IN THE SUPREME COURT OF FLORIDA

CASE NO. SC12-79

DAVID SYLVESTER FRANCES

Appellant,

v.

STATE OF FLORIDA

Appellee.

ANSWER BRIEF OF APPELLEE

ON APPEAL FROM THE NINTH JUDICIAL CIRCUIT
IN AND FOR ORANGE COUNTY, FLORIDA

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RESPONSE TO REQUEST FOR ORAL ARGUMENT

The State recognizes that oral argument is routinely granted in first-time post-conviction proceedings in capital cases. The State defers to the Court as to whether argument will assist the Court in deciding this case.

PRELIMINARY MATTERS

Frances was convicted and sentenced to death for the strangulation murders of Helena Mills, who was a family friend, and JoAnna Charles, who was a sixteen-year-old friend of Ms. Mills. Ms. Mills was strangled to death by Frances and his brother so they could steal her car. Miss Charles, who was living with Ms. Mills, was strangled to death because she had stayed home sick from school, and was therefore in the wrong place at the wrong time. A detailed statement of the facts of the murders is set out below.

Against the backdrop of a double murder where there is no question of guilt, and little question about the appropriate penalty, Frances has chosen to challenge his convictions and sentences on the theory that the decision to seek the death penalty in this case was somehow "racially motivated" instead of being the direct result of the senseless and brutal murders that Frances committed. The facts of this case speak for themselves -- no interpretation of those facts leads to the conclusion that this case is anything but a case that should be prosecuted

capitally. And, under these facts, suggesting that race had anything to do with anything has no basis in reality. These crimes deserve the sentence Frances received.

STATEMENT OF THE CASE AND FACTS

On direct appeal, this Court summarized the facts of this case in the following way:

> David Sylvester Frances and his younger brother Elvis Frances were charged by indictment with the first-degree murders of Helena Mills and JoAnna Charles, the robbery of Mills' automobile, and two counts of the petit theft of Charles' jewelry and a Playstation video game system belonging to Mills' son.
>
> Gleneth Byron, the mother of the Frances brothers, was a close friend of Mills and lived about five minutes from Mills' condominium in Orlando. The two families often socialized together. The Frances brothers had been living with Byron for about a month and neither was employed. Byron asked the brothers to move out and planned to give them money for bus tickets to Tallahassee, where the family had lived previously. David Frances called Byron around noon on November 6, 2000, to tell her that the brothers had a ride to Tallahassee. When Byron returned home at 5 p.m., her sons and all of their belongings were gone.
>
> Early that same morning, the Frances brothers rang the doorbell at Mills' condominium. Mills' thirteen-year-old son Dwayne Rivers answered the door and talked to the brothers briefly for a minute or two. Rivers knew the brothers from when they all had lived in the Virgin Islands. Rivers told the brothers that JoAnna Charles, who was a sixteen-year-old family friend living with Mills, was staying home from school that day because she was sick. The brothers departed and Rivers left for school at 8:45 a.m. When Rivers returned home at 6 p.m., he saw Charles' red Toyota in front of the condominium, but he did not see his mother's green Mazda 626 in the garage. Rivers called for Charles and banged on the locked door of the master bedroom, but did not receive a response. When

Rivers entered the master bedroom through a sliding glass door on the balcony, he discovered the bodies of his mother and Charles on the floor of the bathroom. Rivers phoned Byron and then called 911.

When the paramedics arrived, they discovered Charles' body on top of Mills' body. Both women had been strangled with an electric cord. A cord was still wrapped around Charles' neck. The bodies were in rigor mortis. There were no signs of forced entry into the condominium. The medical examiner testified that Mills had multiple recent abrasions to her face, injuries to her neck, ruptured blood vessels in her face, and a cut across her neck caused by the cord being wrapped around her neck and pulled at each end. Charles had a groove around her neck with superficial lacerations. She also had crescent-shaped fingernail marks on her right neck caused by her attempts to remove either the ligature or hands from her neck. The material under Charles' nails matched her own DNA. Material removed from Mills' nails was identified as male DNA. While neither David nor Elvis could be excluded as the contributor of the material found under Mills' nails, the sample was so limited that this finding was not significant. The electrical cord around Charles' neck was tested for latent fingerprints, but there were not enough ridgelines on the latent prints to enable a match. No DNA testing was conducted on the electrical cord because the chemicals used for the latent print testing would have destroyed the DNA. Conversely, had the cord been tested for DNA, it would have obliterated any latent prints.

The tag number and information about Mills' stolen vehicle were entered into the national law enforcement data base. On December 5, 2000, the Frances brothers and three other individuals were stopped in Mills' vehicle in DeKalb County, Georgia. Elvis was driving the vehicle and David was a passenger in the back seat. The vehicle still bore Mills' license plate. David claimed that he had bought the vehicle in Tallahassee, but was unable to name the seller.

Orlando police detectives traveled to Georgia to interview the brothers. Twenty-year-old David gave a statement after being advised of his *Miranda* [FN1]

rights and waiving them. In this statement, David originally denied any knowledge of the murders, claimed that he and Elvis took a bus from Orlando to Tallahassee, and stated that he had bought Mills' car from someone named “Will” in Tallahassee. David subsequently admitted being at Mills' house on the morning of the murders and stated that Elvis killed both victims. David admitted that he helped Elvis move the bodies and participated in stealing Mills' car. David also admitted that the brothers took Mills' car and drove it to Tallahassee.

[FN1] *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

The officers then interviewed sixteen-year-old Elvis at the juvenile detention facility where he was being held. The officers played David's taped interview for Elvis. Elvis related a different version of events, claiming that David also participated in the murders. The brothers were arrested for first-degree murder and transported back to Florida. An attempt to record their conversations in the transport van was unsuccessful because the equipment did not work.

David was interviewed a second time on December 6. During this interview, David related the following additional details about the murders. Byron wanted the brothers out of her house, but they had no money and no place to go. After talking to Rivers on Monday morning, the brothers decided to steal Mills' car. They went back to Mills' house where they met her in her garden. Mills told the brothers to go inside. When she came in, both brothers jumped her. David strangled Mills with his hands until she passed out. Elvis attempted to do the same to Charles, but had difficulty because Charles struggled with him. Both brothers moved the women into the bedroom and David then strangled Mills with an electric cord. Because Charles “still had life in her,” the brothers wrapped the electric cord around her neck and each pulled on an end in order to kill her. They took jewelry and a Playstation from the house and drove off in Mills' car. They pawned the stolen items for $240. They drove to Tallahassee and then to Georgia in Mills' car. Both

of David's taped interviews were published to the jury at trial.

Mills' vehicle was sealed and returned to Orlando in a sealed car trailer. David's prints were lifted from the rear passenger window of the vehicle. The owner of the pawn shop identified receipts showing that the items from Mills' house were pawned at 11:32 a.m. on the morning of the murders. David presented his driver's license to pawn a PlayStation, a pendant, and three chains. Rivers was able to identify the pawned items as belonging to his mother and Charles. The thumbprint on the pawn ticket belonged to David Frances. Rivers was also able to recognize his mother's car keys based on a small blue flashlight with her employer's logo that was on the key ring.

. . .

The jury trial commenced on October 25, 2004, in the circuit court in Orange County. At the close of the State's case, David moved for a judgment of acquittal, arguing that premeditation had not been shown. The trial court denied the motion. The jury returned guilty verdicts on all of the charges.

At the penalty phase, the State presented victim impact testimony from Mills' son and Charles' mother and additional testimony from the medical examiner about the physical effects of asphyxiation. The defense presented the testimony of nine witnesses:*812 a psychotherapist and mitigation specialist who met and interviewed David and a number of people who knew him during his childhood; family members, friends, and former teachers and coaches; David's corrections officer; and Dr. Eric Mings, the psychologist who evaluated David's mental health status. All of the family members and friends testified that David was a quiet, respectful child and young man, but Elvis was aggressive and violent. They also testified that David tried to keep Elvis out of fights and trouble. Prison inmate Tameka Jones [FN2] testified about the murder of Monique Washington in Tallahassee in September 2000. Jones, who had been a roommate of the brothers in Tallahassee, went with Elvis to Washington's apartment, ostensibly to help Washington move her belongings. Instead, Elvis strangled Washington with

his hands and an electric cord in order to steal her car. Jones also stated that David helped Elvis dispose of Washington's body after the fact. Dr. Mings testified that David has average intelligence and had developed a pathologically dependent relationship with Elvis at an early age.

> [FN2] Jones was serving a sentence for third-degree murder based on her role in the murder of Monique Washington.

The jury recommended that David be sentenced to death for Mills' murder by a vote of nine to three and for Charles' murder by a vote of ten to two. Additional live and videotaped mitigating evidence was presented to the court during the *Spencer* [FN3] hearing. The court found two aggravating circumstances applicable to Mills' murder: a prior violent felony based on the contemporaneous conviction for the murder of the other victim and that the murder was committed during the course of a robbery. The court found these same two aggravators applicable to Charles' murder, plus the heinous, atrocious, or cruel aggravating circumstance. The court rejected the statutory mitigators of no significant history of prior criminal activity (based on David's helping Elvis dispose of Washington's body and the fact that David was absent without leave (AWOL) from the United States Army) and acting under duress or the substantial domination of another, *i.e.*, his brother Elvis. The court found and gave unspecified weight to David's “relative youth [twenty years old] together with other factors,” but did not specify these other factors; the relative personalities of the two brothers (David being quiet and gentle; Elvis being aggressive and bad); and David's pathologically dependent relationship with Elvis. The court also gave “serious weight” to David being abandoned by his mother shortly after birth and being raised by his grandmother in poverty in the Virgin Islands; David's lack of a positive male role model; David's pathological relationship with Elvis, and Elvis's dominant role in the brothers' relationship. The court ruled that the aggravating circumstances outweighed the mitigating and imposed death sentences for both murders. The court also sentenced David to a consecutive fifteen-year sentence

on the robbery conviction and sixty days on the petit thefts.

[FN3] *Spencer v. State*, 615 So. 2d 688 (Fla. 1993).

In his appeal to this Court, Frances raises three issues, each of which encompasses a number of sub-issues. He claims that: (1) the trial court improperly restricted his presentation of guilt and penalty phase evidence that was relevant to his relative culpability for the crimes and what sentence he should receive; (2) the trial court improperly found the heinous, atrocious, or cruel aggravating circumstance (HAC), excluded existing mitigating evidence, and concluded that the aggravating circumstances outweighed the mitigating circumstances; and (3) Florida's death penalty statute is unconstitutional under *Ring v. Arizona*. We address each claim in turn below.

Frances v. State, 970 So. 2d 806, 809-813 (Fla. 2007).

THE EVIDENTIARY HEARING FACTS

Dorothy Sedgwick, Assistant State Attorney, was initially assigned as the prosecutor in Frances' case and prosecuted the case of Frances' younger brother and co-defendant, Elvis Frances. (V8, R14-15).[1] Because Sedgwick had been in the division "a very long time," she was transferred to another unit prior to Frances' trial. Her entire caseload was re-assigned and Frances' case was then assigned to prosecutor Mark Wixtrom. (V8, R16, 33-4). Wixtrom would have evaluated the case and made decisions on any potential plea offers. (V8, R31-2, 33).

[1] Cites to the current 3.851 appeal record are by volume number "V_" followed by page number "R_." Cites to the direct appeal record are "DAR, V_, R_."

Sedgwick and George Couture, Frances' initial public defender, discussed the possibility of a life sentence. (V8, R16-7, 22, 31). Sedgwick did not expect to offer a life sentence because of the "overwhelming evidence." (V8, R17). She did not recall any problems with the case. Further, she did not discuss race as a factor of the case with Frances' counsel. (V8, R17).

Sedgwick said race was not a consideration in whether or not to offer Frances a life sentence. "Absolutely not. Period. Positively. No question about it." (V8, R18). The only issue Sedgwick and Couture discussed regarding race was that an attorney (Don West) filed a *McCleskey v. Kemp*[2]-type motion in an unrelated case. (V8, R21). West was confronted with the case law, and ultimately withdrew the motion. (V8, R18, 21). Sedgwick then discussed the issue with other attorneys. As to Couture, Sedgwick:

> [W]ould have challenged him that the evidence in this case was so overwhelming, the invasion was so terrible that there was absolutely no reason to offer a plea of life.

(V8, R18-9).

Sedgwick never told Couture that she would not consider a life offer because of the race of the victims. (V8, R21). "Race was never any issue in seeking the death penalty. It was not – not any issue in plea negotiation." (V8, R22). Sedgwick's

[2] *McCleskey v. Kemp,* 481 U.S. 279 (1987).

analysis regarding a plea offer or waiving the death penalty includes all potential aggravating and mitigating factors. (V8, R28-9, 33). When Couture asked if the State was willing to accept a plea to life, Sedgwick told him, “It was a very strong case. Absolutely not.” (V8, R31). Frances “was so deserving of a death sentence and the evidence of guilt that was presentable and provable was so great.” (V8, R24-5).

When Sedgwick turned the case over to Mr. Wixtrom (the prosecutor who conducted the trial on behalf of the State), he was free to evaluate the case on his own and make his own decision on any potential plea offers. (V8, R31). Sedgwick was not in any supervisory role over Wixtrom at that time. (V8, R32). When Sedgwick was handling the case, she was aware Frances was involved in a murder in Tallahassee; however, his involvement had not been determined during the time Sedgwick had the case. (V8, R32).

Dr. Mark Cunningham, psychologist, interviewed Frances on February 19, 2009. (V8, R35-6, 52). He did not conduct any psychological testing on Frances. (V10, R293). He is not a neuropsychologist and does not conduct neuropsychological assessments. (V10, R299). Cunningham interviewed several family members and a mitigation investigator for a total of five hours. (V8, R53; V10, R294). He interviewed three people in person and the rest by phone. (V10, R328). Cunningham reviewed records and

trial counsels' handwritten notes. (V8, R54-5). He was provided with a summary report of an interview that had been previously been conducted with Vernon ("Sessie") Byron, Jr., Frances' maternal half-brother. (V8, R54; V10, R332). Cunningham had copies of the raw data and a report of the psychological testing that had previously been conducted by Dr. Mings in 2002. (V10, R293, 297, 301-02). He was aware that Mings had reached the conclusion that Frances did not have any frontal lobe impairments or neuropsychological damage. (V10, R299). Mings concluded that Frances' full scale IQ score was a 94. (V10, R303).

Cunningham described 26 different adverse factors that influenced Frances' development:

1) Generationality family dysfunction;

2) Functional abandonment by mother as a baby;

3) Amputation of primary attachment;

4) Deficient maternal bonding;

5) Hereditary predisposition to personality pathology from mother;

6) Abandonment by father;

7) Instability of care and relationships in childhood;

8) Experience of paternal rejection;

9) Hereditary predisposition to personality pathology from father;

10) Crowded impoverished and emotionally overwhelmed household of maternal grandparents;

11) Deficient opportunity for primary attachment;

12) Deficient attachment or reciprocal maternal bonding from grandmother;

13) Inadequate stability in parenting and household structure;

14) Death of grandfather;

15) Amputation from all relationships and everything familiar at age six;

16) Severed relationship with maternal family;

17) Severed relationship with maternal grandmother;

18) Pervasive insensitivity of family and parent figures to development needs;

19) Emotional neglect by mother and step-father;

20) Physical abuse and observed physical abuse;

21) Social isolation of household;

22) Parental marital problems and voluntary infrequent contact;

23) Corruptive community;

24) Neighborhood and school violence;

25) Marijuana dependence;

26) Youthfulness.

(V8, R69-73). In Cunningham's opinion, these factors affected the trajectory of Frances' life and the likelihood of bad outcomes. (V8, R73). Further, in Cunningham's opinion, a child is predisposed through heredity. The likelihood of alcohol or drug use, psychological disorders, personality disturbances, or genetic disorders (*i.e.*, heart disease) significantly increases because of heredity. (V8, R75). There are other factors that affect family generations, apart from heredity: scripts, modeling, and sequential damage. (V8, R75-6).

Cunningham said Frances' mother, Gleneth Byron-Frances, told him that her mother, Agatha, beat Gleneth with a shoe or a belt and often left welts. (V8, R79-80). In Cunningham's opinion, Agatha was "profanely verbally abusive and somewhat paranoid that others were stealing from her." (V8, R80, 81). Glyneth and her 10 siblings were all raised in poverty without running water or indoor plumbing. All of the siblings are estranged from each other. (V8, R82-83). According to Frances' half-sister, Katherine Frances Richardson, Frances' paternal grandfather was easily angered and difficult to deal with. (V8, R83). Glyneth reported leaving Frances with his maternal grandparents when he was six months old. (V9, R91; V10, R309). Other maternal relatives said Frances was abandoned by her as a newborn. (V9, R92-3; V10, R309). In Cunningham's opinion, there was no "reciprocal bonding" between Frances and his mother. (V9,

R94). Some maternal family members thought Gleneth was not a good mother. (V10, R341). Frances believed his mother Gleneth treated his half-brother, Vernon, differently. In Cunningham's opinion, she formed a bond with Vernon, unlike her treatment of Frances. (V9, R105-06). Frances was not "emotionally nurtured" in his mother's household when he returned to live with her at age five or six. (V9, R105, 107). In Cunningham's opinion, it was a significant factor that the victims in this case were female due to a "nexus between violence against women and early life attachment related issues." (V9, R109).

Frances' biological father had no involvement in his life. (V9, R115). In Cunningham's opinion, the absence of a father contributed to Frances' personality disturbance. (V9, R116). Relatives told Cunningham that Frances was raised in a two-room home with 14 other people. (V9, R118-19). Ultimately, there were 25 people living in the home. (V9, R120). Frances' Aunt Shirley said all the relatives helped take care of Frances; however, there was no "reciprocal bonding" between Frances and a maternal figure. (V9, R122). Frances moved away from all his aunts and uncles at age six to live with his mother. (V9, R130). Frances told Cunningham that his mother beat him with a belt at age 12. He also endured a few beatings by his stepfather and witnessed Elvis get beat. (V9, R142, 144).

The family did not have an active social life while living in St. Thomas. (V9, R150-51). Frances told Cunningham that his neighborhood had a lot of crime and violence as well as many people that were unemployed. Armed men sold drugs on the streets. Schools were in poor condition and violence was a recurring danger at school. (V9, R163, 169, 170-71). There was no indication Frances ever sold drugs or participated in any violence in his neighborhood. (V9, R181). Frances did not say he was terrified living in the neighborhoods he grew up in. (V9, R180). Cunningham believed Frances had inadequate self-control in terms of judgment and impulsivity, with no regard to consequences. (V9, R177). Frances did not form close relationships with friends. (V9, R178). Frances' response to the murders of Joanna Charles and Helena Mills was "as if nothing catastrophic has occurred." (V9, R178).

Frances told Cunningham that he started abusing marijuana at age 10. Over the next few years, he increased his use until he was using "almost daily." Up until the time of the offenses, Frances was smoking marijuana from one to four times a day. Due to "anesthetizing himself," Frances coped poorly as he entered early adulthood. (V9, R185). Frances told Cunningham he smoked marijuana the evening prior to the murders. (V9, R182; V10, R310, 357). As a result of his drug use, the quality of Frances'

judgment and coping capabilities was affected. (V9, R193). Frances did not significantly abuse alcohol. (V10, R259).

Frances was 20 years old at the time of the murders, but Cunningham believed Frances was "several years immature as compared to (his) chronological age." In Cunningham's opinion, Frances was "20 going on 16, 17." (V9, R212). Frances had less functional maturity due to "broadly disrupted attachment and dysfunctional family context." (V9, R219). With regard to the two murders, Cunningham said Frances was impulsive, lacked empathy toward the victims, failed to see the hazards of using the victim's car, and lacked financial resources. Psychologically, he felt responsible for an emotionally-troubled younger brother as their mother had rejected them and expelled them from her home. (V9, R221; V10, R231). These factors were consistent with "adolescent immaturity." (V9, R220-21). Frances went AWOL from the army after his younger brother Elvis continually got into trouble. (V9, R188).

In Cunningham's opinion, Frances fit the statutory criteria for extreme emotional disturbance because of "adverse developmental factors." (V10, R280). Frances also acted under extreme duress or substantial domination of another because of the "cumulative effects on him." (V10, R281). Also, Frances' capacity to appreciate the criminality of his conduct and conform his conduct to the requirements of the law was

substantially impaired because of the adverse developmental factors. (V10, R284). Cunningham did not ask Frances about the facts of the crimes in this case because (1) he was instructed by defense counsel not to; and (2) Frances' "thoughts and feelings at the time of the offense do not tell me how he came to be damaged or what kind of inmate he will be in prison in the future." (V10, R417). Cunningham did not believe Frances' thoughts and feelings at the time of the offense was helpful in assessing statutory mitigating circumstances that apply to mental state at the time of the crime. (V10, R417).

On cross-examination, Cunningham recognized the DSM-IV-TR as the authoritative treatise in diagnosing mental health disorders. (V10, R303). The only diagnosable disorder Frances had was substance dependence. (V10, R303). Julie Norman had prepared a timeline for the trial attorneys. (V10, R315-16). Cunningham had reviewed the timeline and agreed that Frances went into the Army in July 1998, went AWOL in January 1999, and was classified a deserter in February 1999. (V10, R312-13). Frances was living with his mother between June 1999 and July 2000. (V10, R319). Notwithstanding, he self-reported that he smoked 3-4 "blunts" a day even while living with his mother. (V10, R318-320). Monique Washington was murdered in September of 2000. (V10, R320). Frances committed the murders in the present case on November 6, 2000. (V10, R320).

Cunningham testified that Frances does not have any type of personality disorder. (V10, R321). In Cunningham's opinion, Frances fit the criteria for and Axis I diagnosis (substance abuse) but no Axis II diagnosis. (V10, R322). It was Cunningham's opinion Frances was under the influence of an extreme emotional disturbance and was substantially impaired at the time of the murders. (V10, R323).

Cunningham was aware that Julie Norman, mitigation specialist, spent 300 hours on the case, traveled to St. Kitts and St. Thomas twice, and to Washington D.C., to interview family members. (V10, R333). She interviewed over 40 people and prepared a timeline of Frances' life. (V10, R333). Cunningham said Norman testified at the penalty phase that she was unable to find some of the people who she wanted to talk to. (V10, R335). Ten witnesses testified at the penalty phase. (V10, R332). The testimony presented was that Frances was a good baseball player, a good kid, and an athlete. (V10, R338, 345). Further, David and Elvis were like "night and day" with Elvis being aggressive and high-tempered. (V10, R346).

Rowana Williams, former assistant public defender, discussed Frances' case with George Couture, Frances' initial trial counsel. (V11, R421, 422).

During proffered testimony, Williams claimed Couture told her that Sedgwick would not agree to life sentence for Frances

because “Frances was black and the victim was black, and that there had been complaints that black people weren’t - - their lives weren’t as important as a white victim’s life.” (V11, R432-438).

Peter Schmer, assistant public defender, assisted in representing Frances at trial, but only at the guilt phase. (V11, R440, 442). Schmer said trial counsel Ruiz, who handled *voir dire* and some of the guilt phase, would have been the person who should have corrected the assistant state attorney (Mark Wixtrom) who misquoted what a juror said regarding her feelings about the death penalty. (V11, R448-49). However, Ruiz agreed with Wixtrom regarding their recollection of what Juror Roberts had said. (V11, R450). Schmer could not recall why he did not interject an objection at this time. (V11, R452). Schmer did not recall how much input he gave during the *voir dire* process. (V11, R468).

Schmer did not attend the penalty phase because he was counsel in other cases at the time. (V11, R464-65). He had been involved in discussions and preparation for the penalty phase and considered the mitigation investigation “thorough.” (V12, R494). The trial team made several trips to the Virgin Islands, hired Drs. Mings and Maher to conduct evaluations, and also hired several mitigation specialists. (V12, R494, 497). It was the defense’s strategy to portray Frances as a good person who

was led into this offense by a pathological attachment to his younger brother who was truly the evil one. (V12, R495). The strategy was discussed extensively among the trial team. (V12, R496). It was the consensus of the group to present all the background information and argue that he was a good person who was led astray by his evil brother. (V12, R496).

Schmer did not recall the first time he heard about Couture's interpretation of Sedgwick's remarks regarding race as an issue. He knows it was discussed after the trial was over, but not "with any degree of certainty" that it was discussed while the case was pending. (V12, R498, 507).

George Couture, currently with the federal public defender's office, was Frances' initial trial counsel. (V11, R474, 475). He worked on Frances' case from December 2000 to November 2003. (V14, R856). Couture recalled discussing the possibility of a life sentence with ASA Sedgwick. (V11, R476-77). On one specific occasion, when Couture requested a life sentence without the possibility of parole in exchanged for not seeking the death penalty, Sedgwick told him, "No way, not going to do that, not going to let this one go." Further, Sedgwick said, "this involved a black defendant and black victims, and she would never hear the end of it." Sedgwick explained to Couture "that her office would be accused of making decisions in death penalty cases based upon race." (V11, R479, 486-87; V14,

R863). Couture told many colleagues in his office as well as his supervisor, Bob Wesley, about this conversation. (V11, R479-80; V14, R869, 878). He could not recall why he did not file a specific motion about it or bring it to the Court's attention at that time. (V11, R479-80; V14, R867). In addition, he could not recall the specific date when Sedgwick made these comments. (V14, R857). Since the trial was scheduled "someways down the road," Couture was hopeful that he would be able to settle the case in part. (V11, R480; V14, R868). In addition, he did not want to bring media attention to the case. (V14, R868).

Couture recalled discussing the aggravating and mitigating factors in this case with Sedgwick. (V11, R483). However, Sedgwick "addressed to me that the race of the victim and the race of the defendant was the most important thing to her about not settling the case." (V11, R483, 484). Couture did not get the impression from Sedgwick that "aggravating circumstances were what was driving her in this case." (V11, R485). Couture is aware that prosecutors are scrutinized for their decisions in capital cases, including the race of the victims and defendant, particularly when the victims are black. (V11, R488). Couture said Gerod Hooper, Frances' final trial counsel, attended team meetings to discuss defense strategy. (V14, R856, 879-80).

Julie Norman, a licensed clinical professional counselor ("LCPC") in Illinois, has an extensive professional background

that includes working as a child abuse investigator, a case worker with Cook County, Illinois Public Defender's office, a manager for a battered women's shelter, a grant writer for the Illinois Department of Children and Family Services, and as a mitigation specialist with the Orange County, Florida, Public Defender's office. In addition, she holds a juris doctor degree. (V12, R514, 516, 517, 520-22).

Norman conducted an exhaustive investigation into Frances' background. (V12, R565). She developed a social history by interviewing Frances several times as well as Frances' relatives, friends and teachers. (V12, R532). In Norman's opinion, there was generational dysfunction in Frances' family. (V12, R556). Frances told Norman that he was physically abused by his mother and step-father. He was hit with cords and belts. (V12, R558, 559, 561). Further, Frances also told Norman he often took the blame for Elvis so Elvis would not get beaten. (V12, R561, 563). Norman did not believe Frances was "abandoned" by his mother as an infant. (V12, R556). Work was consistently performed on the case. (V12, R540). Norman prepared a 20-page chronological report of all the witnesses she spoke to in the Virgin Islands. She gave the report to George Couture which was put into the main file. (V12, R547-48, 566). Norman could not recall any event in Frances' life that she did not report to defense trial counsel. She was present when the defense team met

for weekly or bi-weekly team meetings to discuss strategy and relevant mitigating circumstances. (V12, R572-73). It was not the defense team's strategy to present Elvis Frances as the "bad brother" and David Frances as the "good brother." (V12, R577). She did not discuss a theme of "pathological dependence" with defense counsel Hooper or Ruiz but discussed a "dysfunctional family system" with them. (V12, R580-81). The information Norman gathered in the Virgin Islands "was the most comprehensive information that anybody on the team had." (V12, R583). Norman regularly updated the defense team with all the information she gathered. (V14, R586).

Norman said there were mitigating events that occurred in Frances' life that were not presented during the penalty phase. For example, Frances reported received "daily beatings" while growing up. (V12, R592). Frances also reported having to care for his younger brothers and cook meals for the family while his mother "relaxed." (V12, R594-95). Frances' cousin, Michelle Richards, reported hearing abusing language and seeing abusive behavior by Frances' mother when Richards lived with the family for a short period of time. (V12, R595).

In Norman's opinion, information regarding "turf wars" that occurred in Frances' neighborhood should have been presented to the penalty phase jury. (V12, R599). In addition, Frances reported hearing gunfire in his neighbor "daily," as well as

observing people chasing others and shooting at them. (V12, R600, 608-09). Frances observed violent acts occur against others students in school. (V12, R602, 610-11). In Norman's opinion, these events should have been presented to the jury. (V12, R601, 602). However, Norman did not verify these reported instances via police reports. (V12, R615).

Walter Ruiz joined Frances' defense team about a month prior to trial. (V13, R625, 627). Peter Schmer and Gerod Hooper were already working on Frances' case. (V13, R647). Ruiz' responsibilities included participating in *voir dire* and conducting direct examination of the mitigation specialist, Julie Norman. (V13, R629-30). Ruiz emailed Norman "a number of times" and interviewed her "extensively" in order to be prepared to present mitigation. (V13, R630, 648). Norman's role was to create and develop a social history of Frances which would be presented in the penalty phase as mitigation. (V13, R642).

Ruiz reviewed the transcript of *voir dire* during which ASA Wixtrom represented to the Court that Juror Roberts "was unable to consider the death penalty." (V13, R631). The transcript indicated Ruiz concurred with Wixtrom's representation but indicated Roberts said she could set her feelings aside and consider the death penalty. (V13, R631-32). Ruiz said:

> I'm not sure in terms of what I was thinking at the time, but I think, essentially, I just didn't

> remember at that time. Nobody else in our team caught it at that point in time, and it was just a mistake.

(V13, R633). Ruiz said he made a mistake, and he should have included challenging the dismissal of Juror Roberts when he challenged the dismissal of other jurors. (V13, R636, 637). He just "didn't catch it." (V13, R638).

The defense team discussed the possibility of resolving the case with a life sentence except for the impediment that stood in the way, that Frances "was black." (V13, R640-41). Ruiz did not consider filing a motion to preclude the death penalty based on racial considerations as he was not aware of a "legal possibility." (V13, R641).

Ruiz did not recall what Hooper's overall defense theme was; however, the evidence and information indicated that Frances' younger brother Elvis was "more culpable" and Frances was a "follower." (V13, R655-56).

Gerod Hooper was Frances' trial counsel. (V13, R676). Hooper knew other attorneys had previously worked on Frances' case including Walter Ruiz, Peter Schmer, George Couture, Junior Barrett, and Kim Crag-Chaderton. (V13, R678, 679). Crag-Chaderton performed limited work on Frances' case. (V13, R680).

Hooper reviewed personal notes he took during *voir dire* and reviewed portions of the transcripts. (V13, R681, 685). Hooper's notes indicated he wrote a "B" next to jurors Spinks, Dorsey,

and Roberts' names, which indicated they were "Black" which "related to the pigmentation of the skin." (V13, R685-86, 687). He would have included Black African-Americans as well as people from Haiti or the islands that had no nexus to Africa. (V13, R686). Hooper wrote a personal note regarding Juror Roberts that she could impose the death penalty. (V13, R687-88). Hooper did not object to ASA Wixtrom's statement because "Mr. Ruiz informed the court ... that she could impose the death penalty." (V13, R688). The judge "seemed to anticipate an objection" and ruled. (V13, R691). The local rules posted on the door state that "counsel shall refrain from any argument once the judge has ruled." (V13, R691). Therefore, once the judge ruled, Hooper was "cut off" from making any further argument. (V13, R691). In any case, Ruiz did add that Juror Roberts had stated she could consider the death penalty. (V13, R690, 691). Hooper agreed that the judge ultimately struck the juror for cause. (V13, R695). At that point, Hooper felt he should not object and tell the court that there was no motion before the court to strike for cause because Mr. Wixtrom would then just make the motion to strike for cause. (V13, R695). Hooper did not want to "tip off your hand and negate the issue." (V13, R696).

Hooper said he considered filing a *McCleskey v. Kemp* motion because of secondhand information he received from Peter Schmer. (V13, R699). Hooper said Schmer told him Junior Barrett and

George Couture made statements that the state attorney considered the race of the victim in determining whether to seek the death penalty. (V13, R699-700). Hooper sent an e-mail to colleagues Peter Schmer and Susan Cary in August 2004, asking them if it was wrong for the State to use the race of the victim as a consideration in seeking the death penalty. (V13, R698, 699-700). Hooper also sent an e-mail to Jennifer Davis, his supervisor at the time. (V13, R700). Decisions in capital cases would involve the head of the unit. (V13, R700). The basis for the concern was that the victims were black. (V13, R701). The motion was not filed; however, Hooper could not recall the reason it was not filed: "I don't remember whether it came up in any major crimes meeting, some reason or other, she had a reason or someone else had a reason." (V13, R701). Hooper also sent his supervisor an email about the possibility of filing a motion to recuse the Office of the State Attorney from prosecuting Frances' case. (V13, R700). He could not recall why he did not file the motion or recall any further discussion with his supervisor regarding the race issue. (V13, R701).

Subsequent to Elvis Frances' trial, Hooper emailed the ASA and asked if the State was still seeking the death penalty for his client. Hooper believed it was clearly evident that Elvis was the instigator, and "the more culpable of the two." (V13, R712-13). Hooper thought ASA Wixtrom would offer a plea deal for

Frances. (V13, R713). Wixtrom never said race had anything to do with seeking the death penalty for Frances. Hooper never had any discussions with ASA Sedgwick on this case. (V14, R793). However, Hooper did not believe race was a factor in Wixtrom's decision to seek the death penalty. (V14, R848).

In preparation for Frances' penalty phase, Hooper scheduled many depositions and developed a trust between himself and Frances. (V14, R769). Hooper and his colleagues discussed the case on a weekly basis. (V14, R773). For Frances' penalty phase, Hooper decided to present a "non-integrated defense" where the penalty phase attorney did not participate in the guilt phase. (V14, R770-71).

Hooper said mitigation experts conducted a thorough investigation into Frances' background. He said, "There was a 100 percent consensus with everybody ... it was a classic textbook ... good son, bad son scenario." (V14, R777). It was the defense's strategy to present evidence that Frances was "emotionally weak." (V14, R777). Frances was "completely dominated by his brother." (V14, R777, 784). Frances' brother Elvis was "evil." (V14, R777). Elvis "could care less about David." (V14, R778). The whole theme of the penalty phase was that Frances was led astray by his brother. (V14, R786). Elvis refused to testify on David's behalf at the penalty phase. (V14, R780, 831, 834). Elvis would not help David. (V14, R834). Elvis

spoke with Hooper only to tell him he would not help David. (V14, R834). Nevertheless, Hooper deposed Elvis since he had already been tried and convicted. (V14, R838-39).

Hooper only wanted people to testify at the penalty phase that were "100 percent behind me and my client." (V14, R780). Elvis was "exceedingly antagonistic and not on our side at all." (V14, R832). Hooper said he presented mitigating circumstances at the penalty phase that were "case specific" to his client's case. (V13, R704). It is Hooper's strategy not to take every mitigator and hope that it sticks, but to develop a theme and stick with it. (V14, R785).

Hooper's strategy was not to ask for a specific list of mitigators to be considered as he prefers to ask for the "catchall." (V13, R722-23, 725, 734, 737). Hooper did not recall if he spoke to Frances about presenting a list of mitigators to the court. (V13, R739).

Hooper typically has contact with defense experts "throughout the whole process." (V13, R741-42). He and Dr. Mings discussed the doctor's findings, and Hooper advised Mings that the theme of the penalty phase was that Frances "was the more passive one." (V13, R743, 744). Hooper did not recall if Mings suggested getting a second opinion from a mental health expert. (V13, R743). Hooper said Mings is very experienced in death penalty work. Therefore, if Mings did not find mitigation,

Hooper would not hire a second expert "just to hire someone else." (V13, R745). In Hooper's opinion, he believed the defense had a "powerful mitigator" that Elvis Frances was "more culpable" that his client. (V14, R841).

Hooper said that he acknowledged the victims during the penalty phase in order for the jury to consider mercy for Frances. (V13, R758-59). However, Hooper's primary consideration was to "save his (client's) life." (V13, R758). Hooper said Frances is "a perfect gentleman, quiet, respectful." (V14, R784). Frances and Hooper did not have any disagreements on strategy. (V14, R792, 846).

Hooper did not recall presenting evidence that Frances was under extreme mental or emotional disturbance due his theme of "dominance by another." Hooper did not believe that Frances' capacity to appreciate the criminality of his conduct was impaired. (V14, R788). In addition, "It would be a rare case that I would argue remorse to a jury." (V14, R790). In any event, Frances' actions subsequent to the murders contradicted remorse. (V14, R791).

Hooper believed the trial judge's comments about "Southern heritage" would not taint the jury. "Actually, the opposite." Hooper said:

> if a jury is laughing at some levity injected into the proceedings, that they may be less likely to vote for death. So, tactically, what I will do – and I

> will do it two ways. If the judge injects some levity and the jury chuckles at the comment or any type of comment, as long as it's not prejudicial to my client, I'll try to inject some levity. . .

(V14, R806). In Hooper's opinion, "light humor like Southern heritage, obviously, is positive." (V14, R807).

In addition, Juror Pagan's comments didn't taint the jury pool. "If anything, it would have helped because she added a factor to it." (V14, R809). Hooper did not consider moving for a mistrial because, if anything, Juror Pagan "positively tainted the jury pool towards my side." (V14, R812). Hooper did not read the transcript as collateral counsel read it. Hooper did not feel any southerner/northerner analogy was objectionable, nor was it offensive. (V14, R815, 819). Hooper did not believe race played any part in ASA Wixtrom's decision to seek the death penalty. (V14, R848).

Kim Crag-Chaderton was an assistant public defender for five years. (V14, R888-89). Chaderton met with Frances on a few occasions. (V14, R892). She had very limited contact with Gerod Hooper. (V14, R895). Chaderton was from the Virgin Islands, so she assisted with depositions that were conducted in St. Thomas. (V14, R890). Julie Norman went with Chaderton. (V14, R892). Chaderton helped Norman with the local dialect. (V14, R897). She deposed Frances' former teachers and coaches as well as Frances' uncle. (V14, R892).

Junior Barrett was one of the first attorneys involved in Frances' case. (V14, R898-99). He worked on the case for about a year and assisted with mitigation. Ultimately, he did not participate in the trial. (V14, R899-900). Changes within the Public Defender's Office excluded Barrett's involvement in the case. (V14, R901-02).

During the time Barrett spent on Frances' case, several attempts were made with ASA Sedgwick to negotiate a sentence for Frances. (V14, R901-02). Frances was willing to accept a life sentence but the Sedgwick would not agree. (V14, R902). Sedgwick told Barrett she was not willing to offer life "because she didn't want to be accused of being more lenient with a black on black crime, which this was." (V14, R903, 905, 910). Barrett got the "impression" that Sedgwick was not willing to listen to mitigating evidence regarding Frances. (V14, R906). Nonetheless, Barrett did not believe Sedgwick exhibited racism. (V14, R907, 909).

Jeffrey Ashton, Assistant State Attorney, is familiar with the *McClesky v. Kemp* case. He recalled a 1990's newspaper article regarding allegations of racial bias in death penalty cases in the Orlando area. Ashton believed the reporter's name was Bob Levenson. (V14, R918, 920-21, 926).

Ashton said he was the prosecutor in the *Steven Evans*[3] case, which involved a black male defendant and a black male victim. (V14, R923, 926, 927). Ashton did not offer Evans a life sentence because he was serving a robbery sentence when he escaped from a work release program and went with a group of his gang members to rob a drug dealer. Ashton said Evans orchestrated the plan to lure the victim to an apartment where he was beaten and eventually murdered. (V14, R930). Race was not an issue in the *Evans'* case. (V14, R931).[4]

Dr. Jeffrey Danziger, psychiatrist, interviewed Frances pursuant to a court order. (V15, R965). Frances refused to take the MMPI-II psychological test and would not discuss the events that had occurred the day of the murders. (V15, R964). Nonetheless, Danziger was able to conduct a satisfactory

[3] The court took judicial notice of *Evans v. State*, 800 So. 2d 182 (Fla. 2001). (V14, R928).

[4] Pursuant to objection by the State that the testimony was not relevant and Frances had not presented any pattern of racial discrimination (V14, R932), the court asked whether statistics would be presented. (V14, R933). Collateral counsel stated, "We don't have statistics." (V14, R933). Counsel presented a newspaper article "that raised the possibility of inherent racism in the application of the death penalty." (V14, R934). Collateral counsel believed that, even though ASA Wixtrom prosecuted the case, ASA Sedgwick made a statement regarding race as a factor in pursuing the death penalty. (V14, R934). The court noted that the postconviction motion specifically alleged that Sedgwick's alleged racial bias was the reason for seeking the death penalty in Frances' case. (V14, R939).

evaluation of Frances. (V15, R964). Danziger was aware that Frances had confessed. (V15, R967-68).

Danziger did not disagree with Mings' finding that Frances has a full scale IQ of 94. (V15, R965). Further, the military usually conducts testing, and there was nothing in Frances' history to show he suffers from mental retardation, intellectual impairment, dementia, or psychotic episodes. (V15, R966). Danziger reviewed Dr. Cunningham's report which was based on the investigation of Julie Norman, the mitigation specialist at trial, plus some interviews he conducted. (V15, R967).

In Danziger's opinion, Frances was not under the influence of extreme mental or emotional disturbance when he committed the murders. (V15, R968). There was nothing in Frances' history to show that before or after November 6, 2000, he suffered from any mood disorder, psychotic disorder, or anxiety disorder. (V15, R968). Other than the use of cannabis, there was nothing to suggest any substance abuse diagnosis that would have affected Frances mental state. (V15, R968). In Danziger's opinion, there was no evidence of any mental disturbance around the time of the murders. (V15, R969). The facts of the murders showed they were more calculated and planned rather than something done during a period of distress out of impulse. (V15, R970). Frances' confession also supports that opinion. (V15, R970). In addition, Frances had no history of psychiatric problems. (V15, R971).

In Danziger's opinion, Frances' ability to appreciate the criminality of his conduct was not substantially impaired. (V15, R971). The facts showed that Frances went to the home with a plan to steal the victim's car and, while inside, he killed the two women. (V15, R972). When David and Elvis initially went to the victims' house, they saw Dwayne Rivers, the 13-year-old son of one of the victims. They returned to the home after Dwayne left for school. (V15, R975).

Frances told Danziger he used marijuana the night before the murders, had not taken any medication the day of the murders, and was not under the influence of any street drug, prescription drug or substance. (V15, R975). In Danziger's opinion, there was no indication that Frances was dependent on marijuana. (V15, R976).

Frances told Danziger that he was close with Elvis and felt responsible for him. Frances said he went AWOL from the military because "Elvis was getting in trouble. I'm the only one who could get to him, so I came home." (V15, R994). In Danziger's opinion, Frances was capable of taking care of Elvis as Frances "was physically healthy, of average intelligence, had job skills." (V15, R995, 1002). Frances had "resources and abilities" and, as he relayed to Danziger, "the means to get money." (V15, R995).

Mark Wixtrom was the lead prosecutor on Frances' case. (V15, R1005). Wixtrom reviewed the trial transcripts regarding Juror Roberts. (V15, R1006). The trial transcripts indicated that Juror Roberts was "okay" with the death penalty. (V15, R1026). Wixtrom had made a notation on the juror seating chart "okay." (V15, R1025-26). At some point, Wixtrom wrote "opposed" in the section for Juror Roberts. (V15, R1027-28). Wixtrom could not recall why he changed "okay" to "opposed" in his notes. (V15, R1031). However, Wixtrom recalled that trial defense counsel Hooper had throat surgery around the time of trial and was difficult to understand. (V15, R1028-29). Additionally, the transcript reflected that Juror Roberts was hard to hear. (V15, R1029). It was "very well possible" that Wixtrom misheard the comment about opposing the death penalty. (V15, R1031). Wixtrom could not think of any other reason he would have made the notation she was "opposed." (V15, R1031). Wixtrom had never done a death penalty case before and was making notes as the jurors were questioned. (V15, R1033). Wixtrom said he usually carried a folder to the podium rather than a single piece of paper because it "looks more professional." Wixtrom would write things on the folder. (V15, R1036). Wixtrom does not make notations with regard to the race of prospective jurors. (V15, R1056). The only reason Wixtrom would have struck Juror Roberts was because it

said on his list that she was opposed to the death penalty. (V15, R1052).

Wixtrom said the decision to seek the death penalty for Frances had been decided prior to the case being assigned to him. (V16, R1090-91). Wixtrom discussed the facts of the case with other members of the homicide unit, the elected State Attorney, and family members. “All of that came into decision to continue to seek the death penalty.” (V16, R1091). Sedgwick was no longer in the homicide unit once Wixtrom took over the case. The discretion to offer a life sentence when Wixtrom had the case would have lain with the senior member of the homicide unit. Wixtrom believed it was Robin Wilkinson at the time. (V16, R1091). An e-mail was sent from Hooper on March 5, 2004, asking whether Wixtrom was still seeking the death penalty. (V16, R1092). Wixtrom pursued the death penalty based on the facts and discussions with the detectives, other members of the state attorney’s office and the surviving family members. (V16, R1095). He also had information regarding Frances’ involvement in a murder that had occurred in Tallahassee. (V16, R1098). Wixtrom said that, based on the severity of the case, the aggravators, the statutory elements, and the family’s wishes, the death penalty was appropriate. (V16, R1101).

THE COLALTERAL PROCEEDING TRIAL COURT’S ORDER

Frances' post-conviction relief motion raised a number of claims that are not contested on appeal. The claims that are raised on appeal were decided in the following way.

The first claim on appeal was claim "II-D" in the trial court, which denied relief finding as follows:

> *Subclaim D: Failure to raise a Neil/Batson/Miller-El violation during voir dire, Failure to object to the "cause" strike of Juror Roberts.*
>
> Defendant asserts that the State intentionally discriminated against him when it struck prospective juror Roberts ("Roberts") for cause even though there was no indication in the record that she was opposed to the death penalty. He further asserts that because he is a "petitioner of color," counsel was ineffective for allowing one of the few African-Americans in the jury pool to be stricken for discriminatory reasons.[9]
>
> The *voir dire* record reflects that after she was asked about her feelings pertaining to the death penalty, Roberts replied, "[A]s far as with all the evidence that's been presented and everything, I feel like if he or she deserved that, yes I can." (VD. 265.) She then stated that she was not opposed to the death penalty in certain cases and, assuming that the case proceeded to the penalty phase, she could vote for the death penalty if the facts coupled with the law warranted that penalty. (VD. 265, 266.) She also stated that she would keep an open mind throughout the entire proceeding and only make up her mind which way she was going to vote after hearing all the facts coupled with the Court recitation of the applicable law. (VD. 266.) Roberts also told Hooper that she was not opposed to the death penalty and indicated she could put aside her personal feelings and decide whether the instant case was appropriate for a death sanction. (VD. 276.)
>
> [FN9] In support of this case, Defendant cites to *State v. Neil, 457* So. 2d 481 (Fla. 1984) and *Batson v. Kentucky,* 476 U.S. 79

(1986). However, those cases involve *peremptory* challenges used in a discriminatory manner as opposed to the *cause* strike in the instant case.

The next day, however, the following took place:

> Mr. Wixtrom: Your Honor, we would move to strike Ms. Roberts in seat number 41. She indicated yesterday she was opposed to the death penalty, which is a race-neutral reason, according to the case law. Although she said she could apply it, she still said she was opposed to it.
>
> Mr. Ruiz: For the record, she is an African-American.
>
> The Court: Your notes reflect that's the statement - - her statement to that effect?
>
> Mr. Ruiz: That's what Mr. Wixtrom just indicated. Yes, sir, I believe that was correct.
>
> The Court: If that carries with it a suggestion that there is *a Neil* violation, opposition to the death penalty is a race neutral reason, and so the observation that she's an African-American is irrelevant, and I will grant the state's motion to strike juror 41 for cause.
>
> Mr. Ruiz: Yes, sir. I will simply add for purposes of the record, she indicated that she would be able to put those feelings aside in making a decision.
>
> (VD. 492, 493.)[10]
>
> [FN10] During the case management conference, the Court determined that an evidentiary hearing was needed because even though Roberts was stricken for cause, it was unclear if there was additional information in the transcript, or if "both Mr. Wixtrom and Mr. Ruiz's notes were in error." (CMC. 23, 24.)

Juror examination during voir dire has a dual purpose: (1) to ascertain whether a legal cause for challenge exists, and (2) to determine whether prudence and good judgment suggest the exercise of a peremptory challenge. *Mitchell v. State,* 458 So. 2d 819, 821 (Fla. 1st DCA 1984). Additionally, a defendant is not entitled to a jury of any particular composition. *Neil,* 457 So. 2d at 487.

During the evidentiary hearing, Ruiz testified that he became involved in the instant case approximately a month before trial. (EH. 627.) After he indicated that he had reviewed the *voir dire* transcripts, the following took place:

> Q: [A]nd do you see any mistakes that you might have made during the voir dire?
>
> A: I see there was one particular juror, Ms. Roberts, I believe she was juror 41 at the time of the jury selection . . . I don't have that independent recollection, but having reviewed the transcripts refreshed my memory. At the time Ms. Roberts' name came up for challenge for cause. The state attorney at the time was Mr. Wixtrom, and ... [he] indicated at the time that Ms. Roberts had . . . indicated that she was unable to consider the death penalty. When Mr. Wixtrom made that representation to the Court, in my review of the transcript and of the responses Ms. Roberts had made, it was apparent to me that she had responded on four separate instances where she indicated that she could, in fact, consider the death penalty and that she could ... impose the death penalty.
>
> The Witness: [A]nd when Mr. Hooper followed up on that, she affirmed it again. . . . When Mr. Wixtrom made the representation that she could not consider the death penalty, my memory was not clear on that. I did not - - based on my review of those records indicate that to the court, in fact, she had said the opposite of what Mr. Wixtrom was submitting to the court....

The Court: But you concurred with Mr. Wixtrom' [s] representation.

The Witness: Yes, sir. Yes, sir. I did. I verbally conferred and concurred and said that I believe that that was correct.

Mr. Hendry: Why did you concur with Mr. Wixtrom's - -

A: I'm not sure in terms of what I was thinking at the time, but I think, essentially, I just didn't remember at the time. Nobody else in our team caught it ... and it was just a mistake. I mean, I think it was just a mistake in terms of what Ms. Roberts said versus what Mr. Wixtrom had said.

Q: Okay. And what should you have done?

A: Well, in retrospect, I believe the appropriate way of addressing that would have been to confer with counsel, cocounsel on the case, review exactly what Ms. Roberts had said, in fact, that. she had indicated something very much in opposite to what Mr. Wixtrom was saying and make the court aware of that so the court could consider that in making a determination in their ruling on the challenge for cause on Ms. Roberts. That having looked at the cold record is what I preferred to have done at the time.

Mr. Hendry: Mr. Ruiz, you mentioned that you reviewed these voir dire transcripts . . . what did you state for the record when Juror Roberts was stricken?

A: My recollection was that -- well, number one, I believe I indicated to the court that I concurred with Mr. Wixtrom's representation, number one. Number two, I believe I also indicated words to the effect she said she could set those feelings aside in considering the death penalty which is an incorrect statement.

Q: Were you attempting to preserve the record in this regard?

A: I was.

Q: That's why I want to take you to a time . . . you're under the impression that you preserved this record, preserved the objection to the strike?

A: I did.
Mr. Hendry: Mr. Ruiz, have you reviewed the voir dire transcript where you were objecting to the strikes of these jurors, 35 and 36?

A: Yes.

Q: Okay. Do you feel that you made a mistake in failing to mention Juror Roberts?

A: That was, I believe, at the time when we were actually sitting the entire panel, decided to challenge all additional jurors for any basis we thought was appropriate, and, yeah, I should have included Juror Roberts along with the additional two arguments, at least that's my estimate.

Q: And what should you have stated to the court in this regard?

A: The appropriate representation on the record should have been that she affirmatively said a number of times that she could consider the death penalty, and that Mr. Wixtrom's representation was inaccurate, as well as the fact she could, in fact, consider the full range of penalties, which was the same basic reason that I gave for the exclusion of the other jurors that are referenced in the record. It would have been an appropriate time, I believe, to reraise that issue.

(EH. 631-636.) Ruiz testified that he was confused and made a mistake in failing to mention

> Roberts when he discussed jurors 35 and 36, stating, "Quite frankly, I didn't catch it." (EH. 636, 658, 659, 661.) He further testified that, notwithstanding his mistaken belief about Roberts' assertions, he would have considered keeping her on the jury panel. (EH. 663-665.)
>
> Based on the foregoing, the Court finds credible Ruiz's testimony that he *did not* remember Roberts' testimony and thus mistakenly struck her for cause based on Wixtrom's mischaracterization of her testimony. The Court also finds that there is nothing in the record indicating that Ruiz intentionally called for a false strike or that the defense team was aware of the mistake at the time it was made. Furthermore, Defendant has introduced no evidence showing that, but for Ruiz's mistake, the outcome of the trial could have been different. *Strickland,* 466 U.S. at 694. Accordingly, this claim is denied.
>
> (V6, R142-146).

The second claim on appeal was a secondary part of Claim II-D. The trial court made the following findings in denying relief:

> Defendant also claims that because of pressure from the press and the Ninth Judicial Circuit Court, the State sought the death penalty solely because he is black.[FN11] Accordingly, counsel was ineffective for failing to file a motion to preclude the death penalty pursuant to *McCleskey v. Kemp,* 481 U.S. 279, 294 (1987) (defendant who alleges an equal protection violation has burden of proving existence of purposeful discrimination and that such discrimination effected him). In support of this assertion, he points to former Public Defender George Couture's ("Couture") March 31, 2010, affidavit, wherein Couture stated, *inter alia,* that Assistant State Attorney Dorothy Sedgwick ("Sedgwick") stated in no uncertain terms that she would not consider a life offer because it could give rise to allegations that the State's decisions in capital cases were based upon the race of the victim.[FN12]

[FN11] This claim is based on Defendant's April 14, 2010, motion to amend Subclaim 2D.

[FN12] The defense entered into evidence Defense Exhibit 4 which contained two e-mails from Hooper in 2004 concerning Sedgwick's alleged remarks. (EH. 697, 858.)

During the evidentiary hearing, Couture testified that counsel contacted him within the last few years to discuss his participation in the case, and he was contacted "more recently" to prepare a declaration. (EH. 871-874.) He further testified that he had many conversations with Sedgwick concerning pleas, mitigators, and aggravators, and she gave him the impression that the most important thing to her in the instant case was the race of Defendant and the victims. (EH. 483-485.) According to Couture, Sedgwick "exclusively relied upon the race of the victim and the race of the defendant in making her decision," and she would not let Defendant plea because it was a "black on black crime." (EH. 866, 867.)

Couture stated that he had never heard a prosecutor say anything as shocking as this and because he would never forget it, it was "unnecessary to record it contemporaneous . . . ," although he did share it with his supervisor and others at the Public Defender's Office. (EH. 866, 878.) He also stated that he did not file *a McCleskey* motion or inform the Court about Sedgwick's remarks; in fact, he told no one outside of the Public Defender's office about them because he did not know what would happen if he raised the issue; he was still trying to settle the case; he was concerned about media scrutiny; and Sedgwick would dispute the information which might cause the State to become entrenched in its position, making the case about politics instead of the facts and circumstances of Defendant's background. (EH. 479, 480, 868, 885.)

Sedgwick testified that she was the assigned trial attorney in the instant case until she transferred out of the division. (EH. 14-16.) She also testified that she had conversations with Couture about the possibility of a life plea; however, she would not agree to that based on the strong evidence that she saw. (EH. 16, 17, 22, 30, 31.) Sedgwick stated that

race never played a factor in her decision and she "positively" did not tell Couture she could not consider a life sentence based on the victims' race, or because the case involved a black defendant and black victims; she did admit, however, that she may have said that the case was so strong and so deserving of the death penalty that "they would forever be accusing us of racial discrimination in other cases if we waived death in this case." (EH. 18, 21-26.) She also stated that once she turned the case over to Wixtrom, he was free to evaluate it and make his own decisions concerning any potential plea offers. (EH. 31-33.)

Schmer testified that even though Couture's interpretation of Sedgwick's statements was discussed after the trial, he could not say for certain that it was discussed while the case was pending. (EH. 494, 498, 499.) He also testified that he did not remember what his perception of the e-mail was at that time, and had no knowledge about what Sedgwick said other than what was contained in the e-mail. (EH. 499, 500, 506.) Schmer had no independent recollection of why *a McCleskey* motion was not filed, but stated that the discussions in his office centered around how it would impact other defendants, and "The motion was not filed because there were other mere [sic] egregious cases out there where a life offer was being offered or given certain defendants." (EH. 463, 464, 502, 505, 506.)

Ruiz testified that the defense team discussed the possibility of resolving the instant case with life, but Defendant's race was an impediment to that resolution. (EH. 625, 640, 641.) He further testified that he did not file a motion to preclude the death penalty based on race because he did not understand that "there was a legal possibility to file that motion." (EH. 641.)

Hooper testified that he had reviewed the e-mails that he sent in August 2004 and he believed that it was wrong for the State to use race as a consideration in seeking the death penalty. (EH. 697, 698.) He also testified that he did not have any discussions with Sedgwick regarding this case and he tried to negotiate a life sentence through Wixtrom. (EH. 792, 793.)

> According to Hooper, Wixtrom never implied that his decision to reject the offer had anything to do with race. (EH. 793.) Hooper stated that he did not remember if there was any reason not to file *a McCleskey* motion. (EH. 701.)
>
> Former Public Defender Barrett testified that there were several discussions with Sedgwick concerning a plea to life without the possibility of parole. (EH. 898, 901, 902, 903.) He further testified that even though Defendant stated that he would accept a life offer, Sedgwick would not agree because "she did not want to be accused of being more lenient with a black on black crime . . . ," and/or did not want to give the impression that the State was more lenient on black on black crimes. (EH. 902-905, 910.) Barrett indicated that he did not believe Sedgwick was exhibiting racism or that there was a basis for a motion to preclude the death penalty accusing her of racism. (EH. 907, 909.)
>
> Wixtrom testified that he could not remember who made the decision to seek the death penalty against Defendant, but it had already been made when he took over the case in 2003. (EH. 1005, 1090, 1091.) He further testified that they were going forward with the death penalty based on the severity of the case, the aggravators, the statutory elements, and the wishes of the surviving family members. (EH. 1095, 1101.)
>
> Based on the foregoing, the Court finds that this testimony is not credible wherein there is nothing in the record to support the vague recollections of these witnesses. Accordingly, because Defendant fails to establish that race was ever the reason the State sought the death penalty against him, this claim is denied.
>
> (V6, R146-149).

Frances' third claim is that trial counsel was constitutionally ineffective for "failing to object" to

“improper comments” by the court during jury selection. The trial court rejected that claim:

> *Subclaim B: Failure to object to the Court's improper comments regarding "Southerners" and "Yanks."*
>
> Defendant asserts that the trial court judge interrupted *voir dire* several times to make distinctions about how "Southerners" tended to be more "gentile [sic]" when answering questions about the death penalty when they actually needed to respond more directly like a "Yank." He further asserts that these interjections and instructions tainted the jury pool against him based on his country of origin and also against Hooper who speaks with a "very heavy New York accent."
>
> During jury selection, the following took place:[FN8]
>
> > [FN8] Citations to *voir dire* will be referred to as “(VD.__.)”
> >
> > The Court: [Let] me say a word about our use of language. Oftentimes those of us who are raised in the South tend to say things delicately. It just seems to be a more courteous or a gentile [sic] way of handling things than maybe the Yanks do. So we tend to say, yes, I think I could, when what we really mean is yes. People raised in another environment might be inclined to give a more direct and positive answer. I just want to make sure the record is clear and that I understand where people stand on the issues . . . . Ms. Hill, if the facts warranted it and you weighed the mitigating and aggravating factors according to the instructions that I give you, could you impose the death penalty? Could you vote for the death penalty? Juror Hill: I think it would be very difficult for me to do it. The Court: It's difficult for anybody. This is not an easy task for anyone involved in the room. What I'm asking for you to do is put your gentile [sic], southern nature aside

and give us an answer about whether you could under any circumstances.

Juror Hill: Right. If the crime - - if I honestly believed the crime warranted it and I listened to all the information and I, you know, consulted with the others involved, yes.

The Court: Thank you, Ma'am. That's what I thought your answer was going to be.

Juror Hill: But it would be really difficult.

The Court: I understand.

The Court: Ms. Pagan, I wasn't sure about you for a while, but now I think I'm sure. I thought your answer was more direct at the end, and I'm asking for reassurance now. If you felt that the facts of the case warranted it and you weighed the factors on both sides and according to the instructions given by the court, could you under those circumstances vote for a death penalty?

Juror Pagan: I think so.

The Court: "I think so." See, it's our Southern heritage.

Juror Pagan: I'm not - -

The Court: We all do it. It's a hard question, no question about it.

Juror Pagan: It's very difficult.

The Court: It's a very difficult question, and I know that we're putting jurors on the spot to try to even think about issues like this. It's very difficult to do. But we would like to know if you can ever picture yourself voting for a death penalty.

Juror Pagan: Like I said, if the facts that

I hear are really ugly, yes.

The Court: Thank you, ma'am. I thought that's what you said earlier, and that was going to be your answer. But I just wanted reassurance and evidence in the record that that's what you had said. And the others I'm not asking because I think your answers were clear on the record, so I don't mean to overlook you.

(VD. 172-175.) Thereafter, counsel argued, "[T]he polite Southerner example that the court gave, and that was given on more than one occasion. The purpose was apparently so that the jurors would be more definitive in their position. The case law does not require that. Those are our objections." (VD. 616.)

Defendant now argues that the comments to Juror Hill essentially instructed her that the correct answer was, "Yes, death should be imposed," and anything less than that was far too delicate and/or not positive enough, while the comments to Juror Pagan essentially sought reassurance that she could vote for the death penalty. Accordingly, these geographical distinctions and/or questions tainted the jury pool by informing prospective jurors that they should not sit on the panel if they were not prepared to vote for death in a straightforward fashion. Although he concedes that counsel *did* object to the comments, Defendant argues that the objection was too general because counsel failed to seek either a mistrial or a replacement panel.

In a capital case, a potential juror's initial response to questioning about the death penalty alone does not automatically prove good cause for excusing him if his subsequent responses alleviate doubt concerning his ability to impartially render an advisory verdict; however, he is subject to a challenge for cause if he gives "consistently equivocal voir dire answers" concerning his ability to recommend death. *Conde v. State,* 860 So. 2d 930, 942-43 (Fla. 2003). Furthermore, because disqualification is mandatory if any reasonable doubt exists, it is proper for a trial judge to take the initiative in determining which jurors fail the standard. *Williams v. State*, 689 So. 2d 393, 396 (Fla. 3d DCA 1997) (when

> court interjects itself into voir dire proceedings to ask certain jurors additional questions, that action, without more, does not demonstrate a departure from its position of neutrality so long as the court exercises its authority without harshness or repeated interjections).
>
> Based on the foregoing, the Court finds that the trial court judge's comments and/or questions concerning "Southerners" and "Yanks" *were* perhaps patronizing and unrealistic, particularly in light of the evolving standards of jury selection, and that counsel lodged an objection to them. But, the Court also finds that because there is no indication in the record that the trial court judge was intentionally misleading or trying to intimidate any of the potential jurors, these comments and/or questions, albeit improper, do not rise to the requisite level of prejudice, wherein there is no reasonable probability that but for counsel's alleged omission, the outcome of the case would have been different. *Strickland,* 466 U. S. at 694. Accordingly, this claim is denied.

(V6, R138-141).

The fourth claim in Frances' brief is that his trial counsel were constitutionally ineffective at the penalty phase of his capital trial. The trial court made extensive findings on this claim:

> **Claim IV: Mr. Frances was denied the effective assistance of counsel during the penalty phase of his trial. This violated Mr. Frances' rights under the fifth, sixth, eighth and fourteenth amendments to the United States Constitution and corresponding provisions of the Florida Constitution.**
>
> *Subclaim A: Failure to object to comments erroneously informing the jury that a list of mitigators would be provided at the penalty phase.*
>
> Defendant asserts that during jury selection, the State continually advised the panel that if the case reached a penalty phase, jurors would be given mitigators to consider, and in one instance, even

specified that *a list* of mitigators would be provided. However, counsel failed to present specific mitigators and instead stated at the charge conference that the defense "prefers not to have the mitigating circumstances laid out." Defendant now argues that counsel's failure to object to the State's promise, coupled with his failure to present a framework for determining the existence of mitigators, deprived the jurors of any guidance in determining which mitigators applied and how they should be balanced against the stated aggravators.

Strategic decisions do not constitute ineffective assistance of counsel if alternative courses have been considered and rejected and counsel's decision was reasonable under the norms of professional conduct. *Occhicone v. State,* 786 So. 2d 1037, 1048 (Fla. 2000) (citation omitted). Additionally, counsel cannot be deemed ineffective merely because current counsel disagrees with trial counsel's strategic choices. *Strickland,* 466 U. S. at 689.

During the penalty phase proceeding, the following exchange took place:

> The Court: The defense has not given me a list of mitigating circumstances.
>
> Mr. Hooper: That's correct, Your Honor. The defense prefers not to have the mitigating circumstances listed out. The defense prefers just to have the - - I'm looking for the number, which is just 8A and B, Your Honor. That you may consider any aspect of the Defendant's character, background, and other circumstance in the defense - - we just wish the general instructions.
>
> The Court: I wouldn't differentiate normally to the jury, but is defense requesting any non-statutory mitigating circumstances? Mr. Hooper: No. Just what I said. We don't want to have anything listed out.
>
> Mr. Ashton: I would suggest that, and you're probably thinking the same thing, it might be a good idea to get the Defendant's specific waiver of some of these because

these are some statutories that he is - - based on the evidence, might arguably apply.

The Court: I will inquire. Have you now discussed that with your client?

Mr. Hooper: Yes. He concurs, Your Honor, that it's the better approach.

The Court: Mr. Frances, have you - -

Defendant: Yes, Your Honor.

The Court: Have you discussed with your attorneys that you are entitled to have the jury instructed that they can consider certain mitigating circumstances, including whether or not you have, if you have no significant history of prior criminal activity, that you were under the influence of extreme mental or emotional disturbance, that they may have known that you were an accomplice in the offense, that you were under extreme duress or substantial domination from another person, including Elvis, whether your capacity to appreciate the criminality of your act may have been substantially impaired, or your age. Have you discussed all of these circumstances with your attorneys?

Defendant: Yes, Your Honor.

The Court: And have you discussed with them the possible existence of any non-statutory mitigating circumstances that they may have in mind?

Defendant: Yes, Your Honor.

The Court: And they have asked that I just give a general instruction that the jury may consider any aspect of your character, record or background that they find to be mitigating. Just, do you understand the difference between listing them out and just saying them generally?

Defendant: Yes, Your Honor.

The Court: And have you discussed with your attorneys whether it's a good idea or not a good idea to list them out or - -

Defendant: We discussed it was a good idea, as you say.

The Court: To do them generally?

Defendant: Yes, Your Honor.

The Court: Is that what you wish?

Defendant: Yes, Your Honor.

The Court: Okay. Very well.

(T. 236-238.)

During the evidentiary hearing, Hooper testified that he customarily did not ask for a list of statutory mitigators because he did not want the jurors to feel constrained by what was in front of them; instead, he wanted a "catchall" instruction informing them that they could consider any aspect of a defendant's life and not "judge a person by the worse [sic] thing he's ever done in his life." (EH. 721-724, 726, 733-735.) He further testified that if the State indicated that jurors would be given penalty phase guidelines, that was a true statement and there would have been no reason to challenge it. (EH. 727-729.) Hooper stated that during the charge conference he and Defendant discussed forgoing the list of mitigators, and the Court also questioned Defendant to make sure that he acquiesced in that decision. (EH. 738, 739.)

Based on the foregoing, it is clear that, having considered other courses of action, counsel chose to have the general instructions issued to the jury, and this instruction provided a template that the jurors could use to reach their findings on the mitigators. *Id.* It is also clear that Defendant waived the standard jury instructions on mitigators in favor of Hooper's strategy to seek a general or "catchall"

instruction. Accordingly, because Defendant cannot now be heard to complain about a strategic decision which he obviously agreed with, this claim is denied.

Subclaim B: Failure to investigate and present available mitigation.[FN16]

Subclaim C: Drug Abuse/Dependency.

Subclaim D: Good Deeds.

Subclaim E: Stuttering.

> [FN16] Because these claims are related, they will be addressed together.

Defendant contends that counsel was ineffective for failing to investigate and present a plethora of available statutory and non-statutory mitigation at the penalty phase, including:

- ♦ full details of twenty-six adverse developmental factors and the situational crisis that "interacted" with these adverse factors when Byron expelled Defendant and Elvis from her home without financial resources or an alternative support system;

- ♦ specific references showing exactly how Defendant was developmentally damaged instead of general assertions that he was compromised;

- ♦ information from Elvis concerning his childhood with Defendant;

- ♦ Defendant acted under extreme duress or under the substantial domination of Elvis;

- ♦ Elvis committed the capital felony and thus Defendant's participation as an accomplice was relatively minor;

- ♦ Defendant lacked the ability to appreciate the criminality of his conduct or to conform his actions to the requirements

of law; and was under the influence of extreme mental or emotional disturbance at the time the felonies were committed; and

- Defendant's positive adjustment to prison, his lack of any previous significant criminal activity, and age at the time of the offenses.

He further contends that: he began using marijuana at age twelve and by age fourteen was abusing it on a daily basis (barring the time he spent in the military) up until the day before his arrest; read to students in the library at his high school and acted as a caretaker to his family and younger siblings; and had repeated bouts of stuttering throughout his life which could be the result of repeated familial abandonment.

During the evidentiary hearing, Dr. Mark Cunningham ("Dr. Cunningham")[FN17] testified that he interviewed Defendant, Byron, and Elvis, some of Defendant's maternal and paternal relatives, and mitigation specialist Julie Norman ("Norman"); he also reviewed extensive case records, including the penalty phase and *Spencer* hearing proceedings. (EH. 52-56, 332.) After he identified the twenty-six aforementioned adverse factors,[FN18] Dr. Cunningham stated, with example and explanation, how they negatively influenced Defendant's development and increased his likelihood of a psychological disorder which undermined his capacity to empathize with others or to exercise self-control and good judgment. (EH. 66-69, 73-87, 91-94,101-205, 233-253, 255-263, 265, 267-269, 280-288, 290, 291, 321-323.) He also stated that even though these factors should have been explained during the penalty phase proceeding, the only testimony relating to Defendant's development was Dr. Mings's statement that he was "addicted to Elvis."

[FN17] The State stipulated that Dr. Cunningham, who is a licensed clinical and forensic psychologist in private practice, was an expert in clinical and forensic psychology. (EH. 35, 46.)

[FN18] These factors are listed, with detailed explanation, in the instant Motion. (EH. 69, 70, 72, 73.)(EH. 73, 74, 287.)

Although Dr. Cunningham agreed that Defendant was neither psychotic nor insane, he did opine that Defendant was an "adolescent" who was "20 going on 16, 17," with a marijuana dependency that hindered his ability to engage in social and occupational pursuits.[FN19] (EH. 210, 212, 303-311, 320, 357, 358.) He further opined that these offenses were committed while Defendant was under extreme mental or emotional disturbance and therefore lacked the capacity to appreciate the criminality of his conduct. (EH. 280, 281-284, 379.) Dr. Cunningham stated that Defendant had a reduced chance of prison violence based on his previous adjustment to the OCJ, his high school diploma, and the likelihood that he would be a long-term inmate. (EH. 268-272, 275, 325.)

[FN19] Dr. Cunningham stated that his diagnosis was based on the Diagnostic Statistical Manual of Mental Disorders ("DSM-IV-TR"), and that Defendant reported to him that he smoked marijuana the night before the murders, but did not smoke it the morning of November 6, 2000. (EH. 303-305, 357, 358.)

Norman[FN20] testified that she developed a social history for Defendant and obtained some school records from St. Thomas; in the process, she spent over 300 hours on the case and met with over 40 people, including some of Defendant's relatives, friends, teachers, and other school personnel in St. Kitts and St. Thomas. (EH. 514, 532, 533, 565, 589.) She further testified that she informed members of the defense team about events in Defendant's life and made suggestions on how to present the information that she found, and was present for strategy meetings where the pathological dependence between the brothers and the idea to portray Defendant as essentially a good person were discussed. (EH. 571-574, 582-584, 586, 589, 590.)

[FN20] Norman was qualified as an expert in mitigation investigations. (EH. 532.)

Norman testified that there was generational family dysfunction in Defendant's family, and evidence that he had been physically abused. (EH. 556, 558, 559.) She further testified that he was beaten by Byron and Vernon, but Elvis was beaten harder and more often. (EH. 559, 560.) Additionally, Defendant would sometimes take the blame for Elvis's actions because he (Defendant) would not be beaten as severely as Elvis would. (EH. 559, 560, 561, 563.)

Based on her review of the penalty phase transcripts, Norman stated that the following additional information should have been presented during that proceeding:

- details showing how Defendant and Elvis were torn away from their grandmother and aunts who raised them from babyhood;

- Byron and Vernon retreating to their room after work and leaving Defendant to cook for the family and take care of Elvis;

- daily beatings of both brothers that left Elvis with permanent scarring;

- Byron's abusive language and behavior towards the brothers;

- information about turf wars in the neighborhoods and high school in St. Thomas between rival drug dealers over territory, including the rivalry that killed a fifteen year old boy when Defendant was in his mid-teens;

- Defendant's report that gunfire was heard almost daily in his neighborhood;

- Defendant's reports that, at various times in his life, he observed: a man walk by and shoot into the air; one male chasing another and shooting at him; a school acquaintance hit in the head with a hammer and other students stabbed or "beatdown" with baseball bats during a school riot; a baseball

> teammate cutting the throat of another boy who was strong arming students for money; a student in front of the school shooting a handgun at another student; a male attacked by five assailants who continued to stomp him even after he was unconscious; and an older acquaintance fatally shooting himself while playing with a gun.
>
> (EH. 591-597, 599-602.)

Schmer testified that the general defense strategy was to portray Defendant as a good person who was led into the offenses by a "pathological attachment" to Elvis, the "evil" brother, and stated that background information such as Defendant's impoverished background, strange relationship with his family, and lack of a male role model represented his best chance for a life sentence. (EH. 493-496.) He also testified that he believed that a thorough mitigation investigation had been conducted. (EH. 494.)

Ruiz testified that he did not recall the defense theme; however, the evidence the defense team had indicated that Elvis was more culpable in the murders and more of a leader in general while Defendant was a follower. (EH. 648, 655, 656.)

Hooper testified that developing the penalty phase strategy took a long time[21] and the descriptions of Defendant as a nice, calm, well adjusted person and the "exact opposite of someone who would have committed this crime," made the nexus between his history and the offenses difficult to understand; accordingly, the explanation had to be that Elvis dominated Defendant to "where he would do it." (EH. 767, 769, 783, 784, 846.) He further testified that even though Defendant was not ignorant or physically weak, he was emotionally weak in terms of dealing with Elvis who was the "prime mover" in the offenses. (EH. 777, 778.) However, when Hooper visited Elvis in prison and asked him to testify that it was his idea to commit the murders, Elvis essentially responded, "Screw him;" in other words, while Defendant cared about Elvis, Elvis "could care less about" his brother. (EH. 777-780, 834, 839.) Hooper stated that,

based on Elvis' response, he believed that he would either cop an attitude on the stand and not testify at all, or else would say the murders were Defendant's fault. (EH. 781.)

> [FN21] According to Hooper, while environmental and background history is always considered to explain what appears to be a bad person or a bad act, "you have to be real careful with that" because it can be dangerous to talk about a bad life when others who have horrible childhoods do not end up killing people. (EH. 781, 782.)

Hooper stated that he picked a defense theme and stuck with it, presenting nothing to the jury that did not support that theme. (EH. 790.) He also stated that he did not believe that Defendant's capacity to appreciate the criminality of his conduct or his ability to conform his conduct to the law was substantially compromised, and there was no requirement that a particular scientific test be presented as a predicate for presenting the case to the jury. (EH. 788, 844, 845.) Hooper testified that Dr. Mings' testimony about Elvis being the dominant figure and Defendant the passive one, was helpful; however, he could not recall if seeking a second mental health opinion was ever mentioned. (EH. 743, 744.) According to Hooper, he would have hired an expert in another field if Dr. Mings had recommended that, but did not automatically hire additional experts with no basis for doing that. (EH. 745, 746.)

Dr. Jeffrey Danziger ("Dr. Danziger")[FN22] testified that he reviewed case records[FN23] and evaluated Defendant; however, even though the evaluation was "satisfactory," Defendant refused to talk about the November 6, 2011, events in any detail[FN24] and refused to take the Minnesota Multiphasic Personal Inventory II ("MMPI-II") assessment. (EH. 948, 963-965.)[FN25] He also stated that, based on Dr. Mings' assessment, Defendant is a man of roughly average intellectual ability and there is no indication that he suffers from mental retardation, intellectual impairment, dementia, or any severe cognition deficit. (EH. 965, 966.)

[FN22] Dr. Danziger was tendered as an expert in forensic psychiatry and addiction psychiatry. (EH. 951.) He stated that there were five different axis used for diagnostic purposes according to the DSMIV-TR, including: (1) major mental illnesses; (2) developmental and personality disorders; (3) medical illnesses, particularly those that might play a role in affecting someone's mental state; (4) current stressors that may be affecting mental state; and (5) global assessment of functioning. (EH. 954, 955.)

[FN23] Dr. Danziger reviewed the Indictment and PSI, all of the penalty phase and *Spencer* hearing testimony, the Florida Supreme Court decision, the motion to vacate, the Attorney General's response, and Dr. Cunningham's April 4, 2009, report. (EH. 963, 967.)

[FN24} Defendant *did* talk about what occurred prior to entering the victims' home and after he left the home, but did not describe anything in-between. (EH. 964.)

[FN25] Dr. Danziger stated that the MMPI-II is a broadband psychological test which generates a profile about current mental health symptoms and diagnostic clues and can provide information about personality and characteristics. (EH. 958, 959.)

After indicating that he was familiar with the facts of the crime, as well as Defendant's psychosocial history and confession, and the penalty phase testimony, Dr. Danziger opined that Defendant was not under the influence of any extreme mental or emotional disturbance at the time of the offenses wherein his history before, during, and after the murders did not indicate that he suffered from any mood, psychotic, or anxiety disorder, or any mental illness. (EH. 967-971.) He further opined that Defendant's capacity to appreciate the criminality of his conduct and/or conform it to the requirements of law was not substantially impaired at the time of the

murders. (EH. 971-973.) Dr. Danziger stated that even if Defendant was cannabis dependent,[FN26] his dependence had no relationship to the offenses because: (1) cannabis intoxication is not associated with violence; (2) Defendant has no history of violence in the past while under the influence of cannabis; (3) Defendant stated he did not smoke cannabis on the day of the offenses; and (4) anything that he smoked the night of November 5, 2000, would have been out of his system by the time of the murders. (EH. 976, 977.)

> [FN26] Defendant reported to Dr. Danziger that he had smoked marijuana regularly since he was fourteen years old, and used it several times on a daily basis; according to Dr. Danziger, if this is accurate, it would be consistent with a diagnosis of cannabis dependence. (EH. 976, 977.)

A defendant's claim that he was denied ineffective assistance of counsel based on counsel's alleged failure to present mitigation evidence will not be sustained where the jury was aware of most aspects of the mitigation evidence that the defendant argues should have been presented. *Troy v. State,* 57 So. 3d 828, 835 (Fla. 2011). *See also Gudinas v. State,* 816 So. 2d 1095, 1106 (Fla. 2002) (counsel cannot be deemed ineffective for failing to present cumulative evidence); *Woods v. State,* 531 So. 2d 78, 82 (Fla. 1988) ("[T]he testimony now advanced, while possibly more detailed than that presented at sentencing, is, essentially, just cumulative to the prior testimony. More is not necessarily better.") Furthermore, defense counsel is entitled to rely on the evaluations conducted by qualified mental health experts, even if, in retrospect, "those evaluations may not have been as complete as others may desire." *Darling v. State,* 966 So. 2d 366, 377 (Fla. 2007.)

Based on the foregoing, the Court finds that the testimony presented during the evidentiary hearing virtually added nothing new to the mitigation, but instead essentially provided a more *detailed* account of the mitigation previously presented during the penalty phase proceedings. *Frances,* 970 So. 2d at 811, 812 (during the penalty phase, the court considered, *inter*

> *alia,* Defendant's age; the differing personalities of the brothers; Defendant's pathological attachment to Elvis; Defendant's abandonment by his mother at an early age and his poverty stricken childhood in the Virgin Islands; and Elvis' dominant role in the relationship between the brothers). The Court also finds that here, as in *Darling,* counsel was entitled to rely on his mental health expert, psychologist Dr. Mings, who evaluated Defendant's mental health status and did not indicate that any further testing and/or evaluation needed to be performed. Accordingly, because counsel's performance was not legally deficient under the applicable standards, this claim is denied. *Strickland,* 466 U. S. at 690, 694.
>
> (V6, R152-162).

The final claim in Frances' brief is a one-sentence claim of "cumulative error." Without conceding that this claim is sufficiently briefed for appellate purposes, the trial court denied relief on the cumulative error claim that was before it, finding that all of Frances' claims were either procedurally barred or meritless, and that the cumulative error claim failed. (V6, R164).

SUMMARY OF THE ARGUMENT

The "challenge for cause" claim is based on the incorrect premise that the juror at issue was removed by a peremptory challenge. In fact, the juror was removed for cause -- as it turned out, the State, and the defense, were confused about the juror's answers, and mistakenly exercised a cause challenge. If the mistaken removal of a juror for cause can somehow state a claim for relief, that claim should have been raised on direct

appeal. It was not, and is procedurally barred now. In any event, Frances does not claim, and could not show, that a biased juror served on his jury. That is what he must show to obtain post-conviction relief, and he has not done so. Finally, because a peremptory challenge is not at issue, the *Batson/Neil/Slappy* analysis has nothing to do with the issue.

The "reverse-*McCleskey*" was rejected by the post-conviction trial court in a well-supported finding that the testimony suggesting that Frances was prosecuted capitally because his victims were African-American was not credible. Frances was prosecuted capitally because of the severity of his murders, not for any other reason.

The two allegedly inappropriate comments by the trial court during *voir dire* were not objected to, which suggests that they were not perceived at the time as being objectionable. The "comments" were not raised on direct appeal, which suggests that appellate counsel did not find them objectionable, either. Regardless, there was no deficiency, nor was Frances prejudiced. The substantive claim is barred, and the ineffectiveness claim fails to meet the *Strickland* burden of proof. Likewise, it was not improper for the State to refer to the penalty phase jury instructions as containing the mitigating circumstances.

The collateral proceeding trial court made extensive findings with respect to the "failure to present mitigation"

ineffectiveness claim, and resolved the witness credibility issues on which that claim turns against Frances. The trial court correctly found that Frances had failed to demonstrate either deficient performance or prejudice, and denied relief. That result is correct, and should not be disturbed.

The "cumulative error" claim is insufficiently briefed. In any event, there is no basis for relief because there is no "error" to "cumulate."

ARGUMENT

I. THE "CHALLENGE FOR CAUSE" CLAIM

On pages 8-36 of his brief, Frances says that he is entitled to relief because a juror was mistakenly (and successfully) challenged for cause by the State. In the typical case, the decision on whether or not to remove a juror for cause is reviewed for an abuse of discretion. *Kearse v. State,* 770 So. 2d 1119 (Fla. 2000). This is not the typical case, because the juror at issue was challenged by mistake by the State. There is no suggestion that any biased juror served, nor is there any assertion that Frances was prejudiced by the **removal** of a juror who was, at worst, a juror that Frances was likely glad to see removed.

The trial court's order denying relief sets out the circumstances through which the State challenged juror Roberts for cause -- the State mistakenly believed that Roberts was

opposed to capital punishment when, in fact, she was not. (DAR, V2, R265-67, 276; DAR, V4, R492-93). While the record of *voir dire* is not a model of clarity, it shows that the State challenged this juror by mistake, that defense counsel alternately agreed with the prosecutor's statement that Roberts was opposed to the death penalty and then said that Roberts had "indicated that she would be able to put those feelings aside," and that Roberts was stricken for cause on the State's motion. (V6, R143). The end result was that the State accidentally removed a juror who was ostensibly favorable to the State's position. That outcome did not prejudice Frances at all.[5] It makes no sense at all for defense counsel to complain because the State mistakenly removed this juror for cause -- the challenge benefitted Frances and worked to the detriment of the State.

In any event, assuming that a mistaken cause challenge of a juror who could have recommended a sentence of death states some sort of reviewable claim, that claim should have been but was not raised on direct appeal. The failure to timely raise this

[5] The record shows that trial counsel did renew objection to the removal of two other jurors (numbers 35 and 36) (DAR, V4, R615-17) and that even though co-counsel Hooper believed that Roberts had indicated no opposition to the death penalty, he did nothing to call the State's error to the court's attention. (DAR, V4, R493). These actions suggest that the defense had no desire to see juror Roberts returned to the panel, which is the most that could have been done. Whether or not the State would have used a peremptory challenge to remove her is unknown and unknowable.

"claim" is a procedural bar to consideration of the claim in a post-conviction proceeding.

Assuming for the sake of argument that an ineffectiveness of counsel claim about juror Roberts will lie, Frances is not entitled to relief because he cannot show *Strickland* prejudice. In *Carratelli*, this Court said:

> Under *Strickland*, to demonstrate prejudice a defendant must show that there is a reasonable probability - one sufficient to undermine confidence in the outcome - that, but for counsel's unprofessional errors, the result of the proceeding would have been different. 466 U.S. at 694, 104 S.Ct. 2052. In the context of the **denial** of challenges for cause, such prejudice can be shown only where one who was actually biased against the defendant sat as a juror. **We therefore hold that where a postconviction motion alleges that trial counsel was ineffective for failing to raise or preserve a cause challenge, the defendant must demonstrate that a juror was actually biased.**
>
> A juror is competent if he or she "can lay aside any bias or prejudice and render his verdict solely upon the evidence presented and the instructions on the law given to him by the court." *Lusk,* 446 So. 2d at 1041. Therefore, actual bias means bias-in-fact that would prevent service as an impartial juror. *See United States v. Wood,* 299 U.S. 123, 133-34, 57 S.Ct. 177, 81 L.Ed. 78 (1936) (stating, in a case involving a statute permitting government employees to serve as jurors in the District of Columbia, that the defendant in a criminal case still has the ability during *voir dire* to "ascertain whether a prospective juror ... has any bias in fact which would prevent his serving as an impartial juror"). Under the actual bias standard, the defendant must demonstrate that the juror in question was not impartial - *i.e.*, **that the juror was biased against the defendant, and the evidence of bias must be plain on the face of the record**. *See Carratelli II*, 915 So. 2d at 1260 (*citing Jenkins*, 824 So. 2d at 982); *see also Patton v. Yount*, 467 U.S. 1025, 1038-

> 40, 104 S.Ct. 2885, 81 L.Ed.2d 847 (1984) (stating that in habeas review a state court's findings are presumed correct and that although the record showing the ambiguous *voir dire* answers of three jurors challenged for cause "arouses some concern, only the trial judge could tell which of these answers was said with the greatest comprehension and certainty").

Carratelli v. State, 961 So. 2d 312, 324 (Fla. 2007). (emphasis added). The scenario in *Carratelli* is the square opposite of the scenario in this case, but the legal effect is the same -- no juror biased against Frances was seated, and he cannot show *Strickland* prejudice as a matter of law. If anything, juror Roberts was "biased" against Frances and the State mistakenly thought otherwise. Frances was the beneficiary of that mistake, and he has no basis for complaint.[6]

Frances tries to cast the mistaken cause challenge as a "racially motivated peremptory challenge." This strategy is an effort to resurrect a claim that has no basis. The problem is that the facts do not fit that claim. The following took place at trial:

> Mr. Wixtrom [Prosecutor]: Your Honor, we would move to strike Ms. Roberts in seat number 41. **She indicated yesterday she was opposed to the death penalty,** which is a race-neutral reason, according to the case law. Although she said she could apply it, she still said she was opposed to it.

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[6] The State does not concede deficient performance by defense counsel. While it is debatable, the appearance is certainly that defense counsel took advantage of the State's mistake and avoided having to use a challenge of their own to remove this juror.

> Mr. Ruiz [Defense Counsel]: For the record, she is an African-American.
>
> The Court: **Your notes reflect that's the statement - - her statement to that effect**?
>
> Mr. Ruiz: **That's what Mr. Wixtrom just indicated. Yes, sir, I believe that was correct.**
>
> The Court: If that carries with it a suggestion that there is *a Neil* violation, opposition to the death penalty is a race neutral reason, and **so the observation that she's an African-American is irrelevant, and I will grant the state's motion to strike juror 41 for cause**.
>
> Mr. Ruiz: Yes, sir. I will simply add for purposes of the record, she indicated that she would be able to put those feelings aside in making a decision.

(DAR, V4, R492, 493.) The record is clear that juror Roberts was stricken for cause -- that removes the issue from the *Batson/Neil/Slappy* rule, as the trial judge properly noted. Even if the claim is treated as one under *Batson/Neil/Slappy*, that does not help Frances because he loses under *Carratelli*. The Third District has said:

> In point one, defendant-appellant Yanes maintains that his counsel should have objected to two of the State's peremptory strikes which were made against Hispanic jurors. We affirm the denial of relief on authority of *Carratelli v. State*, 915 So.2d 1256 (Fla. 4th DCA 2005) (*en banc*), *approved*, SC06-97 (Fla. July 26, 2007), and *Phillips v. Crosby*, 894 So. 2d 28, 36 (Fla. 2004). **Both cases take the position that postconviction relief cannot be granted in this context unless the lawyer's error resulted in a jury that was not impartial**.

Yanes v. State, 960 So. 2d 834, 835 (Fla. 3d DCA 2007). Likewise, the Fourth District has followed *Carratelli:*

> *Carratelli* involved an ineffective assistance of counsel claim predicated upon counsel's failure to preserve error in the trial court's denial of for-cause challenges to three jurors. 961 So. 2d at 316. To demonstrate prejudice under Strickland, a defendant must establish that "'there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *Id*. at 320 (*quoting Strickland v. Washington,* 466 U.S. 668, 694, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)). In *Carratelli*, our supreme court made it clear that where a defendant alleges ineffective assistance of trial counsel the "proceeding" at issue is the trial. *Id.* at 320-23; *see also Strobridge v. State*, 1 So. 3d 1240 (Fla. 4th DCA 2009) (citing this holding from *Carratelli*). **The court thus held that it was not enough for Carratelli to demonstrate that, had the alleged error in the denial of the for-cause challenges been preserved, such error would have resulted in a reversal on appeal; rather, Carratelli was required to demonstrate that "an actually biased juror served on the jury."** 961 So. 2d at 323. "Under the actual bias standard, the defendant must demonstrate that the juror in question was not impartial - *i.e.*, that the juror was biased against the defendant, and the evidence of bias must be plain on the face of the record." *Id.* at 324.

Jones v. State, 10 So. 3d 140, 142 (Fla. 4th DCA 2009). (emphasis added); *Jenkins v. State*, 824 So. 2d 977, 984 (Fla. 4th DCA 2002); *Nelson v. State*, 73 So. 3d 77, 85 (Fla. 2011) ("However, the notion that a jury would have reached a different verdict if trial counsel had exercised peremptory challenges in a different manner is generally considered mere speculation that fails to rise to the level of prejudice needed to establish an ineffective assistance of trial counsel claim for which relief is granted. It is a dubious proposition that a different use of peremptory challenges would have resulted in a more defense-

friendly jury and verdict and sentencing recommendation." [citations omitted]); *Johnson v. State,* 921 So. 2d 490, 503-4 (Fla. 2005).

Despite the hyperbole of Frances' claim, it has no legal basis, and is undeserving of the attention it has received. It is unlikely that a mistaken challenge for cause by the State that accidently removed a juror who could in fact have voted for a death sentence creates any claim for relief on behalf of the defendant. The State made the mistake, and the defendant benefitted from it. Because the challenge at issue was a cause challenge, *Batson/Neil/Slappy* has nothing at all to do with anything involved in this case. There is no peremptory challenge involved in this case. Finally, since the claim is one of ineffectiveness of counsel instead of a **substantive** claim, the *Carratelli* rule applies, and operates to foreclose relief. No "actually biased" juror served on Frances' jury, and, because that is so, his claim fails. The allegations of racial prejudice are, at the end of the day, aspersions cast for no purpose other than an attempt to avoid the legal failings of this "claim." That tactic is unworthy of our profession. All relief should be denied.

II. THE "*MCCLESKEY V. KEMP*" CLAIM[7]

On pages 36-62 of his brief, Frances says that he is entitled to relief because, he claims, the State sought death in this double-strangulation-murder case **because** the victims were African-American. Frances also says that trial counsel were ineffective for not "filing a motion to preclude the state from seeking death."[8] Assuming for the sake of argument that this is a square ineffectiveness of counsel claim, the claim is a mixed one of law and fact -- the legal conclusions are reviewed *de novo*, and the factual findings are reviewed for clear error. *See, Stephens v. State*, 748 So. 2d 1028 (Fla. 1999). However, coupled with the *Strickland* standard is the settled law that:

> 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). This claim is, of necessity, wholly dependent on credibility findings

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[7] This claim is more correctly labeled a "reverse *McCleskey*" claim since the victims and the defendant are all African-American.

[8] The facts of this case clearly support a capital sentence -- this Court has already said as much in affirming on direct appeal. To suggest that the State should have been somehow prevented from seeking death in this case simply because of the race of the victims and the defendant is offensive and has no legal basis.

made by the trial court, which rejected the claims of "racial motivation" as "not credible." (V6, R149).[9]

This claim is based on the testimony of one former assistant public defender who said that the first assistant state attorney would not consider a life offer in this case because it would give rise to claims that the State made charging decisions in capital cases based on the race of the victim. (V6, R146). The defense theory is apparently that the State's "motivation" somehow becomes racist when the crime is a "black on black" crime and the State will not offer a life sentence.[10] The other assistant public defenders who testified said that they had no indication that "racism" had anything to do with the State's refusal to negotiate this case. (V6, R147-48). Moreover, the assistant state attorney who is accused of being a racist ultimately transferred out of the homicide division and turned this prosecution over to another lawyer, **who would have been free to entertain plea negotiations as he saw fit.** (V6, R147; V8, R31-32; V16, R1091; R1095; R1098; R1101). **Frances has never suggested or implied that the second**

[9] The trial court's findings are set out in full at pages 37-48, above.

[10] This argument, obviously, overlooks the facts of this double murder which was carried out by strangulation. The facts of this case, as this Court well knows, are horrible. It is not possible to imagine circumstances under which this case would not be one in which the State sought death.

prosecutor refused to negotiate a plea based on race. (V6, R148). That fact alone is fatal to Frances' claim, assuming there is a claim in the first place.

In denying relief on this claim, the trial court said:

> Based on the foregoing, the Court finds that this testimony is not credible wherein there is nothing in the record to support the vague recollections of these witnesses. Accordingly, because Defendant fails to establish that race was ever the reason the State sought the death penalty against him, this claim is denied.

(V6, R149). Those findings are supported by the record, and should be affirmed in all respects.

In resolving a virtually identical reverse-*McCleskey* claim, the Eleventh Circuit said:

> Although prosecutors are vested with wide-ranging discretion, *see Ball v. United States*, 470 U.S. 856, 859, 105 S.Ct. 1668, 1670, 84 L.Ed.2d 740 (1985), prosecutorial decisions remain subject to "ordinary equal protection standards." *Wayte v. United States*, 470 U.S. 598, 608, 105 S.Ct. 1524, 1531, 84 L.Ed.2d 547 (1985).
>
> > [A]lthough prosecutorial discretion is broad, it is not unfettered. Selectivity in the enforcement of criminal laws is subject to constitutional constraints. In particular, the decision to prosecute may not be deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification.
>
> *Id.* (quotations, citations, and ellipsis omitted). At the time the State decided to pursue a capital sentence in Freeman's case, the law of the Supreme Court was clear: regardless the color of Freeman's skin, race could play no role in the decision to seek a capital sentence against him.

In order to prove his Fourteenth Amendment equal protection rights were violated by the State's decision to seek the death penalty, Freeman was required to prove the decisionmakers in his case "acted with discriminatory purpose" in selecting his sentence. *McCleskey*, 481 U.S. at 292, 107 S.Ct. at 1767. **As we have just recounted, however, the state court made a finding of fact that the prosecutors pursued a capital sentence because of the seriousness of Freeman's crimes-not because of his race.**

Freeman's Eighth Amendment claim faces a similar obstacle. A state must ensure that the discretion of its prosecutors is "suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action." *Id*. at 302, 107 S.Ct. at 1772 (*quoting Gregg v. Georgia*, 428 U.S. 153, 189, 96 S.Ct. 2909, 2932, 49 L.Ed.2d 859 (1976)). If the State of Florida (acting through the State Attorney's Office) failed to "establish rational criteria [narrowing] the decisionmaker's judgment as to whether the circumstances of a particular defendant's case meet the threshold" for a capital sentence, it would violate the Eighth Amendment. *Id.* at 305, 107 S.Ct. at 1774. However, Freeman does not challenge the well-organized, multi-tiered process employed by the Florida State Attorney's Office in determining whether to pursue a capital sentence in any given murder case. Instead, Freeman argues "[b]ased on the facts presented at the evidentiary hearing below, it is apparent that ... [t]he State's selection of Mr. Freeman as a candidate for the death penalty was based upon arbitrary factors unrelated to the circumstances of the offense or the character of the defendant." *Petitioner-Appellant's Brief*, at 16-17. **The problem with that argument, of course, is that it is completely undermined by the state court's adverse factual finding.** By specifically finding the State Attorney's Office did not pursue the death penalty in Freeman's case based on his race, the state court eliminated the factual basis for Freeman's contention that his sentence was arbitrary and capricious in violation of the Eighth Amendment.

Freeman's Sixth Amendment claim rests on his Eighth and Fourteenth Amendment claims, and suffers

> from the same defect. To prevail on a claim of ineffective assistance, a petitioner must establish two things: his trial counsel's performance was deficient and the deficient performance prejudiced the petitioner. *See Gordon v. United States,* 518 F.3d 1291, 1297 (11th Cir. 2008) (*citing Strickland*, 466 U.S. at 687-88, 104 S.Ct. at 2064). Freeman asserts his Sixth Amendment right to counsel was violated when his trial lawyer failed to object to the State's alleged consideration of race during its decisionmaking process.
>
> The first step in the ineffectiveness analysis is to determine whether defense counsel's performance was deficient; that is, whether counsel was unreasonable under prevailing professional norms for failing to bring an Eighth or Fourteenth Amendment challenge to Freeman's capital sentence. *See Stewart v. Sec'y, Dep't of Corr.*, 476 F.3d 1193, 1209 (11th Cir. 2007). A lawyer cannot be deficient for failing to raise a meritless claim, *see Chandler v. Moore*, 240 F.3d 907, 917 (11th Cir. 2001); therefore, it follows that defense counsel's failure to raise Eighth or Fourteenth Amendment objections to Freeman's sentence could be deficient only if there were reason for objecting to the State's exercise of its charging discretion. **As we have already established, however, the state court found the prosecutors had not improperly exercised their charging discretion because they did not consider race as a factor in deciding to pursue a capital sentence. Consequently, there was no misconduct to which Freeman's counsel could reasonably object.**

Freeman v. Atty. Gen., 536 F.3d 1225, 1232-1233 (11th Cir. 2008). (emphasis added). *Freeman* is functionally identical to this case, and the result should be the same. Frances' claim, whether based in the Sixth,[11] Eighth, or Fourteenth Amendment,

[11] Because there was nothing to object to, the performance of counsel cannot be deficient or prejudicial under *Strickland*. The State suggests that this Court should make findings as to both prongs to insure that its judgment is respected.

fails based on the facts. The fact that the State Attorney's Office was sensitive to the *McCleskey* issue does not establish a discriminatory purpose -- it demonstrates a concerted effort to insure that charging decisions are made, in a neutral and color-blind manner. The aspersions to the contrary have no basis in fact, as the trial court found. There is no basis for relief.

III. THE COMMENTS DURING *VOIR DIRE* CLAIM

On pages 62-85 of his brief, Frances says that trial counsel was ineffective for "failing to object to improper comments made by the court about southerners, Yankees and gentiles," and for "failing to object when the State informed the jury [during *voir dire*] that a list of mitigators would be provided." Because this is an ineffectiveness of counsel claim, the claim is a mixed one of law and fact -- the legal conclusions are reviewed *de novo*, and the factual findings are reviewed for clear error. *See, Stephens v. State*, 748 So. 2d 1028 (Fla. 1999). However, coupled with the *Strickland* standard is the settled law that:

> 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).

The first part of this claim is Frances' claim that the trial court improperly referred to "Southerners, Yankees and Gentiles during *voir dire.*" Based on the context, it appears that "gentile" is a scrivener's error which should be "genteel." The word "gentile" appears twice in the transcript according to Frances. *Initial Brief*, at 64. (DAR, V2, R172, 173). In context, "genteel" would be the proper word -- this appears to be a typographical error, because the word "gentile" makes no sense here, and would not be correctly used.[12]

The collateral proceeding trial court's order is set out at pages 45-48, above. Before the jury was sworn, trial counsel specifically objected to the "polite Southerner example" (using those exact words) that the Court had used. (DAR, V4, R616). That objection is at least minimally adequate to preserve the substantive claim raised in Frances' post-conviction proceeding, assuming *arguendo* that the comment was in any way improper. No such claim was raised on direct appeal, probably because direct

[12] Frances' suggestion that "anti-Semitism" worked its way into the jury selection process is as unfounded as his claims of racism. Even if the trial court actually used the word "Gentile" (which should be capitalized if it really was what the court said), it makes no difference. If the record can be twisted to make the word "Gentile" fit, it still, in "context," is not discriminatory.

appeal counsel, like trial counsel Hooper, did not find the comments objectionable. (V14, R814-17).[13]

The fact that there was no contemporaneous objection to the court's comments (which occurred twice) suggests that those remarks did not play in the courtroom as Frances would now have it. *See, Sawyer v. Butler,* 881 F.2d 1273, 1287 (5th Cir. 1989) (*en banc).* In any event, these comments did not in any way suggest or imply that Frances should be sentenced to death. Counsel preserved the issue even though in context it is not objectionable in the first place. Frances cannot establish the deficient performance prong of *Strickland*, and his claim fails on that basis alone. Moreover, Frances cannot establish *Strickland* prejudice. No biased juror was seated, and Frances cannot demonstrate that no trial counsel would have dealt with this issue as his attorneys did. This claim fails.[14]

The second part of this claim is a claim that trial counsel was ineffective for not objecting to statements by the prosecution during *voir dire* that the jury would be given a list of mitigators for consideration. The collateral proceeding trial

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[13] Frances has not raised any claim related to this one in his contemporaneously-filed petition for writ of habeas corpus.

[14] In any event, trial counsel Hooper testified that he has a strategy of allowing or injecting "levity" during *voir dire*. (V14, R806). He saw nothing objectionable about these comments. That is a reasonable trial strategy that is not a basis for relief under *Strickland.*

court denied relief on this claim. See pages 49-52, above. The collateral proceeding trial court resolved the claim in the following way:

> During the evidentiary hearing, Hooper testified that he customarily did not ask for a list of statutory mitigators because he did not want the jurors to feel constrained by what was in front of them; instead, he wanted a "catchall" instruction informing them that they could consider any aspect of a defendant's life and not "judge a person by the worse [sic] thing he's ever done in his life." (EH. 721-724, 726, 733-735.) He further testified that if the State indicated that jurors would be given penalty phase guidelines, that was a true statement and there would have been no reason to challenge it. (EH. 727-729.) Hooper stated that during the charge conference he and Defendant discussed forgoing the list of mitigators, and the Court also questioned Defendant to make sure that he acquiesced in that decision. (EH. 738, 739.)
>
> Based on the foregoing, it is clear that, having considered other courses of action, counsel chose to have the general instructions issued to the jury, and this instruction provided a template that the jurors could use to reach their findings on the mitigators. *Id.* It is also clear that Defendant waived the standard jury instructions on mitigators in favor of Hooper's strategy to seek a general or "catchall" instruction. Accordingly, because Defendant cannot now be heard to complain about a strategic decision which he obviously agreed with, this claim is denied.

(V6, R155). That result is correct, and should not be disturbed. In any event, the most that the state did was refer to the penalty phase jury instructions, which is not improper. *See, Rodriguez v. State*, 919 So. 2d 1252, 1283 (Fla. 2005); *Jones v. State*, 845 So. 2d 55, 67 (Fla. 2003). Even if error could somehow be created from a legitimate comment by the State about

how the proceeding was expected to unfold, that error is harmless beyond a reasonable doubt. *See, Hitchcock v. State*, 755 So. 2d 638, 643 (Fla. 2000).

If Frances' claim is that trial counsel was ineffective, that claim fails for the reasons set out by the trial court. If the claim is that the statutory mitigating factors should have been found, that claim does not appear to have been raised in the post-conviction proceeding. *See, Initial Brief*, at 79. The trial court properly found that trial counsel's strategy was reasonable, and denied relief because Frances failed to satisfy the deficient performance and prejudice prongs of *Strickland*. There is no basis for relief.

IV. THE FAILURE TO PRESENT MITIGATION CLAIM

On pages 85-100 of his brief, Frances says that his trial counsel were ineffective at the penalty phase because they did not present the "mitigation" that was presented at the post-conviction hearing. In his brief, Frances focuses on mental state mitigation testimony from his post-conviction mental state expert -- he makes no mention of the State expert who testified. Likewise, he makes no mention of the extensive mitigation investigation that was conducted pre-trial, which included several trips to Frances' childhood home in the Virgin Islands. (V9, R119-122). This was far from the "cursory" investigation Frances would have this Court believe took place. The findings

of the collateral proceeding trial court are set out at pages 52-60, above.

Those findings are correct, resolve the credibility of witness questions in favor of the State, and correctly resolve both prongs of *Strickland* against Frances. This Court has repeatedly held that cumulative evidence is not a basis for finding a deficiency on the part of trial counsel. *Rutherford v. State*, 727 So. 2d 216, 223 (Fla. 1998); *Darling v. State*, 966 So. 2d 366, 378 (Fla. 2007); *Marquard v. State*, 850 So. 2d 417, 429-30 (Fla. 2002). Relief was properly denied.

V. CUMULATIVE ERROR

On page 100 of his brief, Frances includes a one-sentence argument which purports to claim that he is entitled to relief based on the "errors that occurred individually and cumulatively." No "errors" are identified, and no authority is provided in support of this claim. This claim is insufficiently briefed. Alternatively, if this "claim" is considered sufficient to present a claim, there is no basis for relief because there is no "error" to "cumulate" in the first place.

CONCLUSION

Carr's conviction and sentence of death should be affirmed in all respects.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above has been furnished by e-mail to: David Hendry Hendry@ccmr.state.fl.us and James Driscoll, Driscoll@ccmr.state.fl.us, on this 1st day of October, 2012.

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CERTIFICATE OF COMPLIANCE

This brief is typed in Courier New 12 point.

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