to proceed in his postconviction proceedings, Dr. Caddy testified that Franklin had the present ability to consult with his attorneys with a reasonable degree of rational understanding, had a factual understanding of the proceedings and understood the adversarial nature of the proceedings, but his rational understanding of the pending collateral proceedings is disrupted by his delusional process. (PCR V22:4016-19). Dr. Caddy testified that Franklin

had a knowledgeable understanding of the proceedings, but his delusional belief that his fate was in God's hands rendered him incompetent to proceed. Dr. Caddy distinguished Franklin's situation from a "volunteer" who simply wanted to end his postconviction proceedings and have his sentence carried out. Rather, Franklin's position is that God will tell him what he wants Franklin to do and, if God does not tell him, that is because God wants Franklin to die and join him on the other side. (PCR V22:4018).

The State presented the testimony of Dr. James Hogan, a psychologist with the Department of Corrections from 1991-2006, who testified that he first met Franklin in 1996 when Franklin was incarcerated at Sumter Correctional Institution serving a sentence from a prior offense. (PCR V22:4025-28). Dr. Hogan was appointed in 2003 to examine Franklin for competency prior to his trial in the instant case. Dr. Hogan also examined Franklin in 2009 pursuant to the current competency proceedings. In addition to interviewing Franklin in 2009, Dr. Hogan testified that he reviewed his prior evaluations of Franklin, reviewed law enforcement reports, Franklin's medical records from the Department of Corrections, and interviewed Department of Corrections' Psychological Specialist Jennifer Sagle. Unlike at the meeting with Dr. Caddy, Franklin agreed to complete the

Miller Forensic Assessment of Symptoms Test. (PCR V8:1431-39).

At the competency hearing, Dr. Hogan testified that he was personally aware of Franklin's history of malingering, dating back to his first encounters with Franklin in the mid-1990s. (PCR V22:4029). When Dr. Hogan met with Franklin in 2009 for his competency evaluation, Franklin was cordial and polite, but did not want to cooperate and discuss the collateral proceedings because Franklin was only concerned with doing God's will. (PCR V22:4032-34). Dr. Hogan disagreed with Dr. Caddy's opinion that Franklin is suffering from religious delusions because, according to Dr. Hogan, Franklin's actions in reading the Bible and being preoccupied with religion are not delusional. (PCR V22:4034-35).

While incarcerated, Franklin asked another female officer if she observed a fire-spitting dragon he referred to as Leviathan. (PCR V22:4033). Dr. Hogan testified that if a person were legitimately experiencing a hallucination, they would have no reason to seek verification from a third-party because they would not perceive that others may not share their vision. (PCR V22:4033, 4036-37). Based on his lengthy history of observations of Franklin, Dr. Hogan ultimately concluded that Franklin was competent to proceed and was malingering. Dr. Hogan did not believe that Franklin was suffering from any delusional systems.

(PCR V22:4037-38, 4050).

Psychologist Dr. Ava Land testified at the competency hearing that she, like Dr. Hogan, had also examined Franklin for competency prior to his trial in 2004. (PCR V22:4062). Dr. Land also met with Franklin three times in 2009 after having been appointed during the postconviction competency proceedings. In 2004, Dr. Land found that Franklin was malingering and was competent to proceed to trial. (PCR V22:4065). After evaluating Franklin in 2009, Dr. Land testified that she believed Franklin was now a "changed man" from her previous evaluation; she opined that Franklin was malingering mental illness prior to his trial in an effort to delay the proceedings or possibly reduce his culpability, and his subsequent significant decrease in disciplinary incidents coincides with the development of his religious beliefs. (PCR V22:4065-66).

When Dr. Land examined Franklin in 2009, he was pleasant, courteous, and cooperative, except when questioned on issues directly related to competency. (PCR V22:4067). Dr. Land did not find that Franklin had a fixed delusional system, and stated that if Dr. Caddy's findings were accurate, most Christians would be considered delusional. (PCR V22:4068, 4082). Franklin told Dr. Land that God speaks to him and Franklin perceived this personal message as a path to follow, but Franklin was not

describing an auditory hallucination of God speaking in a loud booming voice that other people could hear. (PCR V22:4070-71). Dr. Land did not find Franklin incompetent because he made the rational decision to place his fate in God's hands and not actively participate in his postconviction proceedings. (PCR V22:4072-76). Franklin understood that he is facing a death sentence by lethal injection but, due to his faith, he believes he has eternal life in the spiritual sense. (PCR V22:4074).

After hearing the testimony at the competency hearing and reviewing the experts' written reports, the court issued an order finding Franklin competent to proceed in his postconviction proceedings and, pursuant to Rule 3.851(g)(11), allowed him sixty (60) days to file a verified motion for postconviction relief. (PCR V4:741-44). On August 2, 2010, Franklin filed a signed, verified Amended Motion to Vacate Judgment and Sentence raising eleven issues. (PCR V5:786-899). The court conducted a case management conference and issued an order setting an evidentiary hearing on claims one, two, nine and eleven, and summarily denying the remaining claims. (PCR V6:1065-69).

At the evidentiary hearing, Franklin presented testimony from five of Franklin's family members: Charlie Mae Owens (grandmother), Katina Shorter (cousin), Michelle Reio (aunt),

Keisha Washington (half-sister), and Georgette Franklin (aunt). Charlie Mae Owens, Franklin's maternal grandmother, testified about her daughter, Gloria "Jean" Collins' health problems with seizures and epilepsy and the fact that, due to these issues, Franklin and his siblings lived with other people when growing up. (PCR V24:4222-30). Franklin lived in Leesburg with Minnie Thomas and her husband, both of whom treated Franklin very well and spoiled him. Ms. Owens testified that when Franklin was seven or eight, Jean Collins went to Leesburg and took custody of Franklin and returned to St. Petersburg, and from that point on, Franklin consistently tried to return to Leesburg. (PCR V24:4230-31). When he was a teenager, Franklin was sent to prison, and while incarcerated, his mother passed away. After Franklin was released from prison, she saw him at her home on one occasion and recalled overhearing him say that he heard voices in his head. (PCR V24:4232-35). Ms. Owens learned of Franklin's murder charges from Minnie Thomas and indicated that she would have been willing to come and testify had she been contacted by Franklin's attorneys. (PCR V24:4235-37).

Katina Shorter, Franklin's cousin, testified that she lived in Lake County while attending elementary school and saw Franklin every day at the time. (PCR V24:4253-54). She testified that Franklin called Minnie Thomas, "Mommy," and called her

husband, “Daddy,” and the Thomases raised Franklin as if he were their own child. When Franklin returned to St. Petersburg with Jean Collins, Franklin did not adjust well because his mother had rules to obey and was stricter than Minnie Thomas. (PCR V24:4255-58, 4270-71). Franklin was sent to prison when he was a teenager, and after he was released, Katina Shorter saw him about five or six times. (PCR V24:4259-60, 4272). Franklin was into “rapping,” and would say strange things, but she never heard him claim that he was hearing voices. (PCR V24:4260-61, 4272). She testified that Franklin was different after his time in prison and testified that “something bad” happened to him in prison because Franklin acted “strange.” (PCR V24:4263-64). Franklin told her he had been in solitary confinement and made to take medications that he did not want to take. (PCR V24:4263-65). At the time of Franklin’s arrest for the Lake County murders, Ms. Shorter indicated that Franklin did not want anything to do with his family or society. (PCR V24:4273).

Franklin’s aunt, Michelle Reio, testified that Franklin’s mother, Jean Collins began having seizures after the birth of her first child, Keisha. (PCR V24:4277-78). Ms. Reio and Jean Collins visited Franklin when he was living with Minnie Thomas in Leesburg on two occasions and she was sure that Jean had visited Franklin on other occasions. (PCR V24:4281-82). After

Jean Collins regained custody of her son and they returned to St. Petersburg, the family had cookouts and get-togethers "all the time" and Franklin appeared happy. (PCR V24:4284-85, 4303). Franklin had difficulties adjusting and tried to return to Leesburg on a number of occasions. When he was sixteen, Franklin was sentenced to adult prison for eight years. (PCR V24:4286-88). After Franklin was released from prison, Ms. Reio saw him on two occasions, one of which was on the night of the instant murder. (PCR V24:4288, 4301-02). Franklin said that prison was "hard," but he offered no other details other than he had taken "crazy" medication. (PCR V24:4290-95). Ms. Reio also stated that Franklin never mentioned hearing voices, although she acknowledged giving a different answer in a deposition in June, 2011. (PCR V24:4291-93).

Keisha Washington, Franklin's half-sister, similar to Franklin's other family members, testified that she saw Franklin on two occasions after he was released from his eight-year prison sentence. (PCR V24:4306-12). According to Ms. Washington, on the second occasion (the night of the instant murder), Franklin had poor hygiene like he had not bathed for a few days. (PCR V24:4314-15). After his arrest for the Lake County murders, Ms. Washington did not have any further contact with Franklin as she was angry with him. (PCR V24:4316-19).

Georgette Franklin, Appellant's aunt, testified that Franklin's father, Hilliard Franklin, did not know that Franklin was his son until Appellant was fifteen years old. (PCR V24:4330-34). When Franklin was released from prison and about twenty-four years old, the witness testified that she heard Franklin rapping about pulling guts out of people, the devil, and prison guards. (PCR V24:4337-38). Georgette Franklin testified that she overheard Franklin telling another family member that he heard voices and the devil was telling him to do stuff, and also overheard him say that prison guards treated him badly and medicated him. (PCR V24:4339-40).

Collateral counsel also presented testimony from Dr. Glenn Caddy at the evidentiary hearing. Dr. Caddy testified that, after he had testified at the competency hearing, he examined Franklin on two more occasions, had spoken to Antwanna Butler, had listened to the testimony of the five family members at the evidentiary hearing, and had consulted with collateral counsel's retained social worker, Marjorie Hammock. (PCR V24:4362-64, V25:4422). Dr. Caddy testified that Franklin was not cooperative and did not want to assist his current attorneys in participating in an evaluation. (PCR V24:4368-69). Ultimately, Franklin participated to some level and Dr. Caddy was able to obtain a full scale IQ score of 78. (PCR V24:4369-70). Dr. Caddy

also reviewed Franklin's school records and noted excessive absences, poor performance, and placement in emotionally handicapped classes. (PCR V24:4372-75).

Franklin told Dr. Caddy that when his mother, Jean Collins, took custody of him at age eight and moved him to St. Petersburg, he was devastated because he felt that Minnie Thomas was his mother. (PCR V24:4381). Franklin had difficulties adjusting to St. Petersburg and began stealing bicycles in an attempt to return to Leesburg. (PCR V24:4381-83). During his teenage years, Franklin had to have surgery for a hearing impairment. Also at this time, Franklin was placed in juvenile facilities, and eventually, at age 15, entered adult prison. Dr. Caddy testified that Franklin was often targeted in these facilities, spent considerable amounts of time in protective confinement, and as a result, began constructing a fantasy world as a means of coping. (PCR V24:4390-400; V25:4433). Dr. Caddy opined that Franklin's construction of this fantasy life, including evil forces, led to the creation of delusions and prevented Franklin from having total control over his actions. (PCR V24:4403-06). Ultimately, Dr. Caddy concluded that Franklin had a delusional disorder. (PCR V24:4412). Dr. Caddy also agreed with Dr. Mason's diagnosis of antisocial personality disorder. (PCR V25:4453-55).

Social worker Marjorie Hammock testified at the evidentiary hearing that she was retained by collateral counsel to conduct a biopsychosocial assessment of Franklin. (PCR V25:4461-74). Ms. Hammock reviewed Franklin's school records, Department of Corrections records, medical records, interviewed a number of his family members and lay witnesses, and also interviewed Franklin over a two-day period. (PCR V25:4475-81). According to Ms. Hammock, the family members who testified at the evidentiary hearing tended to "minimize" some things regarding Franklin's behavior. (PCR V25:4481). Ms. Hammock repeated the testimony hearing by the postconviction court from the other witnesses regarding Franklin being raised by Minnie Thomas until the age of eight, and then having difficulty adjusting to life in St. Petersburg after his mother regained custody of him. Ms. Hammock concluded that Franklin had significant challenges in his development, including educational and cognitive learning deficits. (PCR V25:4508-09).

Franklin's trial attorneys, Mark Nacke and William Grossenbacher, testified at the evidentiary hearing regarding their efforts to investigate and develop mitigation in preparation for the penalty phase. Grossenbacher testified that, because Franklin had previously entered a plea in other murder and attempted murder cases and made multiple confessions in this

case, the attorneys focused heavily on the penalty phase. (PCR V25:4540). Grossenbacher stated that the penalty phase strategy "in general was to present him as someone who had a very troubled past in that he was snatched from the woman he thought was his mother at the age of eight, that he never got accustomed to the new family, that he was soon in trouble and in juvenile detention, that he was sexually abused in juvenile detention, and to ask the jury to give him a life sentence on that basis." (PCR V25:4541). The defense team had difficulties, however, because Franklin did not want his family members in St. Petersburg contacted and threatened to not attend the trial if counsel made any contact with his family. (PCR V25:15-16).

Prior to the murder trial in the instant case, Grossenbacher and Nacke had represented Franklin in his two other cases involving victims Alice Johnson and pizza delivery man John Horan. In the Alice Johnson attempted murder case, after the trial began, Franklin elected not to attend any further and made the decision to enter a plea. (PCR V25:4546-48). Franklin subsequently entered a plea to the John Horan murder, and Grossenbacher testified that Franklin indicated on a number of occasions that he did not want to attend the instant trial. (PCR V25:4546-48). While attempting to convince Franklin to attend the instant trial, Grossenbacher was also attempting

to obtain information from Franklin about possible mitigating witnesses, but Franklin did not want to involve his family in any manner and he would not give any useful information to his attorneys. (PCR V25:4548-51). The attorneys discussed Franklin's instructions and expressed concern that if they attempted to contact his family, he would elect not to attend the trial. (PCR V25:4548-49).

Grossenbacher testified that Franklin did not have any objection to the attorneys calling Minnie Thomas as a mitigation witness, and the defense had spoken to her about her testimony, as well as taking her deposition. On the morning of her anticipated testimony, however, Ms. Thomas did not show up despite extensive efforts by the defense team to secure her presence. (PCR V25:4553-54, 4597; DAR V11:1027-31).

Grossenbacher noted that a number of mental health experts examined Franklin, but they did not "have any kind of positive opinions" to offer. (PCR V25:4544-45). Grossenbacher recalled that Dr. Douglas Mason indicated that Franklin was malingering and suffered from antisocial personality disorder and noted that these types of opinions were not things that he wanted a jury to hear. (PCR V25:4552). Trial counsel indicated that it was his opinion that presenting Dr. Mason would be detrimental to Franklin and to the defense team's strategy of attempting to

humanize Franklin and presenting him as a troubled child. (PCR V25:4553, 4561-63).

Lead trial counsel Mark Nacke, an experienced capital attorney, testified that given Franklin's prior crimes and sentences, as well as the facts of this case, Franklin was likely going to be convicted of first degree murder. Thus, the defense team focused heavily on the penalty phase. (PCR V25:4574-75). According to trial counsel's recollection, the main strategy at the penalty phase was to humanize Franklin and perform "damage control" to keep things from being introduced because there was not much in the way of mitigation to offer. (PCR V25:4583-84). The defense team sought and obtained records on Franklin from a number of sources: Department of Corrections, Franklin's school records, the Lake County Jail, and medical records. Counsel also noted that Franklin had been evaluated by a number of mental health experts, including Drs. Elizabeth McMahon, Douglas Mason, James Hogan, and Eva Land. (PCR V25:4571, 4586-89).

Trial counsel's recollection was that after Dr. Elizabeth McMahon evaluated Franklin, she indicated that she would not be helpful with mitigation, and thus, counsel did not utilize her any further. (PCR V25:4572-73). Approximately four months before trial, the defense team contacted Dr. Douglas Mason and had him

evaluate Franklin. Prior to having heard Dr. Mason's deposition testimony, Nacke filed a notice of intent to present Dr. Mason at the penalty phase. (PCR V25:4577-81). After listing Dr. Mason as a potential witness, the State filed amended witness lists and named Dr. Luis Torres, Dr. Ava Land, Dr. James Hogan, and Collen D'Acquisto as rebuttal witnesses to Dr. Mason. (PCR V25:4590-97). Trial counsel Nacke recalled that some of the things Dr. Mason said in his deposition caused him not to call Dr. Mason as a witness at the penalty phase. (PCR V25:4581-82, 4589-93). Likewise, counsel indicated that his recollection was that none of the mental health experts involved in this case had beneficial testimony that would have outweighed the detrimental aspect of their testimony. (PCR V25:4589).

In rebuttal, the State called Dr. Elizabeth McMahon as a witness at the evidentiary hearing and she testified that she met with Franklin on two occasions in 2002 in preparing her confidential evaluation for the defense. (PCR V25:4606). Dr. McMahon administered psychological and neuropsychological testing to Franklin. (PCR V25:4607-08). Franklin reported hearing voices, but they were his inner thoughts or internal stimuli. (PCR V25:4609-10). Based on her evaluation, she did not find that Franklin suffered from any brain damage. (PCR V25:4611-12). She also testified that she saw no evidence that

Franklin was insane at the time of the murder. (PCR V25:4613).

The State also called the defense investigator, James T. Williams, and he detailed the process of obtaining Franklin's responses to the lengthy Public Defender's Office's Forensic Assessment Form. (PCR V25:4618-27). When asked about potential mitigating witnesses, Franklin could not think of anyone that would be a potential witness. (PCR V25:4627). Franklin gave him the names of family members, but investigator Williams had to obtain their addresses and phone numbers on his own. Investigator Williams attempted to locate Franklin's family members, but was unable to locate or contact them. (PCR V25:4628-34, 4637). Due to the difficulties in tracking down potential witnesses, Williams attempted to contact Minnie Thomas and secure her assistance in locating potential witnesses. Although Ms. Thomas was subpoenaed to appear for the penalty phase, she did not show up and her son called Williams and told him to leave his mother alone because the stress of the process was affecting her health. (PCR V25:4630-32).

After hearing the testimony from the evidentiary hearing and reviewing the written closing arguments, the trial court issued a detailed order denying Franklin's postconviction claims. (PCR V6-7:957-1158). This appeal follows.

SUMMARY OF THE ARGUMENT

Substantial and competent evidence supports the trial court's finding that Franklin was competent to proceed in his postconviction proceedings. The court heard testimony from three mental health experts and only collateral counsel's retained expert, Dr. Glenn Caddy, found Franklin incompetent to proceed based on a finding that Franklin's rational understanding of the collateral proceedings is disrupted by a religious delusional disorder. The other two experts rejected Dr. Caddy's opinion that Franklin was suffering from a religious delusional disorder and found Franklin competent to proceed. Based on the conflicting evidence, the trial court acted within its discretion in rejecting Dr. Caddy's opinion and competent, substantial evidence supports the court's conclusion that Franklin was competent to proceed.

The court properly denied Franklin's claims of ineffective assistance of counsel for failing to investigate and present mitigating evidence and for failing to call an expert mental health witness, Dr. Mason. Trial counsel immediately began investigating mitigation evidence upon representation and obtained a comprehensive forensic assessment form from Franklin. Counsel further obtained school, medical, and jail records, and spoke with the woman who raised Franklin as a child. Trial

counsel testified that Franklin did not want to involve his biological family members. Counsel also had mental health experts appointed to examine Franklin, including Dr. Mason, but counsel made the strategic decision not to present mental mitigating evidence because of the detrimental information which would be elicited. The trial court properly rejected Franklin's claim because he failed to carry his burden of establishing that counsel performed deficiently and that he was prejudiced.

The postconviction court properly summarily denied Franklin's claim that trial counsel was ineffective during voir dire and for failing to move for a change of venue. The record clearly refuted Franklin's claim that trial counsel was "functionally absent" from voir dire and that prejudice should be presumed pursuant to United States v. Cronic, 466 U.S. 648 (1984). The record also refuted Franklin's claim that counsel should have moved for a change of venue based on the alleged extensive media coverage. The transcript of the voir dire proceedings demonstrated that the vast majority of the jurors were unaware of the facts of this case. Because the record established that there was no good faith basis for trial counsel to move for a change of venue, the court properly summarily denied Franklin's claim.

ARGUMENT

ISSUE I

THE POSTCONVICTION COURT PROPERLY FOUND FRANKLIN COMPETENT TO PROCEED.

After conducting a competency hearing and listening to the testimony of three mental health experts and reviewing their written reports, the postconviction court issued an order finding Franklin competent to proceed in his postconviction proceedings. (PCR V4:741-44). The court found that Franklin had the capacity to understand the nature of the legal process and the collateral proceedings, and that he had the ability to fully disclose to his attorneys facts pertinent to the proceedings. (PCR V4:741-43). The State submits that the postconviction court acted within its discretion in finding Franklin competent to proceed.

In Alston v. State, 894 So. 2d 46, 54 (Fla. 2004), this Court stated:

> The criteria for determining competence to proceed is whether the prisoner "has sufficient present ability to consult with counsel with a reasonable degree of rational understanding - and whether he has a rational as well as a factual understanding of the pending collateral proceedings." Hardy v. State, 716 So. 2d 761, 763 (Fla. 1998) (quoting Dusky v. United States, 362 U.S. 402, 402, 4 L. Ed. 2d 824, 80 S. Ct. 788 (1960)); see also § 916.12(1), Fla. Stat. (2003); Fla. R. Crim. P. 3.211(a)(1) , 3.851(g)(8)(A).
>
> "It is the duty of the trial court to determine what weight should be given to conflicting testimony."

> Mason v. State, 597 So. 2d 776, 779 (Fla. 1992). "The reports of experts are 'merely advisory to the [trial court], which itself retains the responsibility of the decision.'" Hunter v. State, 660 So. 2d 244, 247 (Fla. 1995) (quoting Muhammad v. State, 494 So. 2d 969, 973 (Fla. 1986)). Thus, when the experts' reports or testimony conflict regarding competency to proceed, it is the trial court's responsibility to consider all the relevant evidence and resolve such factual disputes. See, e.g., Hardy, 716 So. 2d at 764 (citing Hunter, 660 So. 2d at 247).
>
> "Where there is sufficient evidence to support the conclusion of the lower court, [this Court] may not substitute [its] judgment for that of the trial judge." Mason, 597 So. 2d at 779. A trial court's decision regarding competency will stand absent a showing of abuse of discretion. See, e.g., Hardy, 716 So. 2d at 764; Carter v. State, 576 So. 2d 1291, 1292 (Fla. 1989).

Consequently, in Alston, this Court noted that "the issue to be addressed by this Court is whether the circuit court abused its discretion in finding" the defendant "competent to proceed in his postconviction proceedings." Alston, 894 So. 2d at 54. No such abuse of discretion has been shown in this case.

At the competency hearing, three mental health experts testified and only one of the experts, collateral counsel's retained expert, Dr. Glenn Caddy, found Franklin incompetent to proceed. Dr. Caddy testified that Franklin would not submit to any psychological testing because that would go along with the desires of his attorneys and Franklin did not want his attorneys to do anything for him. Rather, Franklin expressed a desire to allow God to plan his participation in his collateral

proceedings, and as of yet, Franklin had not received any indications from God that he should participate. (PCR V22:3978-80, 4022). Dr. Caddy opined that Franklin was engaging in "religious delusions" when describing his communications with God and Dr. Caddy ultimately concluded that Franklin's unwillingness to sign the verification on his postconviction motion was the result of his mental illness, specifically, his delusional disorder related to religion. (PCR V22:3986-87). Dr. Caddy testified that Franklin had the present ability to consult with his attorneys with a reasonable degree of rational understanding, had a factual understanding of the proceedings and the adversarial nature of the proceedings, but Franklin was incompetent because his rational understanding of the collateral proceedings is disrupted by his delusional disorder that his fate is in God's hands. (PCR V22:4016-19).

In contrast to Dr. Caddy, the other two experts found Franklin competent to proceed and rejected Dr. Caddy's opinion that Franklin was operating under a religious delusional disorder. As Dr. Ava Land succinctly stated, if Dr. Caddy's findings were accurate, "most Christians would have to be considered delusional." (PCR V22:4068). Dr. James Hogan, who had

extensive dealings with Franklin,[1] testified that he disagreed with Dr. Caddy's opinion that Franklin is suffering from religious delusions because, according to Dr. Hogan, Franklin's actions in reading the Bible and being preoccupied with religion is simply not delusional. (PCR V22:4033-35). Based on his lengthy history of observations of Franklin, including his knowledge of Franklin's history of malingering, Dr. Hogan concluded that Franklin was competent to proceed and was not suffering from any delusional systems. (PCR V22:4037-38, 4050).

Dr. Ava Land, like Dr. Hogan, also had a history with Franklin having examined him for competency in 2004 prior to his trial.[2] (PCR V22:4065). When Dr. Land examined Franklin in 2009, he was pleasant, courteous, and cooperative, except when questioned on issues directly related to competency. (PCR V22:4067). Unlike Dr. Caddy, Dr. Land did not find that Franklin had a fixed delusional system. (PCR V22:4068, 4082). Franklin

[1] Appellant asserts that Dr. Hogan's evaluation was the "least thorough" of the three experts because he only saw Franklin for forty-five minutes in 2009, but counsel ignores the fact that, unlike the other experts, Dr. Hogan had a lengthy history with Franklin dating back to their first encounters in the mid-1990s when Franklin was incarcerated at Sumter Correctional Institution and Dr. Hogan was a senior psychologist at the prison. (PCR V22:4027-28). In addition to meeting with Franklin weekly during this time at the Sumter prison, Dr. Hogan also evaluated Franklin prior to trial in 2003-04, and then evaluated him again in 2009.

[2] At that time, Dr. Land found that Franklin was malingering and was competent for trial. (PCR V22:4065-66)

told Dr. Land that God speaks to him and Franklin perceived this personal message as a path to follow, but Franklin was not describing an auditory hallucination of God speaking in a loud booming voice that other people could hear. (PCR V22:4070-71). Dr. Land did not find Franklin incompetent because he made the rational decision to place his fate in God's hands and not actively participate in his postconviction proceedings. (PCR V22:4072-76). Franklin understood that he is facing a death sentence by lethal injection but, due to his faith, he believes he has eternal life in the spiritual sense. (PCR V22:4074).

In the instant case, the postconviction court's finding of competency is supported by competent, substantial evidence. Although the court heard testimony from collateral counsel's retained mental health expert that Franklin was incompetent due to religious delusions, the court also heard conflicting testimony from two other experts who found Franklin competent and rejected Dr. Caddy's opinion that Franklin had a religious delusional disorder. In addition to reviewing the experts' reports and hearing their testimony, the court also presided over Franklin's original trial and had the benefit of having conducted a competency proceeding prior to trial. See Gore v. State, 24 So. 3d 1, 9-10 (Fla. 2009) (affirming the postconviction court's finding of competency when the court had

conflicting expert opinions and the judge had the benefit of observing the defendant's behavior and presiding over prior competency proceedings). Here, the competent substantial evidence clearly supports the court's finding that Franklin was competent to proceed in his postconviction proceedings. See Alston, 894 So. 2d at 54 (noting that where the experts' reports or testimony conflict regarding competency to proceed, it is the trial court's responsibility to consider all the relevant evidence and resolve such factual disputes and where there is sufficient evidence to support the court's conclusion, this Court may not substitute its judgment for that of the trial judge). Accordingly, this Court should affirm the court's order finding Franklin competent to proceed.

ISSUE II

THE POSTCONVICTION COURT PROPERLY DENIED FRANKLIN'S CLAIM OF INEFFECTIVE ASSISTANCE OF PENALTY PHASE COUNSEL.

In his postconviction motion, Franklin claimed that his penalty phase counsel was ineffective for failing to investigate and present mitigation evidence from a number of family members and for failing to obtain and present a comprehensive social, biological and psychological history of Franklin. After conducting an evidentiary hearing on Franklin's allegations, the trial court issued an order denying the claim and found that penalty phase counsel was not ineffective. The State submits that competent, substantial evidence supports the court's factual findings and that the court properly applied the applicable law set forth in Strickland v. Washington, 466 U.S. 668 (1984), and found that Franklin failed to carry his burden of establishing deficient performance and prejudice.

In order for a defendant to prevail on a claim of ineffective assistance of counsel pursuant to the United States Supreme Court's decision in Strickland, a defendant must establish two general components.

> 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.

Maxwell v. Wainwright, 490 So. 2d 927, 932 (Fla. 1986). When addressing the prejudice prong of a claim directed at penalty phase counsel's performance, the defendant "must demonstrate that there is a reasonable probability that, absent trial counsel's error, the sentencer . . . would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." Cherry v. State, 781 So. 2d 1040, 1048 (Fla. 2000). Furthermore, as the Strickland Court noted, there is a strong presumption that counsel's performance was not ineffective. Strickland, 466 U.S. at 690. A fair assessment of an attorney's performance requires that every effort be made to eliminate the distorting effects of hindsight and to evaluate the conduct from counsel's perspective at the time. Id. at 689. Additionally, Franklin's burden of establishing deficient performance is especially difficult in the instant case because he was represented by experienced counsel.[3] See generally Chandler v. United States, 218 F.3d 1305, 1316 (11th Cir. 2000)

[3] Mark Nacke, currently a Circuit Court Judge, was lead trial counsel for Franklin and, at the time of trial, a very experienced criminal trial attorney. (PCR V25:4565-67). Co-counsel William Grossenbacher, although an experienced trial attorney, testified that this was his first capital case that proceeded to trial. (PCR V25:4531-32). The defense team was also assisted by James T. Williams, an investigator with the Public Defender's Office.

("When courts are examining the performance of an experienced trial counsel, the presumption that his conduct was reasonable is even stronger.").

When reviewing a trial court's ruling on an ineffectiveness claim, this Court defers to the trial court's findings on factual issues, but reviews the trial court's ultimate conclusions on the deficiency and prejudice prongs *de novo*. Bruno v. State, 807 So. 2d 55, 62 (Fla. 2001). In this case, the lower court properly identified the applicable law in analyzing Appellant's claim, correctly applied this law to the facts as presented in the trial and postconviction proceedings, and concluded that Franklin was not entitled to postconviction relief.

Contrary to Franklin's allegations, trial counsel did not perform deficiently in investigating and presenting mitigating evidence. At the outset of their representation, counsel obtained a comprehensive forensic assessment form completed by Franklin indicating potential mitigating evidence. (PCR V20:3780-812). Counsel obtained signed waivers from Franklin and began the process of obtaining Franklin's school, Department of Corrections, and medical records. Counsel had Franklin examined by multiple mental health experts, including Drs. Elizabeth McMahon, Douglas Mason, James Hogan, and Ava Land. Trial counsel

attempted to obtain information regarding Franklin's family members in St. Petersburg, but Franklin expressly informed trial counsel that he did not want these witnesses contacted or involved in his case. As trial counsel Grossenbacher explained, based on their prior representation of Franklin in the other cases, trial counsel was aware that Franklin may have elected not to attend the instant trial if counsel did not abide by Franklin's directions to forego contacting his family members. Franklin allowed counsel to contact his "mother" in Leesburg, Minnie Thomas, and trial counsel spoke with her and anticipated that she would testify at the penalty phase, but she did not appear even after being subpoenaed by trial counsel.

In denying Franklin's claim, the postconviction court noted that trial counsel did not perform deficiently in investigating potential mitigating evidence:

> Prior to the murder trial in the instant case, Grossenbacher and Nacke had represented Franklin in his two other cases involving victims Alice Johnson and pizza delivery man John Horan. In the Johnson case, after the trial began, Franklin elected not to attend any further and made the decision to enter a plea. Franklin subsequently entered a plea to the Horan murder, and Grossenbacher testified that Franklin indicated on a number of occasions that he did not want to attend the instant trial. While attempting to convince Franklin to attend the Lawley trial, Grossenbacher was also attempting to obtain information from Franklin about possible mitigating witnesses, but Franklin did not want to involve his family in any manner and he would not give any useful information to his attorneys.

The attorneys discussed Franklin's instructions and expressed concern that if they attempted to contact his family, he would elect not to attend the trial. Grossenbacher testified that Franklin did not have any objection to the attorneys calling Minnie Thomas as a mitigating witness, and the defense had spoken to her about her testimony, as well as, taking her deposition. On the morning of her anticipated testimony, however, Ms. Thomas did not show up despite extensive efforts by the defense team to secure her presence.

Grossenbacher noted that a number of mental health experts examined Franklin, but they did not "have any kind of positive opinions" to offer.

In fact, Grossenbacher recalled that Dr. Douglas Mason indicated that Franklin was malingering and suffered from antisocial personality disorder and noted that these types of opinions were not things that he wanted a jury to hear.

Trial counsel indicated that it was their opinion that presenting Dr. Mason would be detrimental to Franklin and to the defense team's strategy of attempting to humanize Franklin and presenting him as a troubled child.

Nacke testified that given Franklin's prior cases and sentences, as well as the facts of this case, Franklin was likely going to be convicted of first degree murder. Thus, the defense team focused on the penalty phase. Additionally, defense counsels recollection was that after Dr. Elizabeth McMahon evaluated Franklin, she indicated that she would not be helpful with mitigation, and thus, counsel did not utilize her any further.

Defense investigator, James T. Williams, testified and he detailed the process of obtaining Franklin's responses to the lengthy Public Defender's Office's Forensic Assessment Form. When asked about potential mitigating witnesses, Franklin could not think of anyone that would be a potential witness.

Franklin gave him the names of family members, but investigator Williams had to obtain their addresses and phone numbers on his own and was unable to locate or contact them.

Mr. Williams testified that he attempted to contact witness, Minnie Thomas and secure her assistance in locating potential witnesses and although Ms. Thomas was subpoenaed to appear for the penalty phase, she did not show up. In fact, Ms. Thomas' son called Investigator Williams and told him to leave his mother alone because the stress of the process was affecting her health.

. . .

In the instant case, trial counsel cannot be ineffective for following their client's express instructions not to contact potential mitigating witnesses.

Trial counsel clearly had valid strategic reason for limiting their investigation into Franklin's family members in St. Petersburg given Franklin's express directions not to involve these potential witnesses and threatening not to attend the trial.[Footnote 1] The law is clearly established that such strategic decisions are "virtually unchallengable" under the Sixth Amendment. Strickland, 466 U.S. at 691; Wiggins v. Smith, 539 U.S. 510, 521-22 (2003).[Footnote 2]

[Footnote 1: Shortly after their appointment to represent Franklin, trial counsel obtained the forensic assessment form wherein Franklin listed some family members' names in St. Petersburg (and little other identifying information). The defense investigator attempted to locate and contact these witnesses, but was unsuccessful. After Franklin went to trial on the case involving victim Alice Johnson, he entered into a plea shortly after the trial began. Trial counsel Grossenbacher explained that Franklin "made it very clear" that he could not contact the St. Petersburg family members and threatened not to appear at the instant trial if counsel did not follow his directions.]

> [Footnote 2: As trial counsel correctly noted, because Franklin had never reported any sexual abuse, the only way he could introduce this testimony was to have Franklin testify at the penalty phase.]
>
> **Trial counsel conducted an extensive investigation into potential mitigating evidence.** Among the many things trial counsel obtained are as follows:
>
> Comprehensive forensic assessment form detailing Franklin's social, economic, and psychological background. Counsel obtained Franklin's school, medical, and DOC records and had Franklin evaluated by a number of mental health experts. Based on their extensive investigation, trial counsel was well aware of Franklin's background and made the strategic decision to introduce such evidence from two sources: Minnie Thomas and Franklin himself.
>
> The Appellate Court may recall, the jury unanimously found the existence of four aggravating factors: (1) committed the instant murder while previously convicted of a felony and under sentence of imprisonment; (2) prior conviction for a crime involving threat or use of violence toward a person; (3) murder was committed for pecuniary gain; and (4) murder was cold, calculated, and premeditated. As there is no reasonable probability of a different result had trial counsel performed as alleged by Franklin, this Court denies Claim One.

(PCR V7:1199-1206) (record citations omitted and emphasis added).

The law is well established that trial counsel has a duty to conduct a reasonable investigation of a defendant's background for possible mitigating evidence, Ragsdale v. State, 798 So. 2d 713, 716 (Fla. 2001), and the reasonableness of trial

counsels' actions may be substantially influenced by the defendant's own statements or actions. See Krawczuk v. State, 92 So. 3d 195 (Fla. 2012) (rejecting ineffective assistance of counsel claim where counsel's ability to investigate was limited by the defendant's desire not to include his family); Anderson v. State, 18 So. 3d 501 (Fla. 2009) (rejecting ineffective assistance of penalty phase counsel claim because attorneys' performance was not deficient when defendant himself was a barrier to the discovery of the mitigating evidence); Henyard v. State, 883 So. 2d 753 (Fla. 2004) (noting that the reasonableness of counsel's actions may be determined or substantially influenced by the defendant's actions). In the instant case, as the postconviction court properly found, trial counsel cannot be ineffective for following their client's express instructions not to contact potential mitigating witnesses. See Peede v. State, 955 So. 2d 480, 492-94 (Fla. 2007) (stating that because defendant would not assist his counsel in providing any mitigating evidence or circumstances, he could not complain that his counsel performed ineffectively by failing to pursue mitigation); Cox v. State, 966 So. 2d 337, 362-63 (Fla. 2007) (concluding that defense counsel was not deficient with regard to the timing of meeting with Cox's family because any delay was due to the fact that Cox had informed

defense counsel that he did not want his family involved); Rodriguez v. State, 919 So. 2d 1252, 1263 (Fla. 2005) (finding counsel not ineffective for failure to investigate where defendant did not wish to involve his family and concluding that "[t]he reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions"); Arbelaez v. State, 898 So. 2d 25, 38-39 (Fla. 2005) (stating that "[w]hen a defendant informs his attorney that he does not want his family members to testify on his behalf, the attorney is generally not found to be ineffective in failing to call the family members as witnesses"). Furthermore, trial counsel had a valid strategic reason for limiting their investigation into Franklin's family members in St. Petersburg given Franklin's express directions not to involve these potential witnesses and threatening not to attend the trial if counsel violated his instructions.

Likewise, collateral counsel has failed to show any deficiency in trial counsel's investigation into Franklin's social or psychological background. The fact that collateral counsel retained a social worker during the postconviction proceedings that relayed information obtained from witnesses, including a number of whom Franklin forbid his trial attorneys from contacting, does not establish that trial counsel was

deficient in any manner. See generally Asay v. State, 769 So. 2d 974, 986 (Fla. 2000) (stating that trial counsel's reasonable investigation is not rendered incompetent merely because the defendant has now secured the testimony of a more favorable expert in postconviction). Trial counsel obtained a comprehensive forensic assessment form detailing Franklin's social, economic, and psychological background. Counsel obtained Franklin's school, medical, and DOC records and had Franklin evaluated by a number of mental health experts. As defense counsel Grossenbacher noted, the mental health experts did not have any kind of positive opinions to offer. (PCR V25:4544). As will be discussed in more detail in Issue III, infra, one of the mental health experts who examined Franklin found that he was malingering and had an antisocial personality disorder. (PCR V25:4552). Based on their extensive investigation, trial counsel was well aware of Franklin's background and mental health and made the strategic decision to introduce mitigating evidence from only two sources: Minnie Thomas and Franklin himself. Clearly, as the court found, trial counsel's extensive investigation into potential mitigating evidence was not deficient in any manner.

Collateral counsel argues that the court's factual findings are not supported by competent, substantial evidence, and in

support of his assertion, states that trial counsel failed to obtain a presenting investigation report from 1993 when Franklin was a juvenile, records regarding Franklin's hearing deficits, and school records. Franklin erroneously asserts in his brief that counsel failed to obtain these records, but the testimony at the evidentiary hearing was equivocal as trial counsels Grossenbacher and Nacke could not recall whether the defense obtained this specific information. (PCR V25:4536-39, 4546, 4573-74, 4584). Trial counsel Nacke testified that after reviewing his file, he recalled seeing documentation indicating that information was sought from different sources, "the Department of Corrections, schools, the jail, medical records, things like that." (PCR V25:4570-71). Nacke recalled seeing Franklin's school records from Pinellas County in his file and recalled a letter from Lake County indicating that they did not have any school records. (PCR V25:4571). Even assuming *arguendo* that trial counsel failed to obtain the 1993 presentence report, records regarding Franklin's surgery for his hearing problems, and his complete school records, Franklin has failed to establish how he was prejudiced by this alleged deficiency.

It is well established that this Court is not even required to address Strickland's prejudice prong when there is a failure to establish deficient performance. See Waterhouse v. State, 792

So. 2d 1176, 1182 (Fla. 2001) (stating that when a defendant fails to make a showing as to one prong under Strickland, it is not necessary to delve into whether he has made a showing as to the other prong). As the postconviction properly found, Franklin failed to carry his burden under Strickland of establishing that he suffered any prejudice from trial counsel's alleged deficiency. As the testimony from the evidentiary hearing clearly established, Franklin was not prejudiced by counsel's failure to investigate and present mitigating evidence. The postconviction testimony from Franklin's family members and social worker Marjorie Hammock was cumulative to the testimony introduced at the penalty phase from Franklin and Minnie Thomas' deposition testimony. Additionally, had counsel presented any mental mitigating evidence, it would have established that Franklin was a malingerer who had an antisocial personality disorder; information that trial counsel specifically did not want the jury to hear. (PCR V25:4552).

At the penalty phase, although unsuccessful in presenting Minnie Thomas in person despite extensive efforts, the defense was allowed to present a stipulation of her testimony based on her deposition testimony. (DAR V11:1027-50). Ms. Thomas testified that Franklin was her "adopted" son. Franklin's mother dropped him off with Ms. Thomas when he was six weeks old and he

lived with her until he was eight years old. (DAR V11:1047). Eventually, Franklin's mother showed up with a law enforcement officer and took custody of Franklin. During the time that Franklin lived with Ms. Thomas, he never heard from his biological mother and did not know of her existence; in fact Franklin used the name Quawn Thomas. Franklin referred to Ms. Thomas and her husband as his "mama" and "daddy." (DAR V11:1047-48).

Franklin testified at the penalty phase proceedings that he was born in St. Petersburg, but he grew up in Leesburg with his "mom" and "dad," Minnie and George Thomas. (DAR V11:1053). Franklin did not know about his biological mother until he was eight years old when she showed up with a police officer and took custody of him. (DAR V111054-55). Franklin did not want to accompany his mother down to St. Petersburg, so members of his family physically held him down in the car on the way to St. Petersburg.

After being taken to St. Petersburg, Franklin soon started committing crimes and stealing bicycles in an attempt to return to Leesburg. (DAR V11:1055-56). Franklin attempted to ride a bicycle to Leesburg numerous times, but was unsuccessful. He usually was arrested or became lost and called Ms. Thomas to come and get him. (DAR V11:1055-57). As a result of his arrests

for running away and thefts, Franklin first spent time in a juvenile facility when he was nine years old. When he was twelve years old and placed in a group treatment program for juveniles, he was forced by older boys to perform sexual acts on them. (DAR V11:1058-63). Franklin eventually was placed in an adult prison when he was fifteen years old for a grand theft auto conviction. (DAR V11:1065).

Franklin testified that when he was caught by the St. Petersburg Police Department for the instant crime, he confessed to everything because he was tired of running away and tired of his life. (DAR V11:1068). Franklin spoke with the newspaper reporter and felt that if he confessed, he would die. He had no desire to continue living and felt remorse over the situation. (DAR V11:1068-69). Franklin informed the jury that he had pled guilty in the Alice Johnson attempted murder case and in the John Horan murder case and had expressed remorse in each case. He also apologized to Jerry Lawley's family while on the stand. (DAR V11:1070-73).

Based on the testimony at the penalty phase, Franklin cannot establish that he was prejudiced by trial counsel's alleged deficiency in failing to present testimony from Franklin's family members or a social worker. Because the evidence presented at the postconviction evidentiary hearing was

substantially cumulative to that presented during the penalty phase, Franklin has failed to establish prejudice under Strickland. See Darling v. State, 966 So. 2d 366, 378 (Fla. 2007) ("[T]rial counsel is not ineffective for failing to present cumulative evidence."). Additionally, as the postconviction court noted, the jury unanimously found the existence of four aggravating factors: (1) committed the instant murder while previously convicted of a felony and under sentence of imprisonment; (2) prior conviction for a crime involving threat or use of violence toward a person; (3) murder was committed for pecuniary gain; and (4) murder was cold, calculated, and premeditated. As there is no reasonable probability of a different result given the extensive aggravating factors and weak mitigation presented at trial and the postconviction proceedings, this Court should affirm the court's denial of Franklin's ineffective assistance of penalty phase counsel claim.

ISSUE III

THE POSTCONVICTION COURT PROPERLY REJECTED FRANKLIN'S CLAIM THAT PENALTY PHASE COUNSEL WAS INEFFECTIVE FOR FAILING TO CALL DR. MASON AS A WITNESS.

In Claim II of his postconviction motion, Franklin alleged that trial counsel was ineffective for failing to present expert mental health mitigation from Dr. Douglas Mason. As previously noted in Issue II, supra, trial counsel testified at the evidentiary hearing that Franklin had been examined by a number of mental health experts prior to the trial in the instant case, and the experts did not have any opinions that counsel viewed as positive. Trial counsel Grossnebacher and Nacke both explained that the potential detrimental effect of the mental health experts' opinion outweighed any potential beneficial information they may have provided.

Originally, Dr. Elizabeth McMahon was retained to assist the defense as a confidential mental health expert, but after she examined Franklin, she informed trial counsel that she did not have any helpful testimony. Trial counsel subsequently had Dr. Douglas Mason examine Franklin, and on April 2, 2004, counsel filed a notice of intent to present expert testimony from Dr. Mason at the penalty phase regarding a number of potential mental health mitigating factors. (DAR V4:623-24). After trial counsel filed the notice of intent, the State took

Dr. Mason's deposition and also filed addendums to the witness list and listed a number of rebuttal witnesses including Dr. Luis Torres, Dr. Ava Land, Dr. James Hogan, and Collen D'Acquisto. (DAR V4:634-35). Although trial counsel Nacke could not specifically recall all the reasons he did not present Dr. Mason, he did recall that some of the things Dr. Mason said in his deposition caused him not to call him as a witness at the penalty phase. (PCR V25:4581-82, 4589-93).

The law is well established that strategic decisions of trial counsel do not constitute deficient performance. See Occhicone v. State, 768 So. 2d 1037, 1048 (Fla. 2000) ("[S]trategic decisions do not constitute ineffective assistance of counsel if alternative courses have been considered and rejected and counsel's decision was reasonable under the norms of professional conduct."); Bowles v. State, 979 So. 2d 182 (Fla. 2008) (finding counsel did not perform deficiently by relying on retained mental health expert and not seeking out another mental health expert); Asay v. State, 769 So. 2d 974, 986 (Fla. 2000) (holding that trial counsel's reasonable investigation is not rendered incompetent merely because the defendant has now secured the testimony of a more favorable expert in postconviction). Here, trial counsel obtained numerous mental health evaluations of Franklin and was well aware of the

experts' diagnoses. After hearing Dr. Mason testify at deposition and being made aware of the potential rebuttal witnesses the State would utilize if Dr. Mason testified, trial counsel made the strategic decision not to present Dr. Mason or any other mental health expert.

In denying this claim, the postconviction court properly noted that "[h]ad trial counsel presented Dr. Mason at the penalty phase, the jury would have heard that Franklin has an antisocial personality disorder and lacked a conscience, which would have negated Franklin's personal expression of remorse. The jury would have also heard that Franklin malingered, or faked, the significance of his mental conditions. Certainly, trial counsel made a sound strategic decision in not presenting this evidence to the jury." (PCR V7:1205-06). As previously noted, trial counsel conducted extensive investigation into Franklin's mental health issues and made the strategic decision not to present this type of testimony at trial. After listing Dr. Mason as a potential mitigating witness, trial counsel had the benefit of hearing Dr. Mason testify at his deposition and was made aware of the State's addition of numerous mental health rebuttal witnesses. Obviously, trial counsel made a strategic decision to forego this testimony given Dr. Mason's opinions of malingering and antisocial personality as well as the threat of

further detrimental information being elicited by the State's rebuttal witnesses.

Even assuming that Franklin could have established that trial counsel was deficient for failing to present mental health mitigation, he failed to establish prejudice as required by Strickland. At his deposition, Dr. Mason opined that Franklin was probably experiencing some level of auditory hallucinations, but noted that Franklin tended to embellish his situation in an unsophisticated manner. (PCR V20:3733-34). Dr. Mason also concurred with other experts' opinions, including the State's rebuttal expert witnesses, that Franklin was malingering and had an antisocial personality disorder and lacked a conscience. (PCR V20:3737-38, 3757). As the postconviction court noted, had trial counsel called Dr. Mason as a witness at the penalty phase, the jury would have heard that Franklin has an antisocial personality disorder and lacked a conscience. The jury would have also heard that Franklin malingered the significance of his mental conditions. Certainly, trial counsel made a sound strategic decision in not presenting this evidence to the jury. See Willacy v. State, 967 So. 2d 131, 144 (Fla. 2007) (finding that no prejudice was shown because presenting mental mitigation that may include a finding that Willacy was a sociopath would likely have been more harmful than helpful); Jones v. State, 928

So. 2d 1178, 1184-85 (Fla. 2006) (holding that trial counsel have discretion in determining whether and how to present mental health evidence and counsel cannot be deemed ineffective for failing to present evidence that would open the door to damaging cross-examination and rebuttal evidence that would counter any value that might be gained from the evidence); Freeman v. State, 852 So. 2d 216, 224 (Fla. 2003) (noting that antisocial personality disorder is a trait most jurors look disfavorably upon). Because Franklin failed to show both deficient performance and prejudice regarding his claims of ineffective assistance of penalty phase counsel for failing to call Dr. Mason, this Court should affirm the lower court's denial of this claim.

ISSUE IV

THE POSTCONVICTION COURT PROPERLY SUMMARILY DENIED FRANKLIN'S CLAIM THAT TRIAL COUNSEL WAS INEFFECTIVE DURING VOIR DIRE AND FOR FAILING TO FILE A MOTION FOR CHANGE OF VENUE.

The postconviction court summarily denied Claims III and IV of Franklin's motion after conducting a case management conference and hearing argument of counsel. (PCR V6:1065-67). This Court has stated that a "defendant is entitled to an evidentiary hearing on a postconviction relief motion unless (1) the motion, files, and records in the case conclusively show that the prisoner is entitled to no relief, or (2) the motion or a particular claim is legally insufficient." Freeman v. State, 761 So. 2d 1055, 1061 (Fla. 2000); see also Parker v. State, 904 So. 2d 370, 376 (Fla. 2005). "The defendant bears the burden of establishing a prima facie case based upon a legally valid claim. Mere conclusory allegations are not sufficient to meet this burden." Griffin v. State, 866 So. 2d 1, 9 (Fla. 2003). Where the postconviction motion lacks sufficient factual allegations, or where the alleged facts do not render the judgment vulnerable to collateral attack, the motion may be summarily denied. Hamilton v. State, 875 So. 2d 586, 591 (Fla. 2004).

A defendant is entitled to an evidentiary hearing on a claim of ineffective assistance of counsel if he alleges

specific "facts which are not conclusively rebutted by the record and which demonstrate a deficiency in performance that prejudiced the defendant." Hamilton v. State, 875 So. 2d 586, 591 (Fla. 2004). However, a "defendant may not simply file a motion for postconviction relief containing conclusory allegations that his or her trial counsel was ineffective and then expect to receive an evidentiary hearing." State v. Coney, 845 So. 2d 120, 135 (Fla. 2003). In order for a motion to be facially sufficient, the defendant must allege specific legal and factual grounds that demonstrate a cognizable claim for relief. If a defendant's conclusory allegations are not supported by a properly pled factual basis, the claim is facially insufficient and should be summarily denied. See Davis v. State, 875 So. 2d 359, 368 (Fla. 2003). Thus, an evidentiary hearing is warranted on an ineffective assistance of trial counsel claim only where a defendant alleges specific facts, not conclusively rebutted by the record, which demonstrate a deficiency in performance that prejudiced the defendant. Cherry v. State, 659 So. 2d 1069, 1072 (Fla. 1995).

In order to establish a claim that defense counsel was ineffective, a defendant must establish both deficient performance and prejudice, as set forth in Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984). As to the

first prong, deficient performance, a defendant must establish conduct on the part of counsel that is outside the broad range of competent performance under prevailing professional standards. See Strickland, 466 U.S. at 688. Second, as to the prejudice prong, the deficient performance must be shown to have so affected the fairness and reliability of the proceedings that confidence in the outcome is undermined. Id. at 694; Gore v. State, 846 So. 2d 461, 467 (Fla. 2003). "When a defendant fails to make a showing as to one prong, it is not necessary to delve into whether he has made a showing as to the other prong." Waterhouse v. State, 792 So. 2d 1176, 1182 (Fla. 2001); Zakrzewski v. State, 866 So. 2d 688, 692 (Fla. 2003).

This Court has previously stated that "[a] postconviction court's decision regarding whether to grant a rule 3.851 evidentiary hearing depends upon the written materials before the court; thus, for all practical purposes, its ruling is tantamount to a pure question of law and is subject to *de novo* review." Ventura v. State, 2 So. 3d 194, 197 (Fla. 2009).

In the instant case, the postconviction court properly summarily denied claims III and IV of Franklin's motion. In Claim III, collateral counsel vaguely alleged that trial counsel was ineffective during voir dire for failing to properly question jurors and further speculated that Franklin was

prejudiced by this alleged ineffectiveness because unidentified jurors were not properly screened and unidentified jurors were "improperly stricken." Collateral counsel attempted to avoid the prejudice prong of Strickland by incorrectly asserting that the court should *presume* prejudice pursuant to United States v. Cronic, 466 U.S. 648 (1984), because Franklin was "functionally devoid of counsel" at voir dire. In Cronic, the United States Supreme Court held that there is an exception to the Strickland general rule that spares the defendant of the need to show probable effect on the outcome. Under this standard, the court will presume prejudice where assistance of counsel has been denied entirely or during a critical stage of the proceedings. Cronic, 466 U.S. at 658.

In Fennie v. State, 855 So. 2d 597, 602 (Fla. 2003), this Court rejected a claim similar to Franklin's Cronic claim and found that the Cronic standard was inapplicable because the defendant's trial counsel "did not stand mute during the jury selection process or otherwise completely fail to test the impartiality of jurors on important matters." The Fennie court further stated that "this is not a case in which counsel's conduct fits within the 'narrow spectrum of cases [under Cronic] where the defendant was completely denied effective assistance of counsel.'" Id. (quoting Nixon v. Singletary, 758 So. 2d 618,

622 (Fla. 2000)).

In the instant case, contrary to collateral counsel's assertions, Franklin was not "functionally devoid of counsel" during voir dire. As the postconviction court noted, the voir dire proceedings in this case covered over 350 transcribed pages, and a review of the record clearly shows that trial counsel questioned the venire on matters related to the case, including extensive questioning regarding the prospective jurors' views on the death penalty. (DAR V6-8:105-456; PCR V6:1065-66). As the trial court properly found that "[t]he record clearly refutes collateral counsel's attempt to evade Strickland's prejudice standard" by alleging that trial counsel was functionally absent from voir dire, this Court should affirm the court's summary denial of the instant claim. (PCR V6:1065); See Gordon v. State, 863 So. 2d 1215, 1218 (Fla. 2003) ("A motion for postconviction relief can be denied without an evidentiary hearing when the motion and the record conclusively demonstrate that the movant is entitled to no relief. A defendant may not simply file a motion for postconviction relief containing conclusory allegations that his or her trial counsel was ineffective and then expect to receive an evidentiary hearing. The defendant must allege specific facts that, when considering the totality of the circumstances, are not

conclusively rebutted by the record and that demonstrate a deficiency on the part of counsel which is detrimental to the defendant.") (quoting LeCroy v. Dugger, 727 So. 2d 236, 239 (Fla. 1998)).

Furthermore, even if Franklin's meritless Cronic claim is examined under the proper standard set forth in Strickland, the record clearly refutes any claim that he was actually prejudiced by trial counsel's performance at voir dire. See Carratelli v. State, 961 So. 2d 312, 324-25 (Fla. 2007) (holding that in postconviction context, the Strickland standard applies to ineffective assistance of counsel claims relating to trial counsel's failure to challenge jurors and a defendant must show that a biased juror actually served on the jury). As Franklin's allegations regarding this claim failed to identify any specific jurors as required by Carratelli and simply speculated that potential jurors may have been biased, the court properly summarily denied his claim.

Similarly, the court properly summarily denied Claim IV of Franklin's motion alleging that trial counsel was ineffective for failing to file a motion for a change of venue based on the alleged intense media coverage of Franklin's crimes prior to his

trial in the instant case.[4] The record in this case clearly established that, even if trial counsel had filed a motion for change of venue, there is no reasonable probability that this Court would have granted the motion.

In Griffin v. State, 866 So. 2d 1 (Fla. 2003), the Florida Supreme Court addressed a similar claim and set forth the applicable law:

> Trial counsel's failure to move for a change of venue does not necessarily constitute ineffective assistance of counsel. See Wike v. State, 813 So. 2d 12 (Fla. 2002) (concluding that counsel was not deficient for failing to move for change of venue when counsel discussed venue issue with defendant and prepared motion for filing, but defendant opposed change of venue and concluding that prejudice prong was not met because defendant failed to establish that grounds existed for venue change or that there was substantial difficulty in seating fair or impartial jury). **"When applying the prejudice prong [of Strickland] to a claim that defense counsel was ineffective for failing to move for a change of venue, the defendant must, at a minimum, 'bring forth evidence demonstrating that there is a reasonable probability that the trial court would have, or at least should have, granted a motion for change of venue if [defense] counsel had presented such a motion**

[4] The instant murder case was the culmination of a violent crime spree carried out by Appellant in December, 2001. On or about December 18, 2001, Franklin shot and killed John Horan, a pizza delivery man. Approximately ten days later, Franklin and his juvenile codefendant, Pamela McCoy, committed a home invasion of a 75-year-old woman, Alice Johnson. Franklin struck Ms. Johnson in the head with a hammer and stole her 2000 Toyota Camry. In October, 2002, Franklin pled guilty to burglary, robbery with a deadly weapon, and attempted felony murder in the Alice Johnson case, and in August, 2003, Franklin pled guilty to first degree murder, kidnapping and armed robbery in the Horan case. Jury selection in the instant case took place in April, 2004.

to the court.'" Id. at 18 (quoting Meeks v. Moore, 216 F.3d 951, 961 (11th Cir. 2000)). Thus, the real issue here is whether a change of venue was proper and whether counsel would have been successful had he moved for a change of venue. The test for determining whether to grant a change of venue is whether the inhabitants of a community are so infected by knowledge of the incident and accompanying prejudice, bias, and preconceived opinions that jurors could not possibly put these matters out of their minds and try the case solely on the evidence presented in the courtroom. See McCaskill v. State, 344 So. 2d 1276, 1278 (Fla. 1977). In exercising its discretion regarding a change of venue, a trial court must make a two-pronged analysis, evaluating: (1) the extent and nature of any pretrial publicity; and (2) the difficulty encountered in actually selecting a jury. See Rolling v. State, 695 So. 2d 278, 285 (Fla. 1997). **Of course, pretrial publicity is normal and expected in certain kinds of cases, and that fact standing alone will not require a change of venue.** Id.

In the instant case, the judge asked if any of the venire members had heard about the case; nineteen responded that they had. The judge then allowed individual voir dire of these venire members as to their knowledge of the case. Three venire members were excused for cause based on exposure to publicity; one was excused for cause based on her death penalty views; and one was excused for cause based on his bias against the police. Of the remaining fourteen venire members who had heard about the case, twelve had only vague remembrances of reading something about the case. All fourteen stated that they had not formed an opinion and would decide the case on the facts presented at trial. Based on this record, even if counsel had moved for a change of venue there is no reasonable probability that the court would have granted the motion as there was little difficulty in selecting an impartial jury. Thus, summary denial on this issue was proper.

Griffin, 866 So. 2d at 12-13 (emphasis added).

Similar to the situation in Griffin, the record shows in the instant case that only a limited number of prospective jurors had knowledge of the case from the pretrial publicity. (DAR V6:161-168). When the jurors were asked if they had any knowledge of the case and were briefly informed of the facts, trial counsel noted that "it didn't look like that many" of the venire raised their hands as having knowledge of the case. (DAR V6:168). Thereafter, the court conducted individual voir dire with the eleven jurors who had indicated they had knowledge of the case. (DAR V6-7:175-226). Of these eleven jurors, four were struck for cause based on their exposure to the pretrial publicity and their views of the case. A review of the jurors' responses indicated that the majority of the jurors had read or heard about the case when the crimes first occurred; over two years before jury selection.

As a review of the jury selection establishes, there was no valid legal basis for trial counsel to raise a motion for a change of venue because the venire in April, 2004, was generally unaware of Franklin's crimes which occurred in December, 2001. As this Court noted in Henyard v. State, 689 So. 2d 239 (Fla. 1996), a case tried before the same judge who tried Franklin:

> An application for change of venue is addressed to the sound discretion of the trial court, but **the defendant has the burden of ... showing that the setting of the trial is inherently**

> **prejudicial because of the general atmosphere and state of mind of the inhabitants in the community. A trial judge is bound to grant a motion for a change of venue when the evidence presented reflects that the community is so pervasively exposed to the circumstances of the incident that prejudice, bias, and preconceived opinions are the natural result.** The trial court may make that determination upon the basis of evidence presented prior to the commencement of the jury selection process, or may withhold making the determination until an attempt is made to obtain impartial jurors to try the cause.
>
> [Manning v. State, 378 So. 2d 274, 276 (Fla. 1980)] (citation omitted). **Ordinarily, absent an extreme or unusual situation, the need to change venue should not be determined until an attempt is made to select a jury.**
>
> During the actual voir dire here, each prospective juror was questioned thoroughly and individually about his or her exposure to the pretrial publicity surrounding the case. While the jurors had all read or heard something about the case, each stated that he or she had not formed an opinion and would consider only the evidence presented during the trial in making a decision. Further, the record demonstrates that the members of Henyard's venire did not possess such prejudice or extensive knowledge of the case as to require a change of venue. Therefore, we find that on the record before us, the trial court did not abuse its discretion in denying Henyard's motions for a change of venue.

Henyard, 689 So. 2d at 245-46 (emphasis added); see also Dillbeck v. State, 964 So. 2d 95, 104 (Fla. 2007) (explaining that to establish prejudice from the failure to move for a change of venue, the defendant must establish that the motion would have been granted if filed); Knight v. State, 923 So. 2d 387, 402 (Fla. 2005) (rejecting an ineffective assistance of

counsel claim of failing to request a change of venue because "there was no legal basis for a change of venue, counsel was not ineffective for failing to request one" where the court noted there was no difficulty in seating a jury and only 34 of the 106 venire members questioned had been exposed to any news coverage).

In the instant case, there is no reasonable probability that the trial court would have granted a motion for change of venue after voir dire as the record conclusively established that the venire was not prejudiced or biased based on the alleged extensive pretrial publicity. The postconviction court noted that a simple review of the record established "that there was no good faith reason for trial counsel to move for a change of venue." (PCR V6:1067). Accordingly, this Court should affirm the trial court's summary denial of the instant claim as Franklin has failed to establish prejudice as a result of trial counsel's alleged deficient performance for failing to move for a change of venue.

CONCLUSION

In conclusion, Appellee respectfully requests that this Honorable Court affirm the lower court's order denying Appellant postconviction relief.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished electronically to Mark S. Gruber, Assistant CCRC-M, Office of the Capital Collateral Regional Counsel, Middle Region, 3801 Corporex Park Dr., Suite 210, Tampa, Florida 33619-1136, gruber@ccmr.state.fl.us, this 17th day of October, 2012.

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,

PAMELA JO BONDI
ATTORNEY GENERAL

STEPHEN D. AKE
ASSISTANT ATTORNEY GENERAL
Florida Bar No. 14087
Concourse Center 4
3507 East Frontage Road, Suite 200
Tampa, Florida 33607-7013
Telephone: (813) 287-7910
Facsimile: (813) 281-5501
capapp@myfloridalegal.com
Stephen.Ake@myfloridalegal.com

COUNSEL FOR APPELLEE