IN THE SUPREME COURT OF FLORIDA

JERMAINE LEBRON,

Appellant,

v.

STATE OF FLORIDA

Appellee.
_____/

Case No. SC12-677

ON APPEAL FROM THE NINTH JUDICIAL CIRCUIT
IN AND FOR OSCEOLA COUNTY, STATE OF FLORIDA

ANSWER BRIEF OF APPELLEE

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STATEMENT OF THE CASE

This is an appeal[1] from the denial of Lebron's first *Florida Rule of Criminal Procedure* 3.851 motion, which was filed on June 19, 2009. (V2, R126-221).[2] The State duly filed an answer to the motion (V2, R225-255), and a case management conference was conducted on January 26, 2010. (V29, R3148-95). An evidentiary hearing was conducted on November 7-10, 2011, (V35-38, R3258-3884), and, on March 13, 2012, the collateral proceeding trial court entered its order denying all relief. (V13, R1869-1908).

The Facts of the Murder

On direct appeal from his conviction and sentence of death, this Court summarized the facts in the following way:

> Appellant, Jermaine Lebron ("Lebron") was arrested in New York City for the murder of Larry Neal Oliver. During the first trial concerning the charge, Lebron was represented by Mr. Slovis (a New York attorney, appearing pro hac vice on Lebron's behalf) and Mr. Norgard (a Florida lawyer, also representing Lebron on appeal). [FN1] This first trial resulted in a mistrial, based upon the trial court's finding of a jury deadlock.
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> > [FN1] Although Slovis conducted the majority of the venire questioning in the first trial, and was present during *voir dire* inquiry regarding the death penalty, Norgard

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[1] Cites to the 3.851 appeal record will be V_, R _ for volume number followed by page number.

[2] Lebron was originally represented by CCRC-Middle Region. CCRC counsel withdrew, claiming a conflict of interest, and current counsel was appointed from the registry to represent Lebron. (V11, R1565-67, 1571-73).

> assumed the lead with regard to interrogating prospective jurors concerning death penalty issues.

At the beginning of Lebron's retrial, Norgard was involved in another capital case, and, therefore, the pretrial and guilt phase proceedings were conducted with only Slovis appearing on Lebron's behalf. During this second trial, it was established that Lebron was a major participant in the robbery and murder of the victim (who worked with one of Lebron's acquaintances, Danny Summers). Indeed, all of the eyewitnesses testified that it was Lebron (nicknamed "Bugsy") who had directed the events both before and after the victim's death, and who, using a sawed-off shotgun (which he called "Betsy"), had fatally shot the victim.

According to eyewitnesses, the victim had been lured to a house in Osceola County (the "Gardenia house") where Lebron and several others were staying after Lebron offered to sell the victim some "spinners" for his truck. Shortly after the victim arrived at the home, Lebron called to him to come toward the back bedrooms. As the victim entered the hallway leading to the bedrooms, he was forced to lie face down, and was shot at short range in the back of the head. Eyewitnesses testified that, after the victim was shot, Lebron was smiling and laughing, yelling, "I did it. I did it," and describing how it felt to kill the victim, and what it looked like. Money, checks, and a credit card were taken from the victim, and stereo equipment was stripped from his truck. Lebron directed others present at the time to burn the victim's identification papers, to dispose of the victim's body, and to clean up the area where the victim had been shot.

Over the next several days, Lebron and some of the others used the victim's credit card, pawned his stereo equipment, and cashed his checks. An attempt was also made to burn the victim's truck. During this time, Lebron admitted to his former girlfriend, Danita Sullivan, that he had shot a man, that "he had killed someone." He also told his current girlfriend, Christina Charbonier, that he had killed a man for his truck. Shortly thereafter, Lebron left for New York

City, the place where "Legz Diamond," a topless juice bar owned by his mother, was located.

The victim's body was later discovered in a rural area near the Walt Disney World property. Although the body was covered with a blanket and some shrubs, it was still visible from the road.

The medical examiner, Dr. Julia Martin, performed the autopsy on Oliver's body after it was discovered. She testified that the head was badly decomposed, and that the trauma to the head, which incorporated*1002 the left portion of the lip, was consistent with a gunshot wound or other type of trauma, with no evidence of any abrasion around it. The entrance of the gunshot wound was to the right back of the head, slightly to the right of the midline and low in the back of the head. X-ray films showed the shot pellets traveling in a slightly upward fashion, right to left. There was a laceration of the scalp consistent with a shot at close or contact range. There were some bones missing from the back of the head. There were no bruises to the hands consistent with defensive wounds. The cause of death, which was instantaneous, was from a shotgun wound to the head.

After Lebron left for New York, the others having knowledge of the event reported the murder to law enforcement officers. All of the witnesses claimed that they had followed Lebron's directions throughout the unfolding events because Lebron had threatened them, and they were afraid that he might do to one of them what he had done to Oliver. Initially, two of these individuals, Joe and Mark Tocci, did not tell the complete truth concerning the extent to which members of the group had been involved in the murder. During the course of the interview, however, the witnesses, who were questioned by the officers separately, eventually recounted the events of the murder and its aftermath consistently with their testimony at trial. All of the witnesses other than the Tocci brothers gave statements which were consistent throughout, and also consistent with what the police were able to verify with evidence and other statements (such as where the body was hidden; where the truck was burned; how the checks were cashed; and where Oliver's property was pawned).

At about the same time, a crime-scene investigation was being conducted by the Osceola County Sheriff's Department. Investigators observed several drops of what appeared to be dried blood in a big area at the southeast bedroom door of the home where the event allegedly occurred. They also discovered what appeared to be blood that had some foreign substance on it. The area was at least twelve to fourteen inches in diameter. A very strong stench of dried blood was detected immediately upon entering the residence.

Plastic balls were found inside the southeast bedroom, along with sponges and pellets. A spent Winchester twelve-gauge pheasant shotgun shell was found in a drawer in another bedroom. In a third bedroom, the police found four shotgun shells and the decedent's ring in a pair of sneakers.

Shortly after these eyewitness reports were made to law enforcement, Lebron, accompanied at the time by Stacie Kirk and Howard Kendall (who was involved in burning Oliver's truck), was apprehended in a car parked on the street outside of Legz Diamond, and arrested. Incident to the arrest, a search of the vehicle was conducted, and a day planner was recovered from the center console underneath the dashboard between the passenger seat and the driver's seat. Upon opening the planner, an identifying card with the name "Larry N. Oliver" was found. Detective Rodriguez retrieved the planner and secured it for safekeeping. He also found four shotgun shells in the center console.

After searching the vehicle, Detective Rodriguez returned to the precinct offices where Lebron was being held, and was present while Detective Thompson interrogated Lebron. Prior to speaking with Lebron, Thompson read him the standard Miranda rights from two forms. Lebron was also allowed to read the forms, and he signed or initialed the forms, indicating that he understood their content.

Rodriguez and Detective Delroco from the Manhattan precinct were also present. They began questioning Lebron at approximately 3:15 in the morning. Thompson obtained Lebron's statement, and it was recorded on a

> microcassette. This was received into evidence, and played for the jury. In his recorded statement, Lebron told the officer that he had stayed at the Gardenia house, sleeping on the couch, or in one of the rooms. He denied being at the house on the night of the murder, claiming to have gone to his former girlfriend's house that night. He repeatedly said he did not know Oliver, although, at the end of the statement, he said "it could have happened" that he met Oliver that night, but simply did not remember the meeting. He recalled that one of the others had pawned a stereo in Orlando, and admitted having gone to Kinko's with the others (where they had initially gathered on the night of the murder). He acknowledged having seen information about the missing red truck in a flyer, and having heard Oliver's parents make an appeal on the news. When questioned about whether he had noticed any blood spot at the house, or smelled any strange odors there, he said: "It always smelled like that. We always-everybody said it was Mary. That's what everybody always said, it was Mary."
>
> After he was arrested, Lebron was charged with first-degree murder and armed robbery. While in jail, Lebron wrote letters to Christina, who did not respond to them. In the letters, which were written in his own hand, Lebron stated that he loved Christina, called her his fiancee, and referred to her testifying as an alibi witness for him. About a week before trial, however, Christina went to the Osceola County Sheriff's office with the information to which she testified (as a State's witness) at trial. She stated that Lebron threatened her at that time, so she had sought advice about what she should do. She decided to testify, because she "started thinking about if anything happened to, if anything happened to my daughter I would want somebody to come forward."

Lebron v. State, 799 So. 2d 997, 1001-1003 (Fla. 2001). This Court reversed the death sentence and remanded for a new penalty phase proceeding.

The Sentencing Facts

In the appeal from the sentence of death at issue in this

proceeding, this Court described the post-direct appeal history of this case, and the sentencing facts, in the following way:

> Lebron's first trial resulted in a mistrial due to jury deadlock. *See id.* at 1001. During the guilt phase of the second trial, the jury found the following on special-verdict forms: (1) Lebron was guilty of first-degree felony murder; (2) Oliver was killed by someone other than Lebron; (3) Lebron did not possess a firearm during the commission of the felony murder; (4) Lebron was guilty of robbery with a firearm; and (5) Lebron possessed a firearm during the commission of the robbery. *See id.* at 1004. During the penalty phase for this same proceeding, the jury recommended the death penalty by a vote of seven to five. *See id.* at 1006. The trial court sentenced Lebron to death. *See id.* at 1008. In 2001, this Court affirmed Lebron's convictions but vacated the death sentence and remanded for resentencing. *See id.* at 1022. [FN1] After a new penalty phase was held, the jury recommended the death penalty by a vote of seven to five. *See Lebron v. State*, 894 So. 2d 849, 852 (Fla. 2005). The trial court sentenced Lebron to death. *See id.* In 2005, this Court again vacated the death sentence and remanded for resentencing. *See id.* at 856. [FN2]
>
> > [FN1] This Court vacated Lebron's death sentence due to the following: (1) the trial court erred in finding the felony-probation aggravator because this violated the ex post facto doctrine; and (2) the trial court erred in rejecting the minor-participant mitigator based on the trial court's improper finding that Lebron shot Oliver, which was contrary to the special finding of the jury that someone other than Lebron shot Oliver. *See id.* at 1020-21.
> >
> > [FN2] This Court vacated Lebron's death sentence because the probative value of the evidence presented to establish the prior-violent-felony aggravator was far outweighed by its prejudicial effect. *See id.* at 853.

During the most recent penalty-phase proceeding, which

commenced on August 16, 2005, the State presented the testimony of Detective Andrew Lang, who provided a summary of the facts surrounding the incident. Lang testified that Daniel Summers supplied the following information with regard to Lebron's conduct immediately prior to Oliver's death: (1) Lebron was playing with the shotgun in the vehicle on the ride home after Oliver had agreed to follow them; (2) Lebron stated that he could not believe Oliver was stupid enough to follow them to the house; (3) at the house, Lebron had the shotgun in his possession when Summers and Oliver walked down the hallway; and (4) Lebron directed Oliver to lie on the floor, and Oliver eventually complied after an initial struggle. Additionally, Lang testified that the autopsy of Oliver showed no signs of defensive wounds or wounds consistent with a struggle. Lang also testified that Charissa Wilburn provided information that was consistent with Summers' statement: Wilburn stated that immediately after she heard a struggle in the hallway, she heard a shotgun blast.

Lang also presented evidence that Dwayne Sapp made the following statements with regard to Lebron's conduct: (1) when Sapp arrived at the house, Lebron had the gun in his possession; (2) Lebron directed Sapp to look at "his" (Lebron's) truck (the red pickup truck that belonged to Oliver) which had been parked in the garage; (3) Lebron directed Sapp and the others to clean the area where Oliver had been shot; (4) Lebron directed that the red pickup truck be destroyed; and (5) Lebron was present when equipment from Oliver's truck was pawned and Oliver's credit card was used. Lang addressed that when Lebron was arrested in New York, both a shotgun shell and Oliver's day planner were found in the car used by Lebron, and, finally that Lebron had been previously convicted of a robbery and kidnapping and also on a charge of aggravated assault.

The State presented evidence from Oliver's mother with regard to victim-impact evidence and also exhibits which included (1) proof of Lebron's prior-violent-felony convictions; (2) pictures of the deceased Oliver after the murder and the hallway at the crime scene; and (3) evaluations of mental health professionals who analyzed Lebron.

The defense presented only the testimony of Jocelyn Ortiz, Lebron's mother. Her testimony revealed that while she was living on the streets of New York City, she became pregnant with Lebron when she was sixteen years old and had used drugs during this pregnancy. Lebron's father was only involved with Lebron for the first few months of his life. Her memory of Lebron during the first few months after his birth was her drug involvement and unsuccessful attempts to feed him. When Lebron was about three months old, she entered a drug rehab program. Her motivation to enter this residential program was based on being advised that Lebron would be taken from her if she did not rehabilitate. Lebron was in foster care during this time.

After completing rehab, she married Tony Ortiz and she worked as a counselor with the rehab program she attended. From the time Lebron was three months old until he was four or five years old, she did not use drugs. After her job as a counselor there ended, she became a dancer and later a stripper which covered approximately ten years.

During this period of time, Lebron would steal from her on different occasions. She testified that on occasion she used corporal punishment on Lebron in an attempt to instill discipline and would tell him to leave her alone when he would "cling" to her. Her employment provided sufficient income to provide for Lebron, and she would provide him with money and the items (*e.g.*, clothes) he desired.

The defense presented exhibits which included (1) the charges and convictions of the other individuals involved in the Oliver incident; (2) reports with regard to Lebron's prior arrest in New York (these reports disclosed that he was seventeen at that time and a codefendant possessed a gun that was used during the crime); [FN3] and (3) reports with regard to Lebron's attendance and performance at various schools and group homes during his teenage years.

> [FN3] On February 18, 1993, Lebron was convicted of attempted robbery for this crime, which was committed in New York.

On August 17, 2005, the jury returned a recommendation of death by a vote of seven to five. The jury found three aggravators on Attachment A [FN4] and addressed other mitigators on Attachment B. [FN5]

> [FN4] The trial court required the jurors to record a numerical vote for each aggravator on a document called "Attachment A." The jury found the following aggravation: (1) Lebron had a conviction for a prior violent felony (the jury vote was twelve to zero); (2) the felony murder of Oliver was committed while Lebron was engaged in a robbery (twelve to zero); and (3) the felony murder of Oliver was committed for financial gain (nine to three).
>
> [FN5] The trial court also required the jurors to record a numerical vote for each mitigator on a document called "Attachment B." The jury found the following with regard to mitigation: (1) Lebron was not merely an accomplice, whose participation was relatively minor, in the felony murder of Oliver (twelve to zero); (2) Lebron's age was not a mitigator (twelve to zero); (3) no aspect of Lebron's character, record, or background was a mitigator (nine to three); and (4) no other circumstance of the felony murder was a mitigator (twelve to zero).

On September 28, 2005, Lebron moved for a new trial based upon a letter that allegedly established juror misconduct. Lebron asserted that the jurors had allegedly discussed that Lebron had placed a gun to the head of an individual in a separate incident, even though such evidence was never presented to the jury. On October 3, 2005, the trial court conducted a hearing on this issue and multiple jurors were questioned. On October 20, 2005, the trial court denied the motion for a new trial.

On October 20, 2005, the trial court conducted a *Spencer* [FN6] hearing. During this hearing, the trial court considered the testimony of Howard Kendall (given during the trial that involved the victim Roger

Nasser) that Lebron was motivated to perpetrate the crime against Nasser [FN7] because Nasser had attempted to rape Stacie Kirk, who was seventeen at the time. The defense also presented various school records of Lebron. The defense asserted that the various aggravators should receive limited weight because (1) this Court does not typically give great weight to either the robbery or pecuniary-gain aggravator, and here, the robbery also benefited other individuals involved in its commission; (2) when Lebron committed the crime of attempted robbery in New York, he was a juvenile and an accessory as evidenced by his probation sentence, and the main culprit used a gun that contained blanks; (3) Lebron was provoked by Brandi Gribben's threats, which mitigates the aggravated assault that he committed against her; [FN8] and (4) Lebron did not possess a firearm when he robbed and kidnapped Nasser, and Nasser had earlier attempted to rape Lebron's friend, Kirk. Conversely, the State presented a summary of psychological reports and asserted that Lebron had killed Oliver for no real reason because it was not necessary to murder Oliver to steal his truck.

> [FN6] *Spencer v. State*, 615 So. 2d 688 (Fla. 1993).
>
> [FN7] On June 24, 1997, Lebron was convicted of both robbing and kidnapping Nasser. This incident occurred approximately one week after Oliver's murder.
>
> [FN8] On August 26, 1997, Lebron was convicted of perpetrating an aggravated assault with a firearm against Gribben. This incident occurred only a few days before Oliver's murder.

On December 27, 2005, the trial court sentenced Lebron to death. The trial court found that the State had proven beyond a reasonable doubt that (1) Lebron was previously convicted of a felony that involved the use or threat of violence to a person; and (2) the capital felony was committed while Lebron was engaged in or an accomplice in the commission of robbery (this merged with the financial gain aggravator). The trial court further found that there were no statutory mitigators

present. The trial court found the following nonstatutory mitigators: (1) Lebron's mother used drugs (assigned "very little weight"); (2) Lebron performed poorly in school ("some weight"); (3) Lebron was good with children ("very little weight"); (4) the profile of Lebron's parents was mitigating ("very little weight"); (5) Lebron's mother rejected him and had negative feelings about him ("some weight"); (6) Lebron behaved properly during trial ("very little weight"); and (7) Lebron had emotional problems, mental health problems, and lacked the "world's best mother" ("little weight"). Finally, the trial court found that the death sentence was supported by an *Enmund* [FN9] - *Tison* [FN10] analysis because Lebron was a major participant in the murder of Oliver and Lebron had demonstrated a reckless disregard for human life. This direct appeal followed.

> [FN9] *Enmund v. Florida*, 458 U.S. 782, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982).
>
> [FN10] *Tison v. Arizona*, 481 U.S. 137, 107 S.Ct. 1676, 95 L.Ed.2d 127 (1987).

Lebron v. State, 982 So. 2d 649, 655-658 (Fla. 2008).

The Evidentiary Hearing Facts

Dr. Mark Cunningham, clinical and forensic psychologist, interviewed Lebron and third parties who were friends or family of Lebron. (V35, R3293, 3306-07). He reviewed trial testimony, school records, mental health records, and criminal history. (V35, R3311).

In Cunningham's opinion, there were various categories of adverse or damaging developmental factors in Lebron's life: family factors, neurodevelopmental factors, parenting, community factors, and the "disturbed trajectory" caused by family and community factors. (V35, R3312-14).

The family-related adverse developmental factors included:

(1) generational family dysfunction;

(2) hereditary predisposition to substance abuse; and

(3) hereditary predisposition to psychological disorder.

(V35, R3312).

The neurodevelopmental factors included:

(1) prenatal alcohol and drug exposure;

(2) lack of prenatal care and birth complications;

(3) attention deficit hyperactivity disorder ("ADHD);

(4) learning disability;

(5) childhood speech and language disorder;

(6) head injury with loss of consciousness;

(7) childhood anoxia (lack of oxygen to the brain);

(8) inhalant abuse (sniffing glue);

(9) deficient intelligence in childhood;

(10) neuropsychological deficits; and

(11) youthfulness.

(V35, R3312-13).

The "parenting" adverse developmental factors included:

(1) teenage mother;

(2) mother's deficient intelligence;

(3) alcohol and drug abuse of parents;

(4) father abandonment;

(5) mother abandonment;

(6) amputation of primary attachment;

(7) deficient maternal bonding;

(8) instability of care and relationships in childhood;

(9) mother's physical and verbal abuse;

(10) maternal neglect;

(11) inadequate supervision and guidance;

(12) mother's prostitution, exotic dancing and sex industry;

(13) sexually traumatic exposures.

(V35, R3313).

"Community factors" included:

(1) corruptive community; and

(2) neighborhood violence.

(V35, R3313).

"Disturbed trajectory" included:

(1) emotional disturbance from childhood;

(2) childhood onset of substance abuse; and

(3) cocaine abuse and dependence.

(V35, R3314). Cunningham testified that a review of the records and interviews showed the following adverse developmental factors in Lebron's life:

- Lebron abused substances beginning in childhood (V35, R3316);

- Lebron is antisocial, which can be inherited (V35,

R3317);

- Lebron was abandoned by his mother (V35, R3318; V36, R3452-53);

- Lebron's family tree showed[3] children raised by persons other than their parents (V35, R3328);

- Lebron's relatives abused alcohol[4] (V35, R3331-32);

- Lebron's relatives had mental disorders[5] (V35, R3336-37);

- Lebron is antisocial, which may be inherited from the father (V35, R3338);

- Lebron's mother exposed him to alcohol and drugs *en utero*[6] (V35, R3339-3342; V36, R3469-70);

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[3] The State objected to hearsay testimony based on information obtained from other persons who did not testify at the evidentiary hearing. (V35, R3324-25). Cunningham based his testimony on information given him from Lebron's mother and the mother's psychotherapist, neither of whom testified at the evidentiary hearing. (V35, R3327, 3329).

[4] The State had a standing objection to the family tree testimony. (V35, R3324-25). This portion of the testimony was Cunningham's recitation of information from a psychotherapist, Lebron's mother, and a family friend. None of these persons testified at the evidentiary hearing. (V35, R3330-31).

[5] The State had a standing objection to family tree testimony. This information was provided to Cunningham by Lebron's mother. (V35, R3336).

[6] The State objected to hearsay testimony - Cunningham testified that Lebron's mother told him she used drugs and alcohol while pregnant. The mother, Jocelyn Ortiz, did not testify at the evidentiary hearing. (V35, R3341). Mrs. Ortiz testified at the 2005 penalty phase that she consumed drugs, not alcohol, while pregnant.

- Lebron had ADHD and learning problems in school (V35, R3342, 3348)[7];

- Lebron showed signs of fetal alcohol syndrome (V35, R3343-44);

- the murder was a result of Lebron's impulsive decision-making (V35, R3347);

- Lebron lacked prenatal care (V35, R3348);

- Lebron was described in his teens as having oppositional defiant disorder and conduct disorder (V35, R3362-63);

- signs of conduct disorder included drug abuse, stealing from his mother, and truancy (V35, R3365);

- ADHD can co-exist with conduct disorder (V35, R3366);

- Lebron exhibited antisocial characteristics (V36, R3379);

- Lebron began abusing drugs in childhood, drank heavily and used marijuana in adolescence; (V36, R3380);

- Lebron used cocaine and abused alcohol and marijuana

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[7] Cunningham testified that the records (which were introduced at the 2005 penalty phase) contained psychological evaluations showing Lebron had ADHD. (V35, R3349-54). In fact, when the court asked whether the records to which Cunningham referred were the ones introduced into evidence, it was confirmed they were the same records. (V35, R3353). Cunningham also testified that Lebron's mother testified in a 1997 deposition that Lebron had ADHD. (V35, R3355, 3358). The deposition had been admitted at one penalty phase, but Mrs. Ortiz, Lebron's mother, testified in person at the 2005 penalty phase (V35, R3359, 3367). When asked whether Lebron had ever been diagnosed with ADHD, Cunningham only stated: "He was prescribed a stimulant medication called Cylert" which is used for ADHD patients. (V35, R3360).

almost daily at age 18 (V36, R3381);

- school records show Lebron had a learning disability (V36, R3386, 3390);

- Lebron had a speech disorder in pre-teen and teen years (V36, R3391-93);

- a head injury as an infant led to Lebron's adverse neurodevelopmental development (V36, R3394);

-at age 19, Lebron was beaten and knocked unconscious (V36, R3394);

- Lebron participated in "choking game" when he attended summer camp causing anoxia (V36, R3401);

- Lebron sniffed glue at Pleasantville Cottage School for approximately 5 months (V36, R3403, 3404);

- Lebron has neuropsychological deficits in frontal lobes and executive functioning (V36, R3404);

- due to inhalant abuse, Lebron exhibits brain dysfunction, impulsive decision-making and poor judgment (V36, R3405);

- Lebron suffers from a neuropsychological defect (V36, R3429, 3444)[8];

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[8] The State objected to Cunningham testifying about neuropsychological deficits because he is not a neuropsychologist or psychiatrist, did not conduct neuropsychological testing, and was basing his opinion on the reports of Dr. Eisenstein, a neuropsychologist, and Dr. Wu, a psychiatrist who did not testify at the evidentiary hearing.(V36, R3424-25). Cunningham was allowed to testify that

- Lebron's youthfulness at the time of the murder affected development of the brain's maturity (V36, R3429);

- Lebron was functionally less mature 21 year due to ADHD, neuro-developmental problems, learning disability, and emotional disturbance during childhood and adolescence (V36, R3430-31).

- frontal lobe immaturity led to deficits in judgment and impulse control (V36, R3446, 3450);

- Lebron was placed in institutional setting surrounded by other disturbed children (V36, R3454);

- Lebron's mother worked in "sex industry" as a dancer and a prostitute, which disturbed Lebron (V36, R3463, 3465, 3489);

-mother was abusive to Lebron and abandoned him as an infant (V36, R3466, 3476, 3479, 3482);

- Lebron's mother "straddled the range" of low borderline intelligence to mental retardation (V36, R3467, 3468);

- Lebron's father abandoned him which caused negative psychological development (V36, R3472, 3475);

- Lebron experienced sexually traumatic exposures (V36, R3495);

- Lebron grew up with neighborhood violence (V36, R3500, 3504);

- Lebron was emotionally disturbed from childhood (V36,

Lebron has neuropsychological defects based on Cunningham's review of Dr. Wu and Dr. Eisenstein's reports. (V36, R3428).

R3509);

- special education courses oriented Lebron toward significant behavioral disturbances (V36, R3541);

- Lebron did not have a highly supportive family network, neighbors, or caring school climate (V36, R3546, 3547).

Dr. Hyman Eisenstein, Ph.D., was qualified as an expert in clinical psychology, neuropsychology, and forensic psychology. (V37, R3579). Eisenstein conducted a neuropsychological evaluation of Lebron, reviewed school records, criminal records, and conducted clinical interviews with collateral sources. (V37, R3580, 3581-82). The records reviewed included:

- New York City educational records from September 1980 - May 1986 (V37, R3581-82);

- Jewish Child Care Association records July 1988 - June 1991, and Jewish Child Care Association psychological and psychiatric evaluations (V37, R3582);

- Mount Pleasant Cottage school records, 1988 - 1990 (V37, R3582);

- Glen Mills School records, June 1990 - April 1991 (V37, R3582).[9]

The voluminous records of Lebron's placement history

[9] All of these records were in evidence at the 2005 proceedings during which Lebron was sentenced to death. They are contained in the record on appeal in Case No. SC06-138, which the trial court judicially noticed.

included a considerable number of evaluations by psychologists, psychiatrists, and social workers. (V37, R3586). Among the records were various IQ tests: one in 1984 when Lebron was 10 years old and one in 1986 when Lebron was 12 years old. (V37, R3587).

When Lebron was 12 years old, a neuropsychological evaluation was conducted by Dr. Barbara Novick. (V37, R3587). Eisenstein described the neuropsychological evaluation as "comprehensive." (V37, R3625). Novick did not mention organic involvement and did not diagnose Lebron with ADHD. (V37, R3626). Novick noted "distractibility, restlessness, and attentional problems" but did not diagnose ADHD. (V37, R3629).

When Lebron was 13 years old, a case summary was created which included diagnostic impressions based on history. (V37, R3588). One of the reports at age 13 noted "dysthymia," or depression. (V37, R3629). The case summary also diagnosed Conduct Disorder, Early Personality Disorder - Passive Aggressive Type, and Mixed Developmental Disorder. (V37, R3629).

When Lebron was age 14, there was an evaluation conducted at Mt. Pleasant [sic] Cottage School. (PEH328). There were IQ tests performed when Lebron was age 14 and age 15. (PEH328). Dr. Lepp conducted a psychiatric evaluation of Lebron at age 14½, and Dr. Orloff conducted one at age 15½. (V37, R3589). Both Dr. Lepp and Dr. Orloff diagnosed Lebron with Conduct Disorder.

(V37, R3628). Additionally, Orloff diagnosed Oppositional and Defiant Traits. (V37, R3628). Both Lepp and Orloff noted learning disabilities in arithmetic, reading and articulation. (V37, R3628). Eisenstein testified that learning disabilities will not affect IQ testing. (V37, R3628). Eisenstein did not diagnose Lebron with a learning disability. (V37, R3629). Eisenstein did not review the testimony of Jocelyn Ortiz, Lebron's mother, from the 2005 penalty phase proceeding. (V37, R3630). He did not review Ortiz' deposition dated September 25, 1997. (V37, R3636). Eisenstein was vaguely aware Ortiz contacted her therapist to help Lebron when he was 12 years old because he was having academic difficulties. (V37, R33630). The therapist then located a residential facility for Lebron: the Pleasantville School. (V37, R3630). Lebron was in residential facilities from age 12 to adulthood. (V37, R3631). During that time, various mental health professionals and social workers tried to help him and developed plans. (V37, R3631). In 1990, when he was 16 years old, Lebron would not cooperate with any facility. (V37, R3589, 3631). He was transferred to a military school, Glen Mills, and remained there until he went AWOL. (V37, R3589, 3631). After he went AWOL from Glen Mills, the State of New York tried to find placement for him. (V37, R3631-32). It was very difficult to find placement for Lebron. (V37, R3632). When Lebron became an adult, the court system said they would no

longer deal with him. (V37, R3632).

When Eisenstein interviewed Lebron, Lebron reported a history of substance abuse. (V37, R3589). Lebron also self-reported a closed-head injury. (V37, R3589-90).

Eisenstein conducted the standard neuropsychological battery tests. Some of the tests showed average function; however, several of the tests showed mildly impaired or impaired functioning. (V37, R3592-99). On the Wisconsin Card Sort test, Lebron had a score which showed "severely impaired" because he only completed one category. (V37, R3595). In Eisenstein's opinion, this showed impaired frontal lobe functioning and the inability to "to rationally think, to come up judgment and be able to plan and to execute alternative plans in one's life." (V37, R3597). The Trail Making test also resulted in a test range of "severely impaired." (V37, R3598-99). In Eisenstein's opinion, the test data supported a diagnosis of frontal lobe impairment. (V37, R3599). The WAIS-III test showed Lebron had a full-scale IQ score of 91. (V37, R3601). However, his processing speed on the test was low. (V37, R3601). In Eisenstein's opinion, Lebron has frontal lobe impairment. (V37, R3604). Frontal lobe impairment is not a diagnosis, but a "behavior symptomatology." (V37, R3604). Eisenstein recommended a PET scan be conducted in order to corroborate his testing and analyze brain function. (V37, R3610, 3640). A PET scan was performed in

April 2010. (V37, R3641).[10] There were no neurological examinations conducted. (V37, R3614). Notwithstanding, Eisenstein believed his testing conclusively showed organic brain damage. (V37, R3640).

Frontal lobe impairment would manifest in Lebron's conduct in the ability to use judgment, to think about a particular situation, and to come up with a plan which is logical and sequential. (V37, R3603). An individual like Lebron is unable to think flexibly through a difficult situation and use alternative strategies. (V37, R3604).

Eisenstein's reached six (6) diagnoses for Lebron:

(1) Bipolar I Disorder (V37, R3605);

(2) Reactive Detachment Disorder of Early Childhood (V37, R3606);

(3) Attention Deficit Disorder ("ADHD") (V37, R3606);

(4) Intermittent Explosive Disorder ("IED") (V37, R3607);

(5) Paranoid Personality Disorder (V37, R3610); and

(6) Borderline Personality Disorder (V37, R3611).

Eisenstein's diagnosis of Bipolar Disorder was based on Lebron's developmental history: the impulsive behavior, the lack of control of his behavior, the inability to follow through on programs, the need for excitement such as exhibitionism and

[10] No PET scan results were provided to the trial court, and there was no testimony from any expert about the results of the PET scan.

spending, and self-mutilation. (V37, R3617). Lebron was never diagnosed or treated for Bipolar Disorder. (V37, R3618). In Eisenstein's opinion, the records and persons interviewed shows Lebron's behavior was out of control throughout his life, and Bipolar Disorder was a "missed diagnosis." (V37, R3618). When asked how Lebron met the diagnostic criteria for Bipolar Disorder, Eisenstein could point to no manic episode. (V37, R3642). In Eisenstein's opinion, Lebron had an abnormally and persistently elevated expansive or irritable mood lasting "for weeks, for months; it was the whole time." (V37, R3645). Lebron's mood disturbance was so severe it caused impairments in occupational and social functioning as illustrated by his inability to perform in school, not maintaining attendance at school, and inability to obtain success in an academic environment. (V37, R3646). Lebron's mood disturbance was the reason he went AWOL. (V37, R3647). When questioned about the diagnostic criteria in the DSM-IV-TR which contains as differential diagnosis criteria that Bipolar Disorder cannot be diagnosed if behavior is a product of substance abuse, Eisenstein testified that Lebron's behavior was not a "byproduct of substance abuse." (V37, R3644). Rather, any substance abuse by Lebron was "just to self-medicate for problems of bipolar disorder." (V37, R3644). In Eisenstein's opinion, substance abuse was not responsible for Lebron's conduct (V37, R3644).

Although Lebron engaged in substance abuse, he was never treated for it and did not have a substance disorder. (V37, R3645).

To obtain a diagnosis of Reactive Attachment Disorder, it is necessary to exclude Dysthmic Disorder. (V37, R3647). Yet to diagnose Bipolar Disorder, there must be a rapid alteration between manic symptoms and depressive symptoms. (V37, R3647). In Eisenstein's opinion, that rapid alteration was shown by Lebron self-mutilating. (V37, R3647). Allegedly, Ortiz' boyfriend, Kenneth Dee, told Eisenstein that Lebron engaged in self-mutilation; however, Eisenstein did not examine Lebron for evidence of self-mutilation. (V37, R3648). To reach a diagnosis of Reactive Detachment Disorder, it is necessary to exclude diagnoses of Conduct Disorder, Oppositional Defiant Disorder, and Antisocial Personality Disorder. (V37, R3648). Eisenstein was able to exclude the diagnoses of Conduct Disorder, Oppositional Defiant Disorder, and Antisocial Personality Disorder, in spite of two psychiatrists - Lepp and Orloff - specifically finding Conduct Disorder and Oppositional Defiant Disorder. (V37, R3648-49). Eisenstein said he was able to exclude a diagnosis of Antisocial Personality Disorder even though he agreed Lebron met the criteria[11] of:

[11] These criteria are the Diagnostic criteria for Antisocial Personality Disorder recited directly from the DSM-IV-TR. American Psychiatric Association: *Diagnostic and Statistical*

(1) pervasive disregard and violation of rights of others: failure to conform to social norms, stealing and diagnosis of Conduct Disorder before age 15 (V37, R3649-51);

(2) deceitfulness: repeated lying, conning others for personal profit or pleasure (V37, R3652);

(3) impulsivity (V37, R3652);

(4) irritability or aggressiveness as indicated by repeated physical fights or assaults (V37, R3652);

(5) reckless disregard for safety of self or others (V37, R3653);

(6) consistent irresponsibility (V37, R3653);

(7) Lebron was over 18 at the time of the murder (V37, R3655); and

(8) evidence of Conduct Disorder before age 15 (V37, R3655).

In Eisenstein's opinion, Lebron did not meet the criteria for Antisocial Personality Disorder ("APD") because the final criteria to diagnose APD is that the antisocial behavior is not exclusively during the course of Schizophrenia or a Manic Episode (a prerequisite for a diagnosis of Bipolar Disorder). (V37, R3656). When asked whether Lebron committed the attempted robbery in New York, the Gribben aggravated assault, the Oliver murder, the Nasser robbery and kidnapping, and the theft of the truck to drive to New York during manic episodes, Eisenstein said: "I just want to redefine really what I mean by the manic

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Manual of Mental Disorders, Fourth Edition, Text Revision. Washington, DC, American Psychiatric Association, 2000.

episodes." (V37, R3659). Per Eisenstein's "definition," simply meeting the criteria for a diagnosis does not mean that diagnosis should be applied. (V37, R3660). When confronted with the fact the DSM-IV-TR requires that a diagnoses of APD be excluded in order to reach a diagnosis of Reactive Attachment Disorder or IED, Eisenstein testified that he "ruled out" APD. (V37, R3661).[12]

Eisenstein conceded that a diagnosis of IED can only be reached if the aggressive episodes are not better explained by another mental disorder such as APD, Borderline Personality Disorder, a psychotic disorder, a manic episode, conduct disorder, ADHD, substance abuse or a general medication such as head trauma. (V37, R3662, 3664). Notwithstanding, Eisenstein believed there can be "concomitant" or "multiple" diagnoses, and he would diagnose Borderline Personality Disorder, ADHD, and Manic episodes together with IED. (V37, R36664). Further, even though Lebron met the criteria for APD, Eisenstein would not diagnose APD. (V37, R3664-65). In Eisenstein's opinion, the Oliver murder showed IED and that Lebron's behavior was grossly disproportionate to any sense of logic because there is no reason to "kill a person if you want to steal a truck." (V37,

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[12] As previously outlined, Cunningham found antisocial personality disorder, substance abuse, learning disabilities, conduct disorder and oppositional defiant behavior as "adverse developmental factors."

R3665). The mere fact Lebron killed the victim was grossly disproportionate behavior and "as explosive as you get." (V37, R3666). Eisenstein did not believe luring the victim to the apartment, concealing the gun to move it into the house, and asking the victim to come to the back of the house to see the "spinners" was calculated behavior but rather "the whole mindset is a total explosive behavior." (V37, R3667). Eisenstein could not identify the specific stressor which caused Lebron to "explode" and be involved in the robbery/murder. (V37, R3675). Eisenstein was aware that before the Oliver murder Lebron was singing to music, playing with his gun and saying he was going to "jack" the victim. In Eisenstein's opinion, despite this behavior, Lebron's behavior was aggressive, and therefore explosive. (V37, R3676). Eisenstein could point to no specific behavior which was explosive, merely to the fact a murder was committed. (V37, R3677).

Eisenstein acknowledged that a diagnosis of Reactive Attachment Disorder cannot be reached unless Conduct Disorder and APD can be excluded. (V37, R3667). Regardless, he believed the facts of the murder showed Reactive Attachment because Lebron was unable to form stable relationships and "that was all part and parcel of this whole picture." (V37, R3668). Eisenstein did not agree that the robbery and murder were better explained by a person with APD who had reckless disregard for another

person's life and committed unlawful acts to benefit himself. (V37, R3669).

Eisenstein acknowledged that for a diagnosis of Paranoid Personality Disorder, symptoms associated with drug abuse must be distinguished. Eisenstein did not consider Lebron's drug abuse either chronic or the primary problem. (V37, R3669). Eisenstein believed Paranoid Personality was a more accurate diagnosis than substance abuse because the issue is "about the mistrust, the lack of establishing trustful social relationships ..." Insofar as the DSM criteria for Paranoid Personality Disorder, Eisenstein did not know whether Lebron believed the victim was going to exploit or deceive him, did not know whether the victim threatened Lebron, and was not sure paranoid thoughts motivated the robbery/murder. (V37, R3670-71).

Regarding Lebron's ability to plan as it related to the Oliver robbery/murder, Nasser robbery/kidnapping, New York attempted robbery, or Gribben assault, Eisenstein's response was that there was no "thought-out plan" because Lebron's actions were "not proactive but reactive." (V37, R3671-12). Lebron's actions in the Gribben assault showed lack of a plan through "the very act that a dispute needs to be resolved in that manner." (V37, R3672). Lebron's behavior showed disregard for himself and lack of planning "when you are going to wind up engaged in a behavior that is going to wind up with your own

self-regard literally incarcerated with severe punishment for the rest of your life." (V37, R3673).

Over objection, Eisenstein was allowed to testify to specific hearsay statements made by Mrs. Ortiz (V37, R3681) and Bridget Laureira. (V37, R3681-82).

In Eisenstein's opinion, Lebron had an extreme mental or emotional disturbance at the time of the Oliver murder. (V37, R3622-23). Eisenstein reached this conclusion even though Lebron denied involvement and did not discuss his mental state at the time of the murder. (V37, R3674). Eisenstein based his opinion regarding the mental state as "we look at a window, but we also look at the expansive time line. And when we look at the time line, we can understand the window as well." (V37, R3674).

Pursuant to questioning by the trial court, Eisenstein testified that he believed Lebron was suffering from both extreme mental disturbance and extreme emotional disturbance. (V37, R3688). Eisenstein understanding of the word "extreme" means "something that goes beyond obviously normal, something that is beyond mild, not even moderate but extreme." (V37, R3688). Eisenstein testified that "extreme" means "two standard deviations beyond the mean" and that very few people will have "this type of disorder." (V37, R3688). Lebron's dysfunctional family life, different insults to the brain, and emotional disorders were of an extreme nature. (V37, R3688-89). Eisenstein

was confused about the facts of the case. (V37, R3689). He did not talk to Lebron about any of the facts of the case because Lebron denied involvement. (V37, R3689). Lebron did not talk to Eisenstein about the trip to Kinko's before seeing Mr. Oliver on the street. (V37, R3689). Eisenstein made no determination whether Lebron was suffering from an extreme disturbance at the time he was at Kinko's. Eisenstein was aware that after Lebron and his friends left Kinko's they went to Mary Lineberger's house to use the computer, but he did not talk to Lebron about that. (V37, R3690). Eisenstein did not ascertain whether there was anything that occurred at Ms. Lineberger's house to support his opinion that Lebron was suffering from an extreme disturbance. (V37, R3690). Eisenstein could point to nothing in the record or facts which would cause him to believe Lebron had an extreme disturbance. (V37, R3691). Eisenstein was aware Lebron lured Mr. Oliver back to the house. (V37, R3691). He was not sure what happened in the car on the way back to the house. (V37, R3692). There was nothing that happened during that time that would lead to the conclusion Lebron was under an extreme disturbance at the time. (V37, R3692). Eisenstein did not discuss the events with Lebron and was not aware of stressors. In Eisenstein's opinion, "his entire behavior is inexplicable." (V37, R3693). Eisenstein did not know whether Lebron was consuming alcohol or drugs the day of the murder. (V37, R3693).

There was no indication Lebron was incapable of rational planning. (V37, R3694). There was nothing in the record to show panic or rage on behalf of Lebron up to the time of Oliver's murder. (V37, R3694). Lebron orchestrated the efforts to conceal the crimes. (V37, R3695). Eisenstein was not aware of any deficiencies on behalf of Lebron from extended use of alcohol or solvents, *i.e.*, sniffing glue. (V37, R3695). Eisenstein could not explain what "extreme rage" meant when questioned how the events leading up to the murder showed rage. (V37, R3696). Eisenstein did not talk to any of the co-defendants who were involved in the robbery/murder and were with Lebron. (V37, R3697).

Robert Norgard was one of Lebron's trial counsel. He has been practicing criminal defense since 1981. (V38, R3703). He had tried more than 70 murder cases, more than half of which were capital cases. (V38, R3748). He had conducted 25 or more penalty phases. (V38, R3748). Of all his cases, only 5 defendants that Norgard represented are on Death Row. (V38, R3748). Norgard has spoken at both the "Life Over Death" and the "Death is Different" training seminars for capital defense attorneys. He was in charge of "Death of Different" from 1992 to 2004. (V38, R3748). He has been qualified as an expert in capital sentencing procedures or "*Strickland* expert" more than 15 times. (V38, R3759).

Norgard represented Lebron in not only the murder case, but also the aggravated assault of Brandi Gribbons and the attempted murder of Mr. Nasser.[13] (V38, R3705). Harvey Slovis also represented Lebron on the Oliver murder and Nasser attempted-murder cases. (V38, R3705). Slovis was a criminal attorney from New York whose practice was predominantly criminal defense. (V38, R3707). Lebron's trials were in 1997, 1998, 2002, 2004, and 2005.[14] (V38, R3749). Each time the case was re-tried, Norgard re-examined the case to evaluate whether there was something more he could do. (V38, R3750). Each trial he refined his strategy. (V38, R3750).

Norgard did not recall the deposition testimony of Robert or Charlotte Spears. (V38, R3710). Norgard was familiar with the testimony of Roswell Summers, who testified in the first trial. (V38, R3711). The State called Roswell in the first trial, but he was not called in the second trial. (V38, R3711). Roswell's

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[13] Norgard was involved in Lebron's first trial which resulted in a hung jury. (V38, R3706). He was not involved in the second trial, which resulted in conviction. However, he was familiar with the testimony and evidence from that trial. (V38, R3709). Norgard represented Lebron on direct appeal of that conviction. He also represented Lebron in the three subsequent penalty phases, and in the appeals of those penalty phases. *Lebron v. State*, 799 So. 2d 997 (Fla. 2001); *Lebron v. State*, 894 So. 2d 849 (Fla. 2005); *Lebron v. State*, 982 So. 2d 649 (Fla. 2008).

[14] Lebron's convictions were affirmed after the 1998 trial; however, the death sentence was not affirmed until the 2005(fourth and final) penalty phase.

testimony was used in the first trial to impeach Danny Summer's testimony. (V38, R3712). Norgard testified that it is important to have first and last closing argument in the trial. (V38, R3712). This fact is apparent from Slovis' comment regarding closing argument:

> MR. SLOVIS: I'm going to argue first and then I'm going to listen to what this guy says and then I'm going to go into my rebuttal and then I'm going to put the nail in the coffin.
> . . . .
>
> THE COURT: You were fine the last time. I say you have the opportunity at the end to wrap up the package.
>
> MR. SLOVIS: I'll wrap the package. I'm going to wrap it up for them.

(1998ROA, V26, R1602). This exchange shows how important a defense attorney considers the rebuttal closing argument.

All that Roswell testified about in the first trial was that his son, Danny Summers, did not immediately tell his father the truth when he went to Connecticut after Lebron killed Neal Oliver. (V38, R3746). In the second trial, Danny Summers testified on direct examination that he did not immediately tell his father the truth about what happened in Florida. (R38, R3746). Given the scenario that Danny admitted in the second trial that he did not tell his father why he left Florida, it would serve no purpose to call Roswell as the sole witness and lose first and last closing argument. (V38, R3747-48).

Lebron's sentence was affirmed after the fourth penalty

phase. (V38, R3713). Norgard had started his mitigation investigation back in late 1996 or early 1997 when Lebron was first charged with murder. (V38, R3714). Norgard had an investigator and investigated the penalty phase in "many different directions." (V38, R3714). He tried to obtain all available records. (V38, R3714). In Norgard's opinion, the most relevant records were those from the Jewish Child Care Association ("JCCA"). (V38, R3714-15). Lebron's regular school records were fairly sparse, but the JCCA records were extensive. (V38, R3715). JCCA does the child care for the City of New York and has a cottage school in Pleasantville, New York. (V38, R3715). Ironically, Norgard's brother-in-law worked there, so when Norgard travelled to Pleasantville Cottage School he was able to make contact with the appropriate persons. (V38, R3715). He visited the dorms and facilities at the school. (V38, R3752). Norgard was able to talk to many of the people who provided records and might have substantive mitigation information about Lebron. (V38, R3716). However, the recollection of the people to whom Norgard spoke "was pretty much limited to what they had written in their reports." (V38, R3717, 3752).

Further, a lot of what was in the records "although technically are mitigation were of a negative nature." (V38, R3752). Jurors "aren't necessarily crazy about" negative conduct. (V38, R3753). Norgard did not want to present witnesses

"who were going to regurgitate what was in a report and then have the State be able to ask them about the bad stuff that was in the report." (V38, R3753).[15]

Norgard uses a mitigation checklist for the initial interview of a capital defendant, which he used with Lebron. (V38, R3716). The checklist is the "most comprehensive one I've seen." (V38, R3723). The checklist contains a complete history of life from prenatal through time of offense and contains approximately 120 categories to investigate. (V38, R3775). Not only did Investigator Burnham work on Lebron's case, but also Toni Maloney, a mitigation specialist. (V38, R3736, 3780). In 2005, the appointed mitigation specialist was Rosalie Bolin. (V38, R3756). Norgard talked to Lebron about significant people in his life that could provide mitigation evidence; however, Lebron was not forthcoming with any such information. (V38, R3716). Norgard also spoke with Lebron's mother about possible mitigating witnesses. (V38, R3716).

Norgard hired Dr. Henry Dee, neuropsychologist, in 1997. (V38, R3753). He also filed a Notice of Intent to Present Expert Testimony on neurological impairment, psychological impairment,

[15] In the 2005 penalty phase, Norgard presented the testimony of Jocelyn Ortiz and admitted the convictions and sentences of the co-defendants to show the disproportional sentences. Norgard submitted the school and psychological records in the *Spencer* hearing. *Spencer v. State*, 615 So. 2d 688 (Fla. 1993).

cultural factors, offense factors, social factors, dysfunctional family, substance abuse, and role of co-defendants. (V38, R3754, State Exh. 1). Norgard used Dr. Dee as expert in his cases from 1985 until the latter's death. (v38, R3719). Dee was one of the more prominent experts available in Florida. (V38, R3720). In Dee's opinion, Lebron had "organic personality syndrome," which is the prior DSM[16] label. (V38, R3721, 3726). Basically, Dee believed Lebron had frontal lobe problems. (V38, R3721). Dee also described Lebron as "the coldest antisocial personality disorder he had ever seen." (V38, R3721). Norgard testified:

> And I've used Henry Dee in - I can't begin to tell you how many murder cases - just about every one I've ever been involved in, and I've handled probably a couple of hundred. I've used him many times, and I've never had him describe anybody that way. I mean. It floored me.

(V38, R3721-22). Dee had extensive experience in homicide cases. Norgard discussed the situation with Dee quite a bit. Dee was not called at penalty phase #4 for "lots of reasons" including:

(1) Lebron denied any of the criminal activity, including

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[16] The Diagnostic and Statistical Manual of Mental Disorders-III-R defines "Organic Personality Syndrome" as "usually due to structural damage to the brain." Common causes are neoplasm, head trauma, and cerebrovascular disease. Diagnostic criteria requires evidence from the history, physical examination or laboratory tests of a specific organic factor or factors etiologically related to the disturbance. *Diagnostic and Statistical Manual of Mental Disorders-III-R*, p. 115. The DSM-IV-TR classification label for this condition is now "Personality Change Due to a General Medical Condition." *Diagnostic and Statistical Manual of Mental Disorders-IV-TR*, p. 187-89.

the homicide and the crimes underlying the aggravating circumstances and Dee was unable to render any opinion on the two statutory mental health mitigating circumstances of extreme emotional disturbance or substantially impaired ability to conform his conduct;

(2) Dee described Lebron as "the coldest person he had ever met" and Norgard did not want to expose Lebron to a compelled mental health exam.

(V38, R3727-28). Norgard made a strategic decision not to call a mental health expert in the penalty phase.[17]

Norgard said that, in Dee's opinion, Lebron's neurological problems were present at the time of the murder. (V38, R3741). However, those issues could not be presented for the reasons already stated: exposing Lebron to a State mental health evaluation, Lebron being antisocial, and the "difficulty with trying to link any organic brain damage to the events of this case." (V38, R3742). The decision not to call Dee was discussed with Lebron. (V38, R3742, 3762).

What Norgard was able to present in mitigation was how

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[17] Before the 2002 penalty phase, Norgard requested appointment of Dr. Thomas McClane. (V38, R3755; State Exhibit #2). Norgard presented the testimony of McClane in the 2002 penalty phase. (V38, R3763). However, McClane did not conduct a mental health evaluation of Lebron. McClane reviewed records and testified about behavioral consequences. Because McClane had not evaluated Lebron, it did not expose Lebron to a State expert. Norgard wanted to "have my cake and eat it, too." (V38, R3732).

Lebron was raised, the relationship with his mother and "a whole list of mitigators." Many of the mitigators had to do with Lebron's life history, maladjustment to being institutionalized, and a mother who worked in the adult industry, abused drugs, and neglected Lebron. (V38, R3733). He tried to convince the judge that the relatively minor sentences of the co-defendants was mitigation. (V38, R3777).

Among Lebron's records were various neuropsychological and educational testing evaluations. (V38, R3718). No expert ever diagnosed Lebron with fetal alcohol syndrome. (V38, R3735). However, there was evidence, and Mr. Norgard did present testimony at penalty phase #4, that Lebron's mother used drugs while she was pregnant. (V38, R3756). The mother also testified that she went to residential drug treatment because of drugs. (V38, R3757).[18]

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[18] Jocelyn Ortiz's testimony in the 2005 penalty phase regarding this issue was that: She moved to New York when she was 12 years old. (V7, T354-55, 356-57). Ortiz and her twin brother left home at age 16, because their mother beat them. (V7, T356, 358, 359). Ortiz and her twin brother, a schizophrenic, lived on the streets. Her brother was hospitalized many times and later died in a state mental health facility. (V7, T359). Ortiz became pregnant with Lebron shortly after she left home. (V7, T359). She thought having a baby, "was growing up ... you could get an apartment, public assistance." (V7, T360). Lebron's father, Robert Alvarez, sold drugs and spent time in jail. (V7, T60, 361). Alvarez left Ortiz when Lebron was two months old. (V7, T362-63). Ortiz smoked marijuana and used drugs, "amphetamines, cocaine, heroin, LSD." She abused drugs while she was pregnant with Lebron. (V7, T363, 264). When Ortiz partied at clubs, she left Lebron with a friend. (V7, T366). She entered an outpatient

As far as ADHD (Attention Deficit Hyperactivity Disorder), that was a "rule out" diagnosis. (V38, R3735). Although Lebron was given medications to help with behavioral issues, there was never a conclusive diagnosis of ADHD. (V38, R3735). Norgard investigated Lebron's drug and/or alcohol abuse during the time before the murder; however, there was nothing more than marijuana use. (V38, R3736). No one reported any issue with cocaine or drinking a quart of vodka. (V38, R3736). Lebron described himself as "more of an experimenter as opposed to an abuser." Lebron said he would try a drug as part of a social situation, but they "really didn't do anything for him." (V38, R3736). Lebron liked marijuana, but denied heavy drinking. (V38, R3736, 3764). Regardless of Lebron's denial, Norgard looked at drug and alcohol use at the time of the murder. (V38, R3736). None of the people in Lebron's circle of friends indicated excessive alcohol consumption. (V38, R3764-65).

Norgard was not able to find Tony Ortiz (Lebron's biological father). (V38, R3717). Further, he was told not to have contact with him. (V38, R3758). Norgard was never given the name "Kenneth Dee" as the name of Lebron's stepfather. (V38, R3758). Norgard explained to Lebron and his mother that even if

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drug rehabilitation program at age 17. Eventually, she went into a residential program for 28 months. (V7, T364-65, 367). Lebron was placed in foster care at that time. (V7, T367). Lebron was not back in her care until he was four years old. (V7, T368).

information was embarrassing or the person did not want to participate in the proceedings, Lebron's life was at stake and he needed information regardless of what discomfort or embarrassment it might cause that person. (V38, R3759). Norgard was assured that the stepfather [Kenneth Dee] did not have any contact with Lebron and did not know anything relevant. (V38, R3759, 3778). Lebron's mother did not want to testify about some issues, and it was very difficult to get her to talk about some things. (V38, R3759). Norgard was able to get Lebron's mother to talk about the physical abuse. If there were any additional incidents, she simply did not reveal them. (V38, R3760). Lebron never told Norgard that his mother abused him but would not admit it. (V38, R3760).

Norgard felt he was familiar with Lebron's entire life through interviews with people and records. (V38, R3757). It was difficult to interview any persons who knew Lebron during the time period preceding the Oliver murder because they were all State witnesses. (V38, R3757). After Lebron left Pleasantville, he was working for his mother; however, there was no person Norgard could find that had a relationship with Lebron. (V38, R3758).

In addition to presenting mitigation, it is equally important to challenge the aggravating factors. (V38, R3766). Norgard tried to mitigate the weight of prior violent felonies:

the Nasser case, the Gribben case, and the New York attempted robbery. (V38, R3767). Norgard obtained the New York records to show Lebron did not have the weapon and it was the co-defendants who were primary. Lebron "had more of a tangential involvement" and received relatively light punishment. (V38, R3768). Further, the weapon was not even an operable gun.[19] As far as the Gribben assault, Norgard obtained transcripts from that case to show the jury Gribben was emotionally out of control, throwing objects at Lebron, and was the "one who was in the wrong." Lebron was just trying to get her to leave the apartment. (V38, R3769). In the Nassar case, Norgard had appealed the conviction so that the only felony which came before the jury was simple robbery and kidnapping rather than attempted murder, armed robbery, and armed kidnapping. (V38, R3770).

Regarding "positive prisoner" mitigation, Norgard either had the jail records or had his investigator look into the records. Lebron had some D.R.'s (disciplinary reports) and a potential escape attempt/conspiracy with others to escape. (V38, R3723). Norgard knew the State was aware of the escape attempt. (V38, R3724). Lebron also tried to have a female smuggle a cell phone into jail. (V38, R3724).

At the 2005 "fourth" penalty phase, Norgard made a

[19] It was revealed through the exhibits admitted by Norgard at the penalty phase that, even though the gun was functional, it was loaded with blank cartridges.

strategic decision to present only the testimony of Lebron's mother to explain the family history. (V38, R3763). He then admitted the school and psychological records at the *Spencer* hearing. (V38, R3763-64).

Regarding the appeal of the Nasser aggravated assault, Norgard said that he had testified about the appeal in a hearing with Judge Perry. (V38, R3737). Lebron originally had been charged with attempted first-degree murder, armed robbery, and armed kidnapping. (V38, R3737). Norgard appealed that conviction and obtained a reversal. *Lebron v. State*, 724 So. 2d 1208 (Fla. 5th DCA 1999). Mr. Slovis re-tried the case. (V38, R3751). On retrial, Lebron was convicted of robbery and kidnapping. (State Exhibit #4 at 2005 penalty phase). Norgard filed a notice of appeal of the convictions, together with the other paperwork which trial counsel is required to file because Mr. Slovis did not have support staff. (V38, R3738). The Public Defender was appointed for purpose of appeal. (V38, R3739). The Public Defender had the case for "a real long time." Lebron's mother wanted to hire Norgard for the appeal but did not have the money. (V38, R3739). Eventually, Norgard was hired; however, before he was hired the Public Defender took several extensions of time to file the initial brief. (V38, R3739). Norgard filed a substitution of counsel, but by the time he got the record from the Public Defender, he did not have time to complete the

initial brief. (V38, R3740). Norgard filed a motion for extension, but the Fifth District Court of Appeal dismissed the case instead. (V38, R3741). Norgard filed a motion to reconsider the dismissal, which was denied. He then filed a motion for belated appeal, and Judge Perry held a hearing on the motion. (V38, R3741). Even if the appeal had been allowed, Norgard did not have any viable issues to appeal. (V38, R3751).

Dr. Jeffrey Danziger was qualified as an expert in forensic psychiatry and addictions psychiatry. (V38, R3799, 3802, 3803). He conducted a mental health evaluation and MMPI-2[20] psychological testing. (V38, R3803). He also reviewed psychological reports on Lebron and materials and testimony from the 1998 trial and 2005 penalty phase. (V38, R3807). Danziger's diagnosis of Lebron included:

Axis 1: Polysubstance dependence

Axis 2: Multiple learning disabilities
Antisocial personality disorder

Axis 3: none

Axis 4: Incarceration

Axis 5: GAF 61

(V38, R3815).

Antisocial personality disorder was corroborated by psychiatrist Dr. Fineberg's diagnosis of conduct disorder in

[20] Minnesota Multiphasic Personality Interview, 2nd Edition.

1988 and the staff at Pleasantville. (V38, R3816). Danziger conducted an MMPI-2 evaluation, which was consistent with a severe personality disorder and chronic psychological maladjustment. (V38, R3820). Lebron had elevated scales on Scale 4, psychopathic deviance, and to a lesser extent on Scale 5, the paranoia scale. (V38, R3825).

Danziger found no history or evidence to support a diagnosis of bipolar disorder. (V38, R3830-32). There was no evidence of intermittent explosive disorder. (V38, R3832). Lebron's criminal activities were more planned than impulsive. (V38, R3833). There was no evidence of a "stressor" in the events leading up to the murder to justify a diagnosis of sudden, impulsive rage. (V38, R3833). Lebron lured the victim to the house with a ruse, robbed him, then coordinated disposal of the body and destruction of identifying evidence. (V38, R3834). The facts of the crime showed planning and calculation, not an intermittent explosion. (V38, R3834).

Danziger did not see evidence of reactive attachment disorder. (V38, R3835-36). In fact, a diagnosis of antisocial personality disorder excludes intermittent explosive disorder and reactive attachment disorder. (V38, R3836). Evidence of Attention Deficit Hyperactivity Disorder ("ADHD") was equivocal. (V38, R3836). School records reported "some distractibility or failure to pay attention. On the other hand, [Lebron] was seen

by various examiners who did not diagnose ADHD." (V38, R3836). Dr. Novick conducted neuropsychological testing and did not diagnose ADHD. Dr. Fineberg did not diagnose ADHD. Lebron was at Pleasantville for two years and was not diagnosed with ADHD. (V38, R3836). Lebron told Danziger it was suggested he take Ritalin, but he never took it. (V38, R3837). Some of the school records suggested ADHD was possible, but no one diagnosed ADHD. (V38, R3837, 3859). Even if ADHD were possible in childhood, there was nothing in the Oliver murder that suggested ADHD played any role. (V38, R3837-38). To the contrary, the murder was planned and organized, as was the aftermath. (V38, R3838). There was nothing in the facts to suggest impulsivity, frenzy, panic or rage. (V38, R3839). Further, there was no evidence of impairment by substance abuse. (V38, R3839).

Using a lie to lure Neal Oliver to the house to rob him indicates antisocial personality disorder. (V38, R3840). The facts of the Oliver robbery/murder did not suggest bipolar disorder, ADHD or substance impairment. (V38, R3840). Moreover, there were no reports of manic symptomatology during Lebron's 16 years of incarceration. (V38, R3863). The robbery at gunpoint showed indifference to the well-being of someone else, one of the criteria for antisocial behavior. (V38, R3841). Lebron's statements that he was going to rob Oliver and the act of concealing the firearm to bring it into the house also showed

planning. (V38, R3841). Danziger saw no facts in the robbery/murder to suggest explosive disorder or bipolar disorder. (V38, R3842). Hiding evidence, disposing of the body, and fleeing the jurisdiction show organization, not an incoherent, psychotic state. (V38, R3842).

Lebron's behavior after the murder showed lack of remorse, another indicator of antisocial personality disorder. (V38, R3844). Lebron orchestrated the pawning of items and stripping the truck. Committing a crime for financial gain is an element of antisocial behavior. (V38, R3844).

In Danziger's opinion, Lebron was not under the influence of an extreme mental or emotional disturbance at the time of the murder. (V38, R3845). Further, Lebron's actions of directing the events after the murder disposal of the body, concealing the victim's identity - show ability to appreciate the criminality of the behavior. (V38, R3846).

The fact the Gribben assault was 2 weeks before the Oliver murder and the Nasser assault was 1-2 weeks after the Oliver murder shows a repeat pattern of criminal behavior. The fact a weapon is used would show a disregard for the safety of others. Those behaviors are consistent with a diagnosis of antisocial personality. (V38, R3851).

Dr. Danziger's Axis 1 diagnosis of polysubstance abuse was based on Lebron's self-report that he abused alcohol, cannabis

and cocaine. (V38, R3846). Notwithstanding, there was no indication drugs or alcohol were a factor in the robbery/murder. (V38, R3847). Lebron's behavior of luring the victim, concealing the firearm, taking items for financial gain, and hiding evidence after the murder did not suggest intoxication or impaired mental faculties due to substance abuse. (V38, R3847). Lebron denied any involvement in the robbery/murder, so Danziger was not able to inquire into the area of impairment at the time. (V38, R3848). Danziger was aware Lebron's mother consumed drugs while pregnant, but there was no indication of alcohol abuse or fetal alcohol syndrome. (V38, R3853).

Lebron's learning disabilities as a youth did not have a correlation to his ability to plan and execute the crime. (V38, R3849). Margo Lacey, a psychology intern, indicated that testing reflected indications of mild organic impairment. (V38, R3866, 3874). The other professionals who examined Lebron and did not note organic impairment included Dr. Novick, Ph.D., who conducted a neuropsychological assessment; Dr. Lepp, a psychiatrist; and Dr. Orloff, psychiatrist. (V38, R3874).

Lebron was living independently after he turned age 18 and moved from New York to Florida. (V38, R3849-50). Sometimes he lived alone. Sometimes he lived with girlfriends. Lebron's mother supported him financially from New York. (V38, R3850). Although Lebron lived an irresponsible lifestyle, he was a man

of roughly average intelligence and was not grossly immature. (V38, R3850).

On March 13, 2012, the collateral proceeding trial court entered its' order denying all relief. That order is discussed in the argument section of this brief in connection with the individual claims for relief argued on appeal.

SUMMARY OF THE ARGUMENT

Lebron's brief contains two broad claims of ineffectiveness of counsel at the guilt and penalty phases of his capital trial. Each claim consists of multiple specifications of ineffective assistance, each of which was addressed in extensive detail by the collateral proceeding trial court. Each of those claims is highly fact-specific. The collateral proceeding court evaluated each individual claim under the conjunctive deficient performance-resulting prejudice standard of *Strickland v. Washington*, 466 U.S. 668 (1984), and denied relief. That result is supported by competent substantial evidence, and turns on credibility determinations made by the court that heard and saw the various witnesses testify. The denial of relief should be affirmed in all respects.

ARGUMENT

I. THE GUILT PHASE INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS

THE LEGAL STANDARD FOR INEFFECTIVENESS CLAIMS

In order to prevail on a claim of ineffective assistance of

counsel, a defendant must show both (1) that trial counsel's performance was deficient; and (2) that the deficient performance prejudiced the defendant so as to deprive him of a fair trial. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

To establish the deficiency prong under *Strickland*, the defendant must prove that "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.* The defendant carries the burden to "overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" *Id.* at 689, 104 S.Ct. 2052 (*quoting Michel v. Louisiana*, 350 U.S. 91, 101, 76 S.Ct. 158, 100 L.Ed. 83 (1955)). Counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.' *Hurst v. State*, 18 So.3d 975, 1008 (Fla.2009) (*quoting Strickland*, 466 U.S. at 691, 104 S.Ct. 2052). With respect to the investigation and presentation of mitigation evidence, the United States Supreme Court observed in *Wiggins v. Smith*, 539 U.S. 510, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003), that "*Strickland* does not require counsel to investigate every conceivable line of mitigating evidence no matter how unlikely the effort would be to assist the defendant at sentencing. Nor does *Strickland* require defense counsel to present mitigating

evidence at sentencing in every case." *Wiggins,* 539 U.S. at 533, 123 S.Ct. 2527. Rather, in deciding whether trial counsel exercised reasonable professional judgment with regard to the investigation and presentation of mitigation evidence, a reviewing court must focus on whether the investigation resulting in counsel's decision not to introduce certain mitigation evidence was itself reasonable. *Id.* at 523, 123 S.Ct. 2527; *Strickland,* 466 U.S. at 690-91 104 S.Ct. 2052.

Second, the defendant must prove that the deficient performance resulted in prejudice. *Id.* Thus, the defendant must demonstrate that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694, 104 S.Ct. 2052.

As the United States Supreme Court recently summarized:

> There is no dispute that the clearly established federal law here is *Strickland v. Washington.* In *Strickland,* this Court made clear that "the purpose of the effective assistance guarantee of the Sixth Amendment is not to improve the quality of legal representation ... [but] simply to ensure that criminal defendants receive a fair trial." 466 U.S., at 689, 104 S.Ct. 2052. Thus, "[t]he benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Id.*, at 686, 104 S.Ct. 2052 (emphasis added). The Court acknowledged that "[t]here are countless ways to provide effective assistance in any given case," and

> that "[e]ven the best criminal defense attorneys would not defend a particular client in the same way." *Id.*, at 689, 104 S.Ct. 2052.
>
> Recognizing the "tempt[ation] for a defendant to second-guess counsel's assistance after conviction or adverse sentence," *ibid.*, the Court established that counsel should be "strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment," *Id.*, at 690, 104 S.Ct. 2052 . To overcome that presumption, a defendant must show that counsel failed to act "reasonabl[y] considering all the circumstances." *Id.*, at 688, 104 S.Ct. 2052. The Court cautioned that "[t]he availability of intrusive post-trial inquiry into attorney performance or of detailed guidelines for its evaluation would encourage the proliferation of ineffectiveness challenges." *Id.*, at 690, 104 S.Ct. 2052.
>
> The Court also required that defendants prove prejudice. *Id.*, at 691-692, 104 S.Ct. 2052. "The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.*, at 694, 104 S.Ct. 2052. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* That requires a "substantial," not just "conceivable," likelihood of a different result. *Richter*, 562 U.S., at ----, 131 S.Ct., at 791.

Cullen v. Pinholster, 563 U.S. ___, 131 S.Ct. 1388, 1403 (2011). A defendant who raises a claim that counsel failed to present mitigation in the penalty phase must show that counsel's error deprived him of a reliable penalty phase proceeding. *Henry v. State*, 937 So. 2d 563, 569 (Fla. 2006).

THE INDIVIDUAL CLAIMS

On pages 6-38 of his brief, Lebron raises nine (9) separately denominated claims of ineffective assistance at the

guilt phase of his capital trial. The standard of review applied by this Court when reviewing a trial court's ruling on a post-conviction relief motion following an evidentiary hearing is: "As long as the trial court's findings are supported by competent substantial evidence, 'this Court will not "substitute its judgment for that of the trial court on questions of fact, likewise of the credibility of the witnesses as well as the weight to be given to the evidence by the trial court."'" *Blanco v. State*, 702 So. 2d 1250, 1252 (Fla. 1997), *quoting Demps v. State*, 462 So. 2d `074, 1075 (Fla. 1984) *quoting Goldfarb v. Robertson*, 82 So. 2d 504, 506 (Fla. 1955); *Melendez v. State*, 718 So. 2d 746 (Fla. 1998).

A. THE MOTION TO SUPPRESS CLAIM

On pages 7-12 of his brief, Lebron says that guilt phase counsel was ineffective for not moving to suppress evidence recovered from the stolen car Lebron was riding in when he was arrested in New York. The collateral proceeding trial court denied relief on this claim:

> Mr. Lebron raises the following allegations: After the murder, police officers in New York were informed that he and other suspects were in the area. On December 5, 1995, Detective Martin Rodriguez of the New York City Police Department received a call from Florida authorities about the suspects' possible location and the vehicle in which they were traveling. As Detective Rodriguez approached the car, he saw Mr. Lebron in the front passenger seat, ordered him and the other suspects (Howard Kendall and Stacy Kirk) out of the car, and arrested Mr. Lebron and Mr. Kendall. The

vehicle was searched, and a day planner with an identification card for Larry N. Oliver was located under the console, under the dash, between the two front seats. In addition, four shotgun shells were located in the closed center console.

Mr. Lebron alleges there was no search warrant for the vehicle, so the justification for the search must rely upon the search incident to arrest exception to the Fourth Amendment. He argues the vehicle was searched "by a large number of law enforcement officers" after he and the other occupants were taken into custody and secured, and further argues that "such a search ... may only be conducted of the area within the immediate control of the person being arrested" citing *Chimel v. California,* 395 U.S. 752 (1969), *and Arizona v. Gant,* 556 U.S. 332 (2009). His position is that since he and the others were already in custody, no part of the vehicle was within their immediate control, and the search incident to arrest exception did not apply. He concludes counsel should have filed a Motion to Suppress the fruits of the illegal search, including items found in the vehicle and any statements he and the others made. Noting that he was "only convicted of felony murder and was acquitted of being a principal to premeditated murder, with a specific jury finding that he was not the person who shot the victim," he argues that any evidence connecting him to the robbery was "especially important to the State's conviction ... under a theory of felony murder."

Detective Rodriguez conducted the stop on December 5, 1996 and the trial that resulted in Mr. Lebron's conviction took place in February 1998, eleven years before the United States Supreme Court issued its opinion in *Gant.* Counsel cannot be held ineffective for failing to anticipate a change' in the law. *Hitchcock v. State,* 991 So. 2d 337, 348 (Fla. 2008); *Cherry v. State,* 781 So. 2d 1040, 1053 (Fla. 2000).

Furthermore, the holding in *Gant* is not as narrow as Mr. Lebron states it. While the Court did hold that *Chimel* authorizes a search "only when the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search," it goes on to conclude that "circumstances unique to the vehicle context justify a search incident to a lawful

> arrest when it is `reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle.' *Arizona v. Gant*, 556 U.S. at 343, *citing Thornton v. US.*, 541 U.S. 615, 632 (2004). In the instant case, Detective Rodriguez knew the murder suspects were driving a stolen Chevy Blazer and might be located at a bar near the police precinct. There was an active arrest warrant for Mr. Lebron, who had been indicted for the murder and robbery three days earlier, on December 2, 1996. Therefore, it was reasonable for Detective Rodriguez to believe the vehicle contained relevant evidence, and the search incident to arrest was proper.
>
> Even if the day planner and five shotgun shells had been suppressed, the evidence against Mr. Lebron was strong. He owned the shotgun that killed the victim, threatened the witnesses, and told others that he killed the victim. In addition, Mark Tocci, Charissa Wilburn, Danny Summers, Dwayne Sapp, and Mary Lineberger testified that they heard him boasting about the murder, helped him clean up the scene, and helped him dispose of the victim's body and property. Their testimonies provided incriminating evidence, which was sufficient to support his convictions for murder and robbery.
>
> Based on the foregoing, there is no reasonable probability that a Motion to Suppress would have been successful or that the outcome of the trial would have been different if counsel had filed it. Therefore, Mr. Lebron cannot establish deficient performance or prejudice.

(V13, R1874-77). (footnotes omitted). Those findings are correct and should not be disturbed.

In addition to the grounds for denial of relief found by the trial court, Lebron, Kirk and Kendall were driving a stolen vehicle. Det. Rodriquez testified that he was searching the Blazer **because it was stolen** and because the occupants were suspected of murder. Under *Gant*, the search incident to arrest

for the murder and car theft was proper.

Moreover, Lebron does not acknowledge the "inevitable discovery" exception to the warrant requirement. The police had an active warrant for Defendant, who had already been indicted on murder and robbery charges. Kendall was driving a stolen vehicle. The car did not belong to any of the three persons in the vehicle and would have been impounded and held as evidence in the car theft case. Thus, not only was a search incident to arrest on the murder charges appropriate, but also an inventory search was warranted. *See Fitzpatrick v. State*, 900 So. 2d 495, 514 (Fla. 2005); *Jeffries v. State*, 797 So. 2d 573, 577-578 (Fla. 2001) (normal investigative measures inevitably would have revealed evidence as a matter of routine police procedure). In *Nix v. Williams*, 467 U.S. 431, 448 (1984), the United States Supreme Court adopted the "inevitable discovery" exception to the "fruit of the poisonous tree" doctrine. Under this exception, "evidence obtained as the result of unconstitutional police procedure may still be admissible provided the evidence would ultimately have been discovered by legal means." *Maulden v. State*, 617 So. 2d 298, 301 (Fla. 1993). In adopting the inevitable discovery doctrine, the Supreme Court explained, "Exclusion of physical evidence that would inevitably have been discovered adds nothing to either the integrity or fairness of a criminal trial." *Nix*, 467 U.S. at 446. In order to come within

the inevitable discovery doctrine, the State must demonstrate "that at the time of the constitutional violation an investigation was already under way." *Moody v. State*, 842 So. 2d 754, 759 (Fla. 2003). In other words, the case must be in such a posture that the facts already in the possession of the police would have led to this evidence notwithstanding the police misconduct. *See Moody*, 842 So. 2d at 759. This case falls well within those parameters as well, and there is no basis for finding ineffectiveness of trial counsel because there is no theory under which the evidence would have been suppressed.

B. FAILURE TO CALL THE SPEARS' AS WITNESSES

On pages 13-14 of his brief, Lebron says that counsel was ineffective for not calling Robert and/or Charlotte Spears to testify about an alleged "sighting" of the victim's truck. Lebron presented no evidence on this claim, which fails for lack of proof. Pursuant to *Strickland*, a defendant must prove both deficient performance and prejudice. Lebron did not present the testimony of Mr. and Mrs. Spears that they would have been available to testify at the 2005 penalty phase testimony and the content of their statements. Postconviction counsel Mr. Mills stated that both he and his investigator made attempts to locate Robert and Charlotte Spears, and were unsuccessful in doing so. (V35, R3275). Mr. Norgard touched briefly on this issue at the evidentiary hearing and stated that he did not have a specific

recollection of Robert and Charlotte Spears. (V38, R3710). In addition, Norgard said, "I know the State did not call them (in trial number one) and I know from a tactical and strategic standpoint, we felt it was important to have first and last closing argument. I do not recall making a - - since I can't even remember the Spears, I do not recall making any kind of conscious decision of could we call them or not." (V38, R3712). Because of that failure of proof, Lebron cannot show deficient performance or prejudice under *Strickland. See Melton v. State*, 949 So. 2d 994, 1003 (Fla. 2006) ("If a witness would not have been available to testify at trial, then the defendant will not be able to establish deficient performance or prejudice from counsel's failure to call, interview, or investigate that witness.") (*quoting Nelson v. State*, 875 So. 2d 579, 583 (Fla. 2004)).

In denying relief, the collateral proceeding trial court said:

> Robert Norgard, a Florida attorney, and Harvey Slovis, a New York attorney appearing *pro hac vice,* represented Mr. Lebron during the first trial, which ended in a mistrial. At the beginning of the retrial, Mr. Norgard was involved in another capital case, so Mr. Slovis handled the pre-trial and guilt phases alone. *Lebron v. State,* 799 So. 2d 997, 1000 (Fla. 2001). However, Mr. Lebron did not call Mr. Slovis to be a witness at the evidentiary hearing. He did call Mr. Norgard, who testified as follows: He had no recollection of Robert or Charlotte Spears, but believed he and Mr. Slovis did everything they needed to do to present a potential case. If a potential

> witness had provided any substantive testimony, he would have had the deposition transcribed.
>
> Mr. Lebron failed to present any testimony at the evidentiary hearing to support a finding that Robert and Charlotte Spears were available to testify or that their testimony would have been either exculpatory or impeaching. Therefore, he fails to overcome the presumption that under the circumstances, counsel's decision not to call these witnesses constituted sound trial strategy, and fails to establish either deficient performance or prejudice.

(V13, R1878). Those findings are correct, and should not be disturbed.

C. THE JURY SELECTION CLAIM

On pages 14-24 of his brief, Lebron says that guilt phase counsel was ineffective in various ways during jury selection. The collateral proceeding trial court denied relief on this claim:

> Mr. Lebron alleges trial counsel Harvey Slovis was not qualified to conduct a death penalty case and even acknowledged he was "incompetent" to pick a jury because he did "not know any of the questions to ask." He raises three sub-claims, which will be addressed below. The State argues all jury selection issues are procedurally barred.
>
> On direct appeal, the Florida Supreme Court addressed the denial of a Motion for Continuance that had been filed when co-counsel Robert Norgard was unavailable to participate in the second trial, and concluded that Mr. Slovis was well-qualified to proceed based on his presence and participation in the first trial. *Lebron v. State,* 799 So. 2d 997, 1018 (Fla. 2001). The Court specifically noted that the undersigned judge ruled he would question the prospective jurors in accordance with "the standards of *Witt v. Wainwright*",[9] outlined the procedure to be employed to ensure that an adequate death penalty voir dire would occur, and

continued the proceedings for 24 hours. *Lebron,* 799 So. 2d at 1018. The Court further found that Mr. Slovis asked appropriate questions during jury selection and made appropriate objections. *Id.* Nevertheless, the three subclaims will be addressed on the merits.

> [FN9] *Witt v. Wainwright,* 714 F.2d 1069 (11th Cir. 1983), *modified 723* F.2d 769 (11th Cir. 1984).

First, Mr. Lebron alleges counsel failed to properly object to the striking of Henry Simmons, one of only two African-Americans in the venire, after Mr. Simmons said he had to take the bus to the courthouse and considered it a financial burden to travel to the courthouse every day for an extended period. Mr. Lebron acknowledges that counsel objected and pointed out that this left only one prospective African-American juror, but argues counsel failed to question Mr. Simmons regarding the extent of his financial hardship and whether the standard juror compensation would cover his expenses.[10] He also argues counsel failed to move for the trial court to provide bus fare, contact jury services to find out what arrangements could be made, or ask the trial court to order the Sheriff's office to transport Mr. Simmons.

Mr. Lebron cites no authority for his argument that counsel should have pursued alternate transportation to enable Mr. Simmons to attend jury duty, and this Court finds none. It is highly unlikely that funds would have been available in the trial court's budget to provide bus fare for one particular juror or that the Sheriff would have been willing to transport him. Whether any of the suggested accommodations would have been possible or would have alleviated Mr. Simmons' financial hardship, the fact remains that counsel did object when this potential juror was stricken from the panel." Therefore, the issue was properly preserved for appeal, and he cannot establish prejudice.

Furthermore, Mr. Lebron does not allege or establish that as a result of the striking of Mr. Simmons, an actually biased juror sat on the panel. Therefore, again, he cannot establish prejudice. *Carratelli v. State,* 961 So. 2d 312, 323 (Fla. 2007).

Second, Mr. Lebron alleges counsel failed to ensure that prospective jurors were properly informed as to the law governing the penalty phase. He argues counsel did not ensure they were informed that under the law, "they are never required to vote for death," citing *Henyard v. State,* 689 So. 2d 239, 249-250 (Fla. 1996). Instead, he argues, jurors were repeatedly informed that if the aggravators outweighed the mitigators, it was "the law" or "proper" or "incumbent" to vote to impose the death penalty and that jurors were "duty bound" to vote for death.

> [FN10] He notes that Mr. Simmons stated it cost him $4-5 per day to take the bus to court; the standard juror compensation is $15 for the first three days and $30 per day thereafter.
>
> [FN11] *See* 1998 record on appeal, volume 18, page 200.

As the State argues, Mr. Lebron takes these statements out of context. The record demonstrates that the jury was properly instructed on the law pertaining to the penalty phase. Furthermore, Mr. Lebron cites the 1998 record on appeal, but the 1998 death sentence was vacated. He does not challenge the information given to prospective jurors prior to the 2005 penalty phase, which resulted in the sentence of death that was affirmed by the Florida Supreme Court. Therefore, he cannot establish prejudice.

Third, Mr. Lebron alleges counsel failed to move to strike the jury panel or properly rehabilitate the panel after prospective juror Thomas Rombach made statements indicating he would give more credit to a police officer's testimony. Mr. Rombach stated "it would be a little hard to believe" an officer was not telling the truth. Mr. Lebron acknowledged that counsel moved to strike this prospective juror but argues counsel did not cite Florida law addressing the problem, move to strike the panel, or rehabilitate the rest of the panel. He cites case law indicating it is error to fail to excuse jurors who would give greater weight to an officer's testimony.

After 12 jurors and one alternate juror were selected,

> they were excused and left the courtroom. Mr. Rombach was questioned with a later group, of which only one juror, Denise Annas, and two alternates, Melba Anderson and Rebecca Riehm, would have heard his statement. Counsel did object to the prosecutor's line of questioning regarding Mr. Rombach's position on the credibility of police officers, but the Court denied his challenge for cause and he used a peremptory strike. There is no reasonable probability that the Court would have granted a mistrial, since the Court reminded counsel that Florida law permits jurors to give great weight to the testimony of a police officer. Furthermore, Defendant does not establish that an actually biased juror sat on the panel as a result of counsel's failure to rehabilitate the other potential jurors in Mr. Rombach's group; therefore, he cannot establish that he was prejudiced by counsel's failure to do so. *Carratelli v. State,* 961 So. 2d 312, 323 (Fla. 2007).

(V13, R1878-82). Those findings are supported by competent substantial evidence, and should not be disturbed.

D. THE "IMPROPER OPENING" CLAIM

On pages 24-28 of his brief, Lebron says that counsel were ineffective for not moving for a mistrial based on an allegedly "improper" opening statement. The collateral proceeding trial court denied relief:

> The purpose of openings statements is to provide counsel with an opportunity to outline what he in good faith expects to be established by the evidence presented at trial. *Perez v. State*, 919 So. 2d 347, 363 (Fla. 2005). Ms. Ortiz, Ms. Berrios, and Mr. Bullard did testify during the first trial in 1997, which resulted in a mistrial, and the prosecutor might in good faith have anticipated calling them again at the second trial in 1998, which resulted in the conviction. Mr. Lebron does not allege or establish that the prosecutor's statements were misleading or made in bad faith, and there is no reasonable probability that a Motion for Mistrial would have been

granted on this basis.

> Furthermore, the testimony of other witnesses shows that Mr. Lebron asked people to lie for him. The State called Mr. Lebron's friend Victor Rios for the purpose of admitting into evidence letters that Mr. Lebron wrote to Mr. Rios and Christina Charbonier, asking Christina to lie and create an alibi. In addition, although at trial Danita Sullivan denied being afraid of Mr. Lebron, her prior statement to law enforcement indicated that she was afraid of him and his mother, and that they had threatened her if she ever did anything to betray them." Therefore, Mr. Lebron cannot establish that he was prejudiced by a brief reference to witnesses **who would have provided similar testimony** but ultimately were not called by the State.

(V13, 1883-84). (emphasis added, footnotes omitted). Those findings should not be disturbed.

In addition, the State listed Jesenia Ortiz, and Carmen Berrios in the Supplemental Witness List filed June 23, 1997. (1998ROA V1, R90). The State listed Martin Bullard in the Supplemental Witness List filed October 29, 1997. (1998ROA V1, R90). The record is not clear why the witnesses were not called. The record shows the State intended to call Mr. Bullard and ten additional witnesses, but there was a tornado in Osceola County and some of the witnesses were unavailable. (1998ROA, V24, R1391).

Lebron erroneously assumes that testimony about his efforts to create an alibi would not be admissible. In fact, the court allowed similar testimony from Christina Charbonnier that Lebron ask her to contrive an alibi. In its opinion on direct appeal,

this Court notes:

> While in jail, Lebron wrote letters to Christina, who did not respond to them. In the letters, which were written in his own hand, Lebron stated that he loved Christina, called her his fiancee, and referred to her testifying as an alibi witness for him. About a week before trial, however, Christina went to the Osceola County Sheriff's office with the information to which she testified (as a State's witness) at trial. She stated that Lebron threatened her at that time, so she had sought advice about what she should do. She decided to testify, because she "started thinking about if anything happened to, if anything happened to my daughter I would want somebody to come forward."

Lebron v. State, 799 So. 2d 997, 1003 (Fla. 2001). Counsel cannot be deficient for failing to object to a meritless issue. In any event, there is no prejudice by the fact Jesenia Ortiz did *not* testify to negative information. The trial court instructed the jury that it must decide the case only on the evidence at trial. (1998ROA, V26, R1777). There is no basis for relief.

E. THE "FAILURE TO IMPEACH WITNESSES" CLAIM

On pages 28-31 of his brief, Lebron says that trial counsel was ineffective for not impeaching various witnesses. The collateral proceeding trial court denied relief:

> Mr. Lebron alleges counsel did not have transcripts from the first guilt phase trial to impeach state witnesses Mark Tocci, Charissa Wilburn, and Danny Summers; copies of Danita Sullivan and Charissa Wilburn's convictions for felonies and crimes of dishonesty; or a transcript of Charissa Wilburn's plea colloquy. Therefore, he argues, counsel was unable to attack the witnesses' credibility or point out discrepancies in their trial testimony as compared to

> their statements to police, depositions, or testimony from the previous trial.
>
> As the State argues in its July 16, 2009 response, this claim is purely conclusory. Mr. Lebron fails to explain exactly how counsel could have impeached the witnesses or otherwise refuted their testimony. *Oquendo v. State*, 2 So. 3d 1001, 1004 (Fla. 4th DCA 2008), and cases cited therein; *Johnson v. State, 70* So. 3d 472, 483 (Fla. 2011) (because Johnston presented only bare conclusory allegations on several issues, he was not entitled to an evidentiary hearing on those claims and the lower court did not err in issuing a summary denial).

(V13, R1884). Lebron has not carried his burden of proof, as the trial court found. That result should not be disturbed.

F. THE "OTHER CRIMES" CLAIM

On pages 31-34 of his brief, Lebron says that trial counsel was ineffective with respect to testimony about other "criminal acts" committed by the defendant. This claim has no factual basis, as the collateral proceeding trial court found:

> Mr. Lebron alleges counsel failed to timely object to the testimony of Mark Tocci that he (Lebron) had bragged about stealing a car in the past, for which he went to jail in Orange County. He acknowledges counsel moved to strike the comment, which was granted, but did not object to the follow up question, about whether Mr. Tocci took him seriously.
>
> Mr. Lebron cannot establish prejudice from Mr. Tocci's response to the second question, because Mr. Tocci responded "no." Furthermore, Mr. Lebron leaves out part of the exchange: when Mr. Tocci was asked whether Mr. Lebron ever bragged about things he did in the past, counsel did object to the question, but the Court overruled. [FN18] Therefore, the issue was preserved for appeal. As the State argues, it is only when an objection is sustained that counsel must move

> for a mistrial to preserve the issue for appeal. *Robinson v. State,* 989 So. 2d 747, 750 (Fla. 1st DCA 2010); *Simpson v. State,* 418 So. 2d 984 (Fla. 1982). There is no reasonable probability that the Court would have granted a mistrial over an objection it had overruled. Therefore, Mr. Lebron cannot establish that he was prejudiced.

(V13, R1885). This claim has no legal basis, and the denial of relief should be affirmed.

G. FAILURE TO SUBPOENA WITNESSES

On pages 34-36 of his brief, Lebron says that trial counsel should have called witness Roswell Summers as a witness to impeach Danny Summers. The collateral proceeding trial court denied relief:

> In the first guilt phase trial, the State called Roswell Summers, who testified that his son, witness Danny Summers, initially told him about witnessing a murder at Church Street Station, but later said that he witnessed a shooting at a house. During the second guilt phase trial, the State called Danny Summers as a witness, but did not call Roswell Summers. Mr. Lebron claims counsel was deficient for failing to (1) subpoena and call Roswell Summers as a witness; (2) file a motion to establish the unavailability of the witness and introduce his former testimony; and (3) understand the proper procedure so as to ensure counsel could properly impeach the State's witness through the testimony of other witnesses. Mr. Lebron argues Danny was the only eyewitness who was not also charged with and convicted of a crime, and his credibility was essential to the State's case.
>
> Mr. Norgard testified at the evidentiary hearing that he did not know why the defense did not use Roswell to impeach Danny during the retrial. He admitted it was pure speculation on his part, but surmised that it was a sound tactical decision. If Mr. Slovis had called Roswell Summers as a witness during the retrial, the defense would have lost the right to give the first

> and last closing argument. Danny had already admitted that he waited until the next day to tell his parents about the murder, so Roswell's testimony would not have added anything new.
>
> Mr. Lebron failed to present any testimony at the evidentiary hearing to support a finding that Roswell Summers was available to testify at the 1998 retrial or that his testimony would have been either exculpatory or impeaching. Therefore, he fails to overcome the presumption that under the circumstances, counsel's decision not to call this witness constituted sound trial strategy, and fails to establish either deficient performance or prejudice.

(V13, R1885-87). (footnotes omitted). In any event, as the moving party, Lebron has the burden of proof. As such, since the evidence is absent, Lebron loses. *Gore v. State*, 964 So. 2d 1257, 1270 (Fla. 2007). There is no basis for relief.

H. THE FAILURE TO OBJECT TO "SPECULATION"

On pages 36-37, Lebron says that trial counsel was ineffective for not objecting to testimony about the location of the murder weapon. This claim has no factual basis because counsel did object, as the trial court found:

> Mr. Lebron alleges counsel failed to object when Detective Rodriguez was asked about his search for the shotgun suspected of being the murder weapon. The State asked whether it was possible the shotgun was in New York, to which he responded, "as far as I'm concerned, it probably is." Mr. Lebron argues Detective Rodriguez based his belief on hearsay statements made by Stacie Kirk, which were not corroborated by the evidence.
>
> This claim is refuted by the record. Counsel objected twice to the hearsay statements elicited by the prosecution regarding the location of the shotgun. [FN20]

[FN20] *See* 1998 trial transcript, volume 24, page 1364.

(V13, R1887). This claim is not a basis for relief.

I. "CUMULATIVE ERROR"

On pages 37-38 of his brief, Lebron says that he is entitled to relief based on "cumulative error." However, unless some individual errors can be shown, there can be no "error" to "cumulate." *See Harvey v. State*, 946 So. 2d 937 (Fla. 2006); *See also Downs v. State*, 740 So. 2d 506 (Fla. 1999) (where allegations of individual error are without merit, a cumulative error argument based thereupon must also fail). The collateral proceeding trial court denied relief for that reason:

> This Court has found no merit to the allegations of deficient performance or prejudice in any of the foregoing claims and therefore, finds no cumulative error.

(V13, R1887). That finding should not be disturbed.

II. THE PENALTY PHASE INEFFECTIVENESS CLAIMS

On pages 38-80 of his brief, Lebron raises eight (8) separate claims of penalty phase ineffectiveness of counsel. The standard of review applied by this Court when reviewing a trial court's ruling on a post-conviction relief motion following an evidentiary hearing is: "As long as the trial court's findings are supported by competent substantial evidence, 'this Court will not "substitute its judgment for that of the trial court on

questions of fact, likewise of the credibility of the witnesses as well as the weight to be given to the evidence by the trial court."'" *Blanco v. State*, 702 So. 2d 1250, 1252 (Fla. 1997), *quoting Demps v. State*, 462 So. 2d 1074, 1075 (Fla. 1984) *quoting Goldfarb v. Robertson*, 82 So. 2d 504, 506 (Fla. 1955); *Melendez v. State*, 718 So. 2d 746 (Fla. 1998). As with the guilt phase ineffectiveness claims, Lebron must establish both deficient performance and prejudice in order to prevail on his penalty phase ineffectiveness of counsel claims. To the extent that Lebron invokes the "ABA Guidelines" as authority to support his claims, those guidelines are merely that -- they do not establish a "standard of care" or any other binding directive. *Butler v. State/Tucker*, 37 Fla. L. Weekly S513, ___ n.8 (Fla. July 12, 2012).

A. THE MITIGATION INVESTIGATION

On pages 42-49 of his brief, Lebron says that counsel did not conduct a "reasonably competent" mitigation investigation and presentation. With respect to the mental state-based ineffectiveness claims (which are interspersed throughout the brief), Lebron cannot carry his burden of proof as to either *Strickland* prong. Mr. Norgard's testimony at the evidentiary hearing, the record from the 2005 penalty phase, and the above summary show that Norgard did a thorough investigation of Lebron's background after which he made reasonable strategic

decisions on what evidence to present and how to present the evidence. Mr. Norgard did not present testimony from Dr. Dee regarding neurological defects because it would open the door to the state expert explaining, as Dr. Danziger did at the evidentiary hearing, that Lebron is antisocial, as Dr. Dee said. Lebron has failed to prove deficient performance.

Lebron has also failed to prove the prejudice prong of *Strickland*. Dr. Cunningham's and Dr. Eisenstein's testimony was nothing more than a recital of: (1) hearsay, much of which was rebutted by the actual testimony of Mrs. Ortiz at the penalty phase and the actual records; and (2) hearsay, much of which is inadmissible pursuant to *Dufour;* (3) redundant, nothing more than a recital of what was contained in the records before this Court and (4) internally redundant as the Florida Supreme Court found in *Darling*. Dr. Eisenstein's testimony was refuted by both the records of Lebron's psychological history and by Dr. Danziger. Dr. Eisenstein's diagnoses of intermittent explosive disorder and bipolar disorder are supported by nothing in the voluminous upon which he relied or the facts of this case. As Dr. Danziger testified, the robbery/murder show cunning, planning, and ability to effectuate the plan. When Mr. Oliver said he was looking for spinners, Lebron cleverly came up with a story to lure him back to the house. Lebron had Charissa hide the gun and bring it into the house. Lebron called Oliver to

come down the hallway, at which point the victim was met at gunpoint. Lebron then orchestrated disposal of the body, the clean up, and the pawning of Oliver's possessions. The Florida Supreme Court recognizes the trial court's superior vantage point in assessing the credibility of witnesses. *Valle v. State*, 70 So. 3d 530, 541 (Fla. 2011); *Durousseau v. State*, 55 So. 3d 543, 562 (Fla. 2010). The testimony of Mr. Norgard and Dr. Danziger was supported by the documents in the record and the facts of this case. Dr. Cunningham's testimony was nothing more than a cumulative recital of the evidence from the 2005 penalty phase with pedantic labels. Dr. Eisenstein's testimony was nothing short of incredible. Mr. Norgard was not deficient and there was no prejudice.

The collateral proceeding trial court made extensive findings with respect to this claim, all of which are supported by competent substantial evidence:

> Mr. Lebron alleges counsel failed to use a mitigation specialist or investigator to obtain comprehensive social, biological, or psychological histories; contact family members; consult with counselors and mental health experts who had treated him and his family; consult with experts such as a psychologist, psychiatrist, neuropsychologist, and neurologist to learn about any available mental health mitigation; conduct a reasonably competent investigation into his family and background; conduct a responsible investigation into his activities and acquaintances from the time he left the juvenile system until the time of the murder; or determine the extent of his drug abuse.

He argues counsel could have established the following: (1) he has neurological impairments that affect his cognitive abilities, including his critical decision-making skills, judgment, and reasoning; (2) he suffers from major psychiatric illness, including bipolar disorder, attention deficit disorder, reactive attachment disorder, and intermittent explosive disorder; (3) he suffered from significantly adverse development while growing up; (4) his adverse development caused significant and long-standing problems that continued through the time of the homicide; (5) he has a history of alcohol and substance abuse that continued through the time of the homicide; (6) his mother was frequently violent with him; and (7) his mother did not adequately care for him.

It is Mr. Lebron's burden to show that counsel's ineffectiveness deprived him of a reliable penalty phase proceeding. *Asay v. State,* 769 So. 2d 974, 985 (Fla. 2000), *quoting Rutherford v. State, 727* So. 2d 216, 223 (Fla. 1998). Furthermore, the United States Supreme Court held in *Wiggins v. Smith,* 539 U.S. 510 (2003):

> [O]ur principal concern in deciding whether [counsel] exercised "reasonable professional judgment[t]" is not whether counsel should have presented a mitigation case. Rather, we focus on whether the investigation supporting counsel's decision not to introduce mitigating evidence ... was itself reasonable. In assessing counsel's investigation, we must conduct an objective review of their performance, measured for "reasonableness under prevailing professional norms," which includes a context-dependent consideration of the challenged conduct as seen "from counsel's perspective at the time."

Id. at 522-523.

The following testimony was adduced at the evidentiary hearing. Mr. Norgard hired Dr. Henry Dee to conduct a clinical interview of Mr. Lebron. [FN21] Dr. Dee diagnosed Mr. Lebron with organic personality syndrome

and deemed him to have some frontal lobe impairment. Dr. Dee described Mr. Lebron as having the "coldest antisocial personality disorder" that he had ever seen.

> [FN21] Mr. Norgard used Dr. Dee in numerous cases dating back to 1985 and up until the doctor's death a few years ago.

Mr. Norgard stated that Dr. Dee did not testify at the 2005 penalty phase for a number of reasons. First, Mr. Lebron denied having any guilt as to the homicide and associated crimes involving the aggravating factors, and Dr. Dee was unable to render an opinion as to his extreme mental or emotional disturbance at the time of offense. Second, he did not want to expose Mr. Lebron to a compelled mental health examination based upon Dr. Dee's opinion that Mr. Lebron had the "coldest antisocial personality disorder" that he had ever seen. Dr. Dee found that Mr. Lebron was cold but reacted to things emotionally; he also found Mr. Lebron was very calculating and very rational in how he acted on those emotions. Mr. Norgard stated that based upon the *Dillbeck* [FN22] decision, the State had a right to a compelled mental health examination. Lastly, Mr. Norgard stated it was a strategic decision to not have Mr. Lebron evaluated by a State expert. Mr. Norgard discussed this strategy with Mr. Lebron, who agreed that he did not want to be evaluated by a State expert.

> [FN22] *Dillbeck v. State,* 964 So. 2d 95 (Fla. 2007)

Mr. Norgard stated that his trial strategy was to present mitigation evidence through the testimony of Mr. Lebron's mother, Jocelyn Ortiz, which consisted of the following evidence: the way he was raised; his life history; his adjustment or disadjustment (sic) to be institutionalized; as well as a mother who abused drugs, worked in an adult industry, was very absent and left him in the care of others, subjected him to prenatal alcohol and drugs.

Mr. Norgard's decision not to call Dr. Dee as an expert witness was a reasonable strategic decision. *Miller v. State,* 926 So. 2d 1243, 1252 (determining

that defense counsel reasonably chose not to present certain mental health records through the testimony of a psychologist and instead presented the information through the testimony of the defendant's family members); *Gaskin v. State,* 822 So. 2d 1243, 1248 (Fla. 2002) ("trial counsel will not be held to be deficient when she makes a reasonable strategic decision to not present mental mitigation testimony during the penalty phase because it could open the door to other damaging testimony.").

In order to provide the effective assistance guaranteed under the Sixth Amendment, an attorney has a strict duty to conduct a reasonable investigation of a defendant's background for possible mitigating evidence, including presenting the defendant's medical history, educational history, employment and training history, family and social history, prior adult and juvenile correctional experience, and religious and cultural influences. However, as discussed in *Douglas v. State, 37* Fla. L. Weekly S13 (Fla. January 5, 2012), *Strickland* does not require defense counsel to investigate every conceivable line of mitigating evidence or present mitigating evidence at sentencing in every case.

At the evidentiary hearing, Mr. Norgard provided the following testimony: He hired investigators Darrell Burnham, Rosalie Bolin, and Toni Maloney to investigate potential mitigation evidence. He obtained Mr. Lebron's birth and prenatal records to develop facts that could potentially mitigate the aggravation. He found the records from Jewish Child Care Association were the most relevant because they were more extensive as to his education. [FN23] He traveled to Mount Pleasant Cottage School to review Mr. Lebron's records. He made contact with every person in Mr. Lebron's records whom he considered to have substantive information about Mr. Lebron, including persons who had written extensive reports. [FN24] He did not call individuals who did not have an independent recollection of Mr. Lebron because he did not want them to regurgitate what was written in their reports. Furthermore, he did not want the State to cross-examine these witnesses and bring out the bad things that were written in the report. He reviewed a neuropsychological test that was performed on Mr.

Lebron, however, he did not consider the test to be a significant neurological testing.

> [FN23] Records from the Mount Pleasant Cottage School were a part of the Jewish Child Care Association records.
>
> [FN24] Mr. Norgard testified that some of these individuals had a limited recollection of the reports that they had written about Mr. Lebron and did not have a strong independent recall of him specifically.

Mr. Norgard used an extensive mitigation checklist with Mr. Lebron to identify possible mitigation and to determine if Mr. Lebron had anyone significant in his life that could provide mitigation. However, Mr. Norgard did not find anyone of significance of that nature through Mr. Lebron. [FN25] Instead, he reviewed records pertaining to Mr. Lebron's education, upbringing, and written reports. He also used Ms. Ortiz' testimony about Mr. Lebron's upbringing as mitigation evidence. Based upon the foregoing, this Court finds that Mr. Norgard conducted a reasonably competent investigation into Mr. Lebron's background. There is no reasonable probability the outcome of the penalty phase would have been different if counsel had taken the actions cited herein. Therefore, Mr. Lebron cannot establish either deficient performance or prejudice.

> [FN25] A mitigation checklist was also utilized with Mr. Lebron's mother, Jocelyn Ortiz.

Mr. Lebron also argues that trial counsel failed to produce expert testimony from a psychologist, neuropsychologist, and/or other mental health and neurological experts. He contends the experts could have testified about his brain damage, adverse development, mental illness, and substance abuse, together with the affect these issues had on his underlying value system, moral development, perception of life options and nature of choices, ability to exercise sound judgment, and impulse control. This issue is more specifically raised in sub-claim E and will be addressed fully in the ruling on that claim.

(V13, R1888-93). Those findings should not be disturbed.

B. THE "FAILURE TO PRESENT DRUG USE" CLAIM

On pages 49-52 of his brief, Lebron says that trial counsel was ineffective for not presenting his drug use as mitigating evidence. The trial court rejected that claim:

> [Lebron] identifies the evidence as the deposition of Jocelyn Ortiz; "the testimony of nearly all of the State's lay witnesses about drug use," including Mark Tocci, Danny Summers, Duane Sapp, Mary Lineberger, Stacie Kirk, Brandi Gribben, and Danita Sullivan; the evidence log prepared by Crime Scene Technician Gill showing the presence of illegal substances; and his own self-reports. He also alleges counsel should have located additional witnesses, including Victor Rios, Tawna Shoots, Ruthy Fernandez, Miriam Roth, Christina Charbonnier, Alicia Walker, Stacie Kirk, and Lisa Costello.
>
> At the evidentiary hearing, Mr. Norgard testified as follows: Mr. Lebron described himself as an experimenter as opposed to a drug abuser. Mr. Lebron said his drug of choice was marijuana and denied that he was a heavy drinker; he never reported any use of cocaine or vodka. Regardless of this denial of use, Mr. Norgard certainly would have considered it in terms of Mr. Lebron's behavior at the time of the crime. Moreover, Mr. Norgard did not place a lot of credibility in the Tocci witnesses or the other witness because he felt that they were out to "cover themselves."
>
> Based upon the foregoing, the Court finds that Mr. Norgard conducted a reasonably competent investigation into Mr. Lebron's substance abuse. Therefore, Mr. Lebron cannot establish either deficient performance or prejudice.

(V13, R1893-94). Those findings should not be disturbed.

In any event, the only testimony which was presented at the evidentiary hearing was that Mr. Norgard investigated Lebron's

drug and/or alcohol abuse during the time before the murder; however, there was nothing more than marijuana use. (V38, R3736). No one reported any issue with cocaine or drinking a quart of vodka. (V38, R3736). Lebron described himself as "more of an experimenter as opposed to an abuser." Lebron said he would try a drug as part of a social situation, but they "really didn't do anything for him." (V38, R3736). Lebron liked marijuana, but denied heavy drinking. (V38, R3736, 3764). Regardless of Lebron's denial, Mr. Norgard looked at drug and alcohol use at the time of the murder. (V38, R3736). None of the people in Lebron's circle of friends indicated excessive alcohol consumption. (V38, R3764-65).

Dr. Danziger testified that the facts of the Oliver robbery/murder did not suggest substance impairment. (V38, R3839, 3840). Dr. Danziger's Axis 1 diagnosis of polysubstance abuse was based on Lebron's self-report that he abused alcohol, cannabis and cocaine. (V38, R3846). Notwithstanding, there was no indication drugs or alcohol were a factor in the robbery/murder. (V38, R3737). Lebron's behavior of luring the victim, concealing the firearm, taking items for financial gain, and hiding evidence after the murder does not suggest intoxication or impaired mental faculties due to substance abuse. (V38, R3847). Lebron denied any involvement in the robbery/murder, so Dr. Danziger was not able to inquire into the

area of impairment at the time. (V38, R3848).

Lebron has failed to establish either prong of *Strickland*. The testimony that was elicited at the evidentiary hearing discredits this claim. There was no deficient performance becuase Mr. Norgard did investigate substance abuse. There was no prejudice because, as Dr. Danziger stated, the facts of the crime contradict any claim of substance abuse. Lebron and his friends were at Kinko's falsifying school records so Mrs. Ortiz would send money. When that effort was unsuccessful, they went to Mary Lineberger's house to attempt to contrive records on a computer. As they were driving back to the Tocci's house, they came into contact with Mr. Oliver. Lebron lured Mr. Oliver back to house, told his friends he was going to rob him, had Charissa Wilburn conceal the firearm and carry it into the house, then directed the robbery during which Mr. Oliver was murdered. Subsequent to the murder, Lebron directed disposal of the body, clean up in the house, and obtaining financial benefit from Oliver's pawned items and credit card. This claim fails.

C. THE "INCOMPLETE BRAIN DEVELOPMENT" CLAIM

On pages 52-56 of his brief, Lebron says that trial counsel was ineffective for not presenting evidence of "incomplete brain development" at the time Lebron killed his victim. In effect, this claim is an argument for the extension of *Roper v. Simmons*, 543 U.S. 551 (2005), to defendants over the age of 18 at the

time of the offense.

This Court has addressed this issue several times and held: "The Court has expressly rejected the argument that *Roper* extends beyond the Supreme Court's pronouncement that the execution of an individual who was younger than eighteen at the time of the murder violates the eighth amendment." *Barwick v. State/Buss*, 88 So. 3d 85, 106 (Fla. 2011); *Schoenwetter v. State/McNeil*, 46 So. 3d 535, 560-561 (Fla. 2010); *Reese v. State*, 14 So. 3d 913 (Fla. 2009); *citing Hill v. State*, 921 So. 2d 579, 584 (Fla.), *cert. denied*, 546 U.S. 1219, 126 S. Ct. 1441, 164 L. Ed. 2d 141 (2006); *Evans v. State*, 995 So. 2d 933, 954 (Fla. 2008) ("this Court has consistently held that *Roper* only prohibits the execution of defendants 'whose chronological age is below eighteen' at the time of the capital crime"). Lebron was 21 years old when he murdered Larry Neal Oliver, Jr., and *Roper* is unavailable to him.

The collateral proceeding trial court denied relief:

> The State argues that Florida Supreme Court has held that *Roper* only prohibits the execution of defendants whose chronological age is below 18. *Reese v. State*, 14 So. 3d 913, 920 (Fla. 2009), *citing Hill v. State*, 921 So. 2d 579, 584 (Fla.), *cert. denied*, 546 U.S. 1219 (2006); *Evans v. State*, 995 so. 2d 933, 954 (Fla. 2008). Furthermore, at least one other state court has also held that counsel was not ineffective for failing to call an expert on adolescent brain science, particularly since the 19-year-old defendant was legally an adult. *Hodges v. State*, 912 So. 2d 730, 764 (Miss. 2005). There is no reasonable probability that the outcome of the penalty phase would have been

different - *i.e.*, that Mr. Lebron would have received a life sentence - if counsel had introduced evidence of the 2004 study or any of the other existing studies [FN27] indicating that the human brain is not fully developed until early adulthood. [FN28]

> [FN27] *See* Jay D. Aronson, *Brain Imaging, Culpability, and the Juvenile Death Penalty, 13* Psychol. Pub. Pol'y & L. 115, 1[20 (2007), citing a 1967 report indicating that brain regions responsible for "behavioral inhibition and control, risk assessment, decision making, and emotional maturing take longer" than those for basic life processes and sensory perception.
>
> [FN28] The Florida Supreme Court has also rejected the claim that the 2004 brain-mapping study constitutes newly discovered evidence. *Morton v. State,* 995 So. 2d 233, 245-246 (Fla. 2008).

(V13, R1895-96). There is no basis for relief because this claim has no legal basis.

D. UNPRESENTED "POSITIVE PRISONER EVIDENCE"

On pages 56-59 of his brief, Lebron says that trial counsel was ineffective for not presenting "positive prisoner evidence" under *Skipper v. South Carolina,* 476 U.S. 1 (1986). The collateral proceeding trial court rejected this claim:

> Mr. Lebron alleges "substantial correctional and research date were available in 2005 that could have been particularized" to establish that he was "likely to have a positive adjustment to a life without parole sentence in the Florida Department of Corrections." He identifies the factors as his age (31 at the time of the 2005 penalty phase); jail and prison adjustment prior to 2005 (showing compliance with jail regulations and authority, as well as the availability of additional security for inmates thought to be escape risks); correctional appraisal (he was

> consistently housed in the general population); high school diploma (earned while in the Orange County jail); long-term inmate (studies show such inmates have a lower rate of disciplinary infractions); and capital offender (studies show most capital offenders are never sanctioned for serious institutional violence).
>
> At the evidentiary hearing, Mr. Norgard testified that he was aware of Mr. Lebron's behavior while he was incarcerated. Mr. Lebron had a few D.R.'s (disciplinary reports), and there was an investigation into a conspiracy to commit escape involving Mr. Lebron and other unnamed individuals. Mr. Lebron was also involved in an incident in which a female tried to smuggle a cell phone into the Department of Corrections. Mr. Norgard did not present any positive prisoner evidence because the State would have been able to introduce these matters if he had done so. This constituted reasonable trial strategy, and furthermore, the Court finds that Mr. Lebron has failed to demonstrate deficient performance or prejudice.

(V13, R1896-97). There is no basis for relief.

E. THE FAILURE TO PRESENT EXPERT TESTIMONY CLAIM

On pages 60-65 of his brief, Lebron says that trial counsel was ineffective for not presenting expert testimony about "mental illness and cognitive brain dysfunction" at the penalty phase of his trial. The collateral proceeding trial court made extensive findings which are supported by competent substantial evidence:

> Dr. Henry Dee examined him prior to the first guilt-phase trial, and advised counsel that he had "significant neurological impairments, an IQ of 83, memory impairments, psychological impairments, significant interpersonal communication limitations, a history of substance abuse, and was the product of a poor home environment, among other things." However,

he argues, counsel did not present any expert or other testimony in mitigation in relation to these issues. He argues testimony regarding his major psychiatric illness and cognitive brain dysfunction could have challenged the State's theory that he was the mastermind and planner of the group involved in the robbery and murder and could also have supported the mitigator that he acted under extreme mental and emotional disturbance.

At the evidentiary hearing, Dr. Mark Cunningham and Dr. Hyman Eisenstein testified as expert witnesses for the defense, and Dr. Jeffrey Danziger testified as an expert witness for the State.

Dr. Cunningham interviewed numerous individuals prior to the evidentiary hearing, including Mr. Lebron, Tony Ortiz (stepfather), Bridget Laureira (family friend), Naomi Summerstein (case worker), Caroline Edlich Weil (case worker and family therapist) Debra Schnall (mother's psychotherapist), and Jocelyn Ortiz (mother). He also examined seven binders of records, which included interviews by defense investigators; school, juvenile and criminal records; and expert evaluations. He listed 32 "critically formative adverse development factors" the defense failed to present, and in written closing arguments, counsel alleges these would have given the jury "a mechanism to understand and give scientifically informed weight to each factor individually and collectively." He opined that during the homicide, Mr. Lebron was under the influence of extreme mental and emotional disturbance reflecting the cumulative psychological damage, dysfunction, and associated disturbance from the adverse development factors.

Dr. Eisenstein conducted an evaluation of Mr. Lebron prior to the evidentiary hearing, during which he administered 19 tests and reviewed school, psychological, and psychiatric records. He opined that Mr. Lebron suffered from functional brain impairment with underlying neurological conditions, causing deficits in critical decision making, judgment, and reasoning. He further opined that Mr. Lebron has bipolar disorder, attention deficit disorder, reactive attachment disorder, and intermittent explosive disorder (herein "TED"), and that he was suffering

from extreme mental and emotional disturbances at the time of the crime. He believed Mr. Lebron's behavior was grossly disproportionate to logic because there is no reason to "kill a person if you want to steal a truck."

In contrast, Dr. Danziger conducted an evaluation of Mr. Lebron for the State and diagnosed him with anti-social personality disorder. He testified that IED requires several discrete episodes of failure to resist aggressive impulses, out of proportion to psychosocial stresses, and his review reflected that the murder and robbery in this case was planned rather than sudden, and organized, rather than an aggressive reaction. Mr. Lebron formed and carried out a plan: he used a lie to lure the victim to a place where he could be robbed and ultimately killed. Furthermore, Dr. Danziger noted that the jury found Mr. Lebron was not shooter but that he was involved in planning the incident, as well as the covering up the crime, disposing of the body, and destroying the victim's identification. Dr. Danziger concluded that Mr. Lebron's behavior was not consistent with IED and that he was not under the influence of an extreme mental or emotional disturbance. In *Hoskins v. State, 75 So.* 3d 250 (Fla. 2011), Hoskins argued evidence that he suffered from IED would have established that at the time of the murder, he was unable to conform his actions to the requirements of law and he was under the influence of an extreme mental or emotional disturbance, two statutory mental health mitigators. *See* §921.141(6)(b) and (f), Fla. Stat. (2004). During Hoskins' penalty phase, three experts testified that he had frontal lobe impairment and as a result, he had difficulty controlling his impulses and exercised poor judgment. *Id.* at 254. However, Dr. Krop opined that Hoskins' actions required planning and reflected his consciousness of wrongdoing, noting his effort to avoid arrest and cover up the crime. *Id.* at 255. During his evidentiary hearing, Dr. Eisenstein testified that Hoskins met the criteria for IED, and therefore - disputing the opinion of Dr. Krop - Hoskins' actions were impulsive and uncontrollable. *Id.* at 255.

The Florida Supreme Court observed: "Hoskins' claim of deficiency is that counsel should have found a more

> favorable expert," and concluded that counsel's entire investigation and presentation was not rendered deficient on this basis. *Id.* Hoskins' counsel did not challenge Dr. Krop's expertise or testimony, and the jury heard that he suffered from brain damage that affected his ability to exercise control in emotionally charged situations, but did not find that evidence sufficient to overcome the aggravation. *Id.*
>
> Where counsel conducted a reasonable investigation of mental health mitigation and then made a reasonable strategic decision not to present this information, counsel's performance will not be deemed deficient. *Floyd v. State,* 18 So. 3d 432, 453-454 (Fla. 2009), and cases cited therein. As discussed earlier, Dr. Dee told Mr. Norgard that Mr. Lebron had the "coldest antisocial personality disorder" he had ever seen and did not exhibit irrational outward behavior. Mr. Norgard then made a strategic decision not to call Dr. Dee to testify at the 2005 penalty phase, because he did not want Mr. Lebron to be subjected to examination by a State mental health expert. This was very reasonable under the circumstances, because the State could have presented the damaging testimony of Dr. Jeffrey Danziger to counter the testimonies of Dr. Cunningham and Dr. Eistenstein. It was also reasonable for Mr. Norgard to conclude, as counsel did in *Floyd,* that evidence offered in mitigation would do more harm than good.
>
> Based on the foregoing, there is no reasonable probability the outcome of the penalty phase would have been different if counsel had taken the actions cited herein. Therefore, Mr. Lebron cannot establish either deficient performance or prejudice.

(V13, R1897-1901).

To the extent that further discussion is necessary, Lebron did not present the testimony of any friend or family member to establish available mitigation which was not presented at the 2005 proceedings. Instead, Lebron called two mental health experts to testify to what those friends and family members told

them or what was available from records. Lebron outlines the testimony of Dr. Cunningham and Dr. Eisenstein and claims that Mr. Norgard should have elicited all mitigation "through expert testimony." This statement is in direct contravention of established Florida law which provides that experts cannot be used as a conduit for hearsay testimony. *See Linn v. Fossum*, 946 So. 2d 1031, 1037-1038 (Fla. 2006); *Carratelli v. State*, 832 So. 2d 850, 861 (Fla. 4th DCA 2002). *See also Hastings v. Rigsbee*, 875 So. 2d 772, 778 (Fla. 2d DCA 2004) ("Although expert witnesses are permitted to rely on hearsay evidence, such witnesses may not serve as a conduit for presenting that inadmissible evidence to the finder of fact") *citing State v. Dupont*, 659 So. 2d 405 (Fla. 2d DCA 1995).

This Court has left no doubt about the state of the law:

> Next, Mendoza argues that he was entitled to present into evidence the materials relied upon by his experts. However, as stated by the Court in *Linn v. Fossum*, 946 So.2d 1032 (Fla. 2006),
>
> Florida courts have routinely recognized that an expert's testimony "may not merely be used as a conduit for the introduction of the otherwise inadmissible evidence."
>
> The rationale for this prohibition is twofold. First, allowing the presentation of otherwise inadmissible evidence merely because an expert relied on it in forming an opinion undermines the rules of evidence that would have precluded its admission....
>
> Second, testimony that serves as a conduit for inadmissible evidence is inadmissible under section 90.403, Florida Statutes (2005), because its probative

> value is "substantially outweighed by the danger of unfair prejudice, confusion of issues [or] misleading the jury."
>
> *Id.* at 1037-38 (*quoting Erwin v. Todd*, 699 So. 2d 275, 277 (Fla. 5th DCA 1997); *Schwarz v. State*, 695 So. 2d 452, 455 (Fla. 4th DCA 1997)).

Mendoza v. State, 87 So. 3d 644, 666 (Fla. 2011). And, shortly before the *Mendoza* opinion, this Court had ruled:

> Although experts may testify as to the things on which they rely, **experts cannot bolster or corroborate their opinions with the opinions of other experts who do not testify because "[s]uch testimony improperly permits one expert to become a conduit for the opinion of another expert who is not subject to cross-examination**." *Schwarz v. State*, 695 So. 2d 452, 455 (Fla. 4th DCA 1997). To allow an expert to do so would cause any probative value of the testimony to be "substantially outweighed by the danger of unfair prejudice, confusion of issues, [or] misleading the jury." Id. at 455 (*quoting* § 90.403, Fla. Stat. (1995)). **Further, an expert's testimony may not be used as a basis to introduce otherwise inadmissible evidence.** *See Linn v. Fossum*, 946 So. 2d 1032, 1037 (Fla. 2006). Under these circumstances, the circuit court did not abuse its discretion by allowing the challenged documents to be published on the screen. However, we hasten to remind attorneys and judges that the rules of evidence must be applied before the substance of any document may be admitted for consideration by the trier of fact.

Dufour v. State 69 So. 3d 235, 254-255 (Fla. 2011). (emphasis added). *Johnson v. State*, 37 Fla. L. Weekly S665, 669 (Fla. Nov. 8, 2012); *See also Robinson v. State*, 707 So. 2d 688, 691-692 (Fla. 1998) (unauthenticated, untested affidavit proffered by Robinson is nothing more than inadmissible hearsay); *Frances v. State*, 970 So. 2d 806, 815 (Fla. 2007) (mitigation specialist

cannot simply recite hearsay testimony of witnesses); Erhardt, Sec. 704.1, page 765, *Florida Evidence,* 2011 Edition (a witness may not recite from a publication to bolster his testimony); *Linn v. Fossum,* 946 So.2d 1032, 1038 (Fla. 2006); Erhardt, Sec. 704.1, page 766, *Florida Evidence,* 2011 Edition (an expert may not testify that his opinion is based on consultations or reliance on the opinion of another expert).

Lebron's argument that Mr. Norgard should have simply called an expert to regurgitate what witnesses told him and what documents demonstrate is contrary to settled Florida law. That sort of expert-as-conduit-for-hearsay testimony is clearly not allowed, and Mr. Norgard would not have been allowed to simply present an expert at the penalty phase to testify to hearsay statements of witnesses and findings by other experts.

F. THE "ADVERSE DEVELOPMENT" EVIDENCE

On pages 65-76 of his brief, Lebron says that counsel was ineffective for not presenting evidence of his "adverse development." The "adverse development" evidence is apparently a reference to Dr. Cunningham's methodology of labeling potential mitigation. Dr. Cunningham's testimony was cumulative to the evidence Mr. Norgard presented in 2005. *See Darling v. State/McDonough,* 966 So. 2d 366, 378 (Fla. 2007) ("Although Dr. Cunningham presented various elements from Darling's background in four colorfully named categories, a review of his testimony

reveals that many of the individually identified mitigating factors discussed by Dr. Cunningham were redundant and cumulative of evidence presented during the penalty phase.")

There was no deficient performance because Mr. Norgard made a strategic decision to forego mental health testimony because of the overwhelming negative testimony it would generate from the State's side. There was no prejudice because Dr. Cunningham's hearsay testimony would not have been admissible, and Mr. Norgard was able to present Lebron's life history through a first-hand account from his mother, Jocelyn Ortiz. Lebron cannot establish either part of *Strickland*'s two-part standard, and is not entitled to any relief.

Further, as the collateral proceeding trial court found:

> The testimony of Ms. Ortiz included many of the adverse development factors included in the lists of Mr. Lebron and Dr. Cunningham." Furthermore, this claim lacks merit for the reasons set forth in the ruling on Grounds II-A and II-E. Counsel made a reasonable, strategic decision not to introduce additional evidence. Therefore, Mr. Lebron cannot establish either deficient performance or prejudice.

(V13, R1902).

G. THE "FAILURE TO APPEAL" CLAIM

On pages 76-77 of his brief, Lebron says that trial counsel was ineffective because he did not appeal a separate violent felony for which Lebron was convicted and which was used as one of his prior violent offenses in support of the "prior violent

felony" aggravator.[21] While the collateral proceeding trial court denied relief on this claim, it did not have jurisdiction to entertain it, and should have dismissed it on that basis.

The State objected to this claim being subject to an evidentiary hearing for several reasons: (1) the trial court did not have jurisdiction in the murder case (Case No. 1996-CF-2147) to entertain a motion for ineffective assistance of counsel in Case No. CR95-2368, the Nassar kidnap/robbery/assault case; and, (2) Section 27.711 (11) limits the authority of registry counsel in much the same way that CCRC representation in limited by section 27.7001:

> An attorney appointed under s. 27.710 to represent a capital defendant may not represent the capital defendant during a retrial, a resentencing proceeding, a proceeding commenced under chapter 940, a proceeding challenging a conviction or sentence **other than the conviction and sentence of death** for which the appointment was made, or any civil litigation other than habeas corpus proceedings.

§ 27.711(11), *Fla. Stat.* (2002) (emphasis added). Registry counsel are expressly prohibited from representing a capital defendant in a postconviction proceeding other than the capital proceeding for which counsel was appointed. *State v. Kilgore*, 976 So. 2d 1066, 1069-1070 (Fla. 2007). CCRC filed the Rule 3.851, subsequently withdrew, and current counsel was appointed.

---

[21] The victim in this separate felony was Roger Nasser, case number 1995-CF-2368. Lebron was convicted of assault with a firearm, robbery and kidnapping.

However, Mr. Mills was appointed only in the capital case.

Under *Kilgore,* the circuit court did not have jurisdiction to rule on an issue in a separate case in which no Rule 3.850 motion has been filed. Moreover, claims of ineffectiveness of appellate counsel are properly raised in a petition for writ of habeas corpus, not in a post-conviction relief motion filed in the trial court. *Barwick v. State/Buss*, 88 So. 3d 85, 101 (Fla. 2011); *Griffin v. State*, 866 So. 2d 1, 21 (Fla. 2003).

In any event, without conceding that this claim was ever properly raised in this proceeding, the argument is conclusory and speculative. Defendant alleges that counsel was deficient for failing to follow through on the appeal. In order for counsel to be ineffective, Defendant has to show prejudice, *i.e.*, that the appeal had some merit and if counsel had pursued the appeal the outcome of his case would have changed. Defendant has failed to allege or establish that there was even a meritorious issue to appeal or that the issue could change the outcome. Mr. Norgard testified that he saw no meritorious issue to be raised on appeal. Lebron has proffered no meritorious issue; thus, the prejudice prong of *Strickland* fails.

Finally, the collateral proceeding trial court denied relief on this claim:

> Mr. Lebron was also convicted of attempted robbery on February 18, 1993 in the State of New York, Queens County, and aggravated assault with a firearm on August

> 26, 1997, in the State of Florida in case number 1995-CF-2553. Evidence in the latter case indicated that Mr. Lebron pointed a loaded shotgun at the victim's face and threatened to kill her. *See* the sentencing order in the above-styled case, filed on December 27, 2005. Even if counsel had successfully appealed the convictions in 1995-CF-2368, these other convictions would have been sufficient to establish the prior violent felony aggravator. Furthermore, at the January 2012 evidentiary hearing, Mr. Norgard testified that he did not see any viable issues for an appeal in 1995-CF-2358. Finally, the Court also found a second aggravating factor, *i.e.*, that the capital felony was committed while Mr. Lebron was engaged in or an accomplice to the commission of a robbery. *See* the sentencing order. Based on the foregoing, Mr. Lebron cannot establish prejudice.

(V13, R1902-03). Assuming that the circuit court should have even considered this claim, those findings dispose of it. There is no basis for relief.

H. THE RESTATED "ADVERSE DEVELOPMENT" CLAIM

On pages 77-80 of his brief, Lebron reprises claims 2A and 2E, *supra*. This claim states no new or different grounds for relief, as the collateral proceeding trial court found:

> This claim is cumulative to the allegations set forth in Grounds II-A and II-E. At the evidentiary hearing, Mr. Norgard acknowledged that Dr. Dee found that Mr. Lebron had neurological problems at the time of the homicide. However, as set forth in the ruling on sub-claims A and E, Mr. Norgard did not present this testimony or use other experts because he did not want Mr. Lebron to be subjected to a compelled mental health evaluation by the State, and Mr. Lebron had agreed to this strategy, which was reasonable under the facts and circumstances of this case.

(V13, R1904). This claim is not a basis for relief, and no further discussion of it is needed.

CONCLUSION

WHEREFORE, for the reasons set out above, the denial of relief should be affirmed in all respects.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy hereof has been furnished to: J. Edwin Mills by e-mail jemillslaw@hotmail.com on December 6th, 2012.

KENNETH S. NUNNELLEY
SENIOR ASSISTANT ATTORNEY GENERAL

CERTIFICATE OF COMPLIANCE

This brief is typed in Courier New 12 point.

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