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IN THE SUPREME COURT OF FLORIDA

DERRICK MCLEAN,

Appellant,

v. **CASE NO. SC13-632**
L.T. No. 2004-CF-015923-A-O

STATE OF FLORIDA,

Appellee.
_____/

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

ANSWER BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

Citations to the direct appeal record will be designated with roman numerals reflecting the volume number, followed by the appropriate page number. The record on appeal from the denial of McLean's motion for post-conviction relief, will be referred to as "V" followed by the appropriate volume and page numbers.

STATEMENT OF THE CASE AND FACTS

I. Trial and Direct Appeal

Derrick McLean was indicted by Grand Jury with Murder in the First Degree; Attempted Home Invasion Robbery with Firearm; Attempted First Degree Murder; Kidnapping with Intent to Commit a Felony with a Firearm; and Attempted Robbery with Firearm. (V 536). Following a jury trial, McLean was found guilty on all counts. (XXIV 1628).

On direct appeal, this Court affirmed the convictions, judgments and sentences. This Court summarized the facts as follows:

> The evidence at trial revealed that on November 24, 2004, McLean, along with his cousin, Maurice Lewin, and acquaintance, James Jaggon, drove to the apartment where the victim, fifteen-year-old Jahvon Thompson, lived with his father in Orlando. McLean, Lewin, and Jaggon planned that morning to rob the apartment of marijuana or money or both. On the way to the apartment, the three men agreed that McLean and Jaggon would commit the robbery and Lewin would wait in the car. Although all three men had guns, there was no discussion of shooting or killing anyone during the commission of the robbery. McLean and Jaggon, each armed with a gun, knocked on the victim's door and, when the victim opened the door, rushed into the apartment. McLean was wearing a black baseball cap and batting gloves, and Jaggon was wearing a ski mask. Lewin remained nearby in the car, his gold Buick, and maintained an open line between his Samsung cell phone and McLean's Nokia cell phone.
>
> Meanwhile, the victim's next-door neighbor, Theothlus Lewis, heard loud noises he thought might be music coming from Thompson's apartment. Lewis told his

girlfriend that he was going over to Thompson's apartment to ask him to turn down the music. When Lewis knocked on the door, McLean opened the door, brandished a gun, and motioned for Lewis to enter the apartment. When Lewis entered the living room area, McLean asked him "where was the money at," and Lewis turned his pockets inside-out, revealing he had nothing.

Then, Lewis saw Jahvon Thompson and Jaggon come from the hallway. Both Thompson and Lewis were ordered to sit on the couch. While McLean searched the apartment, Jaggon held Lewis and Thompson at gunpoint. At some point, McLean grabbed a blue pillow sham from a shelf and ordered Jaggon to leave the apartment, telling him to shoot the female next door if he saw her. Lewis testified that he sensed danger from the look in McLean's eyes, so he dove to the floor, crawling toward the back of the apartment. McLean shot at Lewis, hitting him once in the back, and then fired several more shots at Thompson. The medical examiner found that each of the three gunshots to Thompson's chest would have been fatal. After waiting for McLean to leave, Lewis returned to his apartment, where his girlfriend and her daughter had already called 911.

Meanwhile, Lewin and Jaggon drove off, McLean left the scene on foot, and the three men met up at a nearby restaurant. McLean, still carrying the blue pillow sham from the apartment, got into the car with Lewin and Jaggon, and Lewin pulled the car out onto the road. A police officer, who was driving an unmarked car in the vicinity and had been notified of the shooting, saw the gold Buick pass by, and he activated his lights and initiated pursuit. Lewin sped up and attempted to elude the officer but soon crashed into the marked patrol car of a sheriff's deputy who was investigating an unrelated incident nearby. The deputy, who was in his marked car, saw the Buick coming at him and ran from his vehicle in order to get out of the way. Lewin's car struck the marked car, sending it into the deputy, who was struck in the hip and thrown fifteen to twenty feet. The deputy saw Jaggon sitting in the front passenger seat of the Buick. He also saw McLean running from the Buick.

Additional law enforcement arrived on the scene of the crash. Officers who searched the area discovered a batting glove, black baseball cap, Nokia cell phone, shirt, and handgun discarded in the woods adjacent to the crash. A blue pillow sham containing marijuana was found in the backseat of Lewin's Buick. McLean's DNA was later detected on the shirt, pillow sham, and batting glove. The Nokia cell phone discovered in the woods near the crash was determined to be registered to McLean's girlfriend. Cell phone records revealed calls between this Nokia phone and Lewin's phone on the day of the crime. The Nokia phone also contained images of a semiautomatic firearm.

At trial, Lewin and Jaggon testified that the weapon McLean carried during the crimes was a .380. Eight shell casings found in the victim's apartment were consistent with having been fired from a .380 Hi-Point semiautomatic. About six months after the crime, law enforcement found a .380 Hi-Point semiautomatic in the woods about fifteen feet from the road where the crash had occurred. This handgun appeared to be the weapon in the images found on McLean's cell phone.

The day after the crimes, Lewis worked with a police sketch artist to develop a composite of his shooter. Over the next few days, the Orlando Police Department showed Lewis three photo lineups-none including McLean, whose identity they had not yet learned-but Lewis did not recognize any of the individuals as the shooter. On December 1, Jaggon's father told the police that a third man, who was Lewin's cousin and named Derrick, was involved in the crime. A crime line tip also implicated a person named Derrick and provided information about where he lived, and this information led police to identify McLean as a suspect in the crime.

On December 9, police showed Lewis another photo lineup-this one containing McLean-and Lewis identified McLean as the shooter. Lewis said he was 90% certain about his identification but would be absolutely sure if he saw the suspect in person. Police then took McLean into custody for violation of probation,

> questioned him briefly about the murder, and arranged a live lineup of six individuals from which Lewis identified McLean as the shooter. Lewis also made an in-court identification of McLean as the man who shot him.
>
> At trial, Jaggon and Lewin testified against McLean as part of their plea agreements for charges related to the events of November 24, 2004. [FN2] Jaggon and Lewin gave consistent accounts of McLean's participation in the crime. Lewin also testified that when he asked McLean why he fired shots during the robbery, McLean replied that he "wanted to feel like what it feels like to shoot and kill somebody."
>
> FN2. Jaggon was sentenced to twenty-three years for second-degree murder and attempted home invasion robbery. Lewin received a twenty-year sentence for burglary of a dwelling and attempted home invasion robbery.

McLean v. State, 29 So. 3d 1045, 1047-1049 (Fla. 2010).

This Court provided the following summary of the penalty phase:

> During the penalty phase, the defense offered expert testimony regarding McLean's psychological, mental, and emotional health as well as testimony from McLean's older brother. One defense psychologist diagnosed McLean with an organic brain impairment, although the psychologist had no medical records or diagnostic studies to confirm any brain injury. Another defense psychologist testified that McLean had some history of substance abuse and functioned at the emotional level of an adolescent. Both psychologists diagnosed McLean with borderline personality disorder but found that he was of average intelligence. McLean's brother testified to a history of some family dysfunction.
>
> The jury voted nine to three in favor of a death sentence. After conducting a *Spencer* [FN3] hearing, the trial court followed the jury's recommendation,

> finding that the three aggravating factors outweighed several mitigating factors. Of the aggravators, the court found (1) that when McLean committed the murder, he had been previously convicted of a felony and placed on felony probation (moderate weight); (2) that McLean was previously convicted of a felony involving the use or threat of violence, based on McLean's prior armed robbery conviction and the contemporaneous conviction for the attempted first-degree murder of Lewis (great weight); and (3) that McLean committed the murder during the commission of a robbery (great weight). The trial court found two statutory mitigating circumstances: (1) McLean's mental or emotional disturbance at the time of the crime (little weight); and (2) McLean's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law (little weight). The court also found six categories of nonstatutory mitigating circumstances: (1) mental health issues (no weight); (2) substance abuse issues (little weight); (3) disparate treatment of codefendants (no weight); (4) family problems (little weight); (5) brain injury (little weight); and (6) miscellaneous factors, such as poor grades in high school, good behavior in court, and lack of positive role models in his youth (little weight).

McLean, 29 So. 3d at 1049-1050.

II. Post-Conviction Proceedings

A) Course of Proceedings

McLean filed a motion for post-conviction relief challenging his convictions and sentences on October 4, 2011 raising ten claims. The State filed its response on November 30, 2011. A case management conference was held on March 9, 2012 before the Honorable Julie H. O'Kane. (V4, 587). Following this hearing, the court ordered an evidentiary hearing on the first

seven claims of McLean's motion. The hearing was held over the course of two days beginning on September 4' 2012. The trial court entered an order denying McLean's motion for post-conviction relief in its entirety on February 15, 2013. (V7, 1163).

B) Relevant Post-Conviction Facts

McLean's Statement of the Case and Facts omits any reference to the testimony introduced the evidentiary hearing below. Accordingly, the State submits the following relevant facts for this Court's consideration.

Trial attorney Trish Cashman testified that she began working as an assistant public defender shortly after graduating from law school in 1984. (V7, 1068). She handled both misdemeanors and felonies until becoming a member of the special defense division in 1987. Her primary responsibility in that division was to "try death penalty cases." (V7, 1068). Cashman rose to division chief of that unit. She did that for thirteen years before entering private practice. (V7, 1068-69). When she was with the public defender's office she served as a member of the "Death Penalty Steering Committee." (V7, 1069). She has been a faculty member of the Life Over Death Seminar for "probably 15 years." (V7, 1069, 1074). Cashman testified that while she did

not keep specific count of all of the capital cases she has handled, it probably numbers more than thirty. (V7, 1070).

Cashman testified that through her deposition of Detective Joel Wright she gathered information about the Crimeline tip. She was also able to get information about calls that went into the Crimeline. (V7, 1034-35). However, Cashman testified that by law, the Crimeline tip is anonymous. (V7, 1035). Cashman testified that the policy is to protect the identity of the caller and that original calls are reprocessed and that "blind escrow accounts" are utilized. (V7, 1036). Nonetheless, Cashman did seek the identity of the "tipster." (V7, 1036). She filed the motion because her client is entitled to "full and complete discovery in a case in order to enable me to defend him." (V7, 1039). However, by the time she filed a motion to compel, it was Cashman's understanding that the tape had already been destroyed. (V7, 1111).

Cashman was asked about her understanding of the law on eyewitness identification expert testimony. Cashman testified that her view at the time of trial, 2007, was that courts were not allowing such an expert to testify. (V7, 1045-46). However, simply because the case law at the time was against her, was not the sole reason she did not seek to retain such an expert in McLean's case. (V7, 1049-50). In considering whether or not such

an expert would have been beneficial, Cashman testified that the composite sketch was the "spitting image of Mr. McLean." (V7, 1046). Cashman testified that she had consulted with an expert on eyewitness identification on one of her previous cases. (V7, 1047).

Cashman testified that McLean was identified by the surviving victim in a photo lineup, live lineup, and, in a composite sketch. (V7, 1114). The defense attempted to suppress the identification. In not utilizing or retaining an identification expert, she considered the fact the case law has upheld exclusion of such an expert. (V7, 1115). Further, in addition to case law, she considered the other points of identification, including a composite sketch with a remarkable likeness to McLean. One of those points of identification was the two co-defendants who identified McLean, and, "yes, they knew him." (V7, 1122). Another independent point of identification was the DNA linked to McLean on the pillow sham taken from the victim's apartment. (V7, 1123). Additionally, at the crash scene, a cell phone was recovered linked to McLean through his girlfriend. (V7, 1123-24). Cashman testified that whatever defense you use, you do not want to lose credibility with the jury. (V7, 1123-24). It simply did not make sense to engage an identification expert in this case. (V7, 1158).

Cashman testified that she was familiar with Dr. Toomer, a psychologist, and retained him to evaluate McLean. (V7, 1081). Based upon Dr. Toomer's recommendation, Cashman retained Dr. Eisenstein to conduct "some of the neuro testing." Cashman had utilized Dr. Eisenstein before on several cases. (V7, 1081-82). Cashman recalled speaking with Dr. Eisenstein "many times" during the case about McLean about testing and "possible mitigation." (V7, 1059). Cashman did not limit or restrict the evaluations conducted by either Dr. Toomer or Dr. Eisenstein. (V7, 1082-83). It is not her practice to place any limits on the experts with regard to testing or the evaluation that they conduct. (V7, 1083). Cashman testified when she hires a mental health expert she provides them with discovery and a social/family history. "I also always encourage them, if there's records that they want me to obtain, and I try to get whatever documentation there is with a client's life." (V7, 1082).

Once she obtains information from the doctor, Cashman would ask about the findings and ask the doctor how best to present those findings. Cashman testified: "It is their presentation and I'm there to ask questions that will elicit the information that they have to provide." (V7, 1084). Cashman testified that her questioning of Dr. Eisenstein was very open ended and included the tests and the reasons he administered those tests

to McLean. (V7, 1091). Cashman testified that she did not cut Dr. Eisenstein off and specifically asked about his various diagnoses of McLean. Dr. Eisenstein concluded that McLean suffered from organic brain syndrome and borderline personality disorder. (V7, 1092). Again, Cashman testified that she did not recall placing any limits on Dr. Eisenstein. (V7, 1093). Dr. Eisenstein administered a number of tests to McLean including the MMPI, and intelligence testing, along with measures of neurocognitive functioning. (V7, 1101-02). Cashman explained that she had "never told a doctor not to administer a test. I'm not going to tell a doctor how to do their job." (V7, 1103).

Cashman acknowledged that the sentencing memorandum offered at the Spencer hearing referenced ADHD. (V7, 1060-61). Also, Cashman acknowledged that a handwritten note authored by co-counsel McClellan referenced "ADD in-between left brain auditory function, and then the note following the word ADD is tactical performance." (V7, 1141). However, Cashman did not recall Dr. Eisenstein emphasizing or in any way telling her that attention deficit hyperactivity disorder was an important or significant diagnosis in this case. (V7, 1106-07). Cashman believed the defense presented everything in the penalty phase that Dr. Eisenstein emphasized to her about his evaluation and diagnosis. (V7, 1109).

Cashman also facilitated conversations between Dr. Toomer and Dr. Eisenstein "so that Dr. Eisenstein was aware of what tests Dr. Toomer had performed and aware of Dr. Toomer's findings and aware of what additional testing and evaluation was needed in order to develop mitigation." (V7, 1102-03).

Cashman and McClellan made significant efforts to convince McLean to plead guilty in exchange for the State's waiver of the death penalty. (V7, 1127-28, 1132). Cashman also testified that they "tried very, very hard to convince Derrick not to sabotage the penalty phase by telling his family not to cooperate and telling people not to testify and cooperate." (V7, 1062).[1] However, to her knowledge, McLean did not refuse to cooperate with their experts, Dr. Toomer and Dr. Eisenstein. (V7, 1065-66).

Trial defense counsel William McClellan testified that he began working in the public defender's office in 1990 and remained with the defender's office until entering private practice in 2001. His private practice consists primarily of criminal law. Including McLean, McClellan has been involved in litigating three capital cases. (V6, 894). He was death

[1] For example, the defense file reflects that McLean told his friend Todd Johnson, to "not come, not cooperate, and quit answering the phone." (V7, 1135).

qualified when he was appointed to represent McLean along with Trish Cashman. (V6, 894).

McClellan testified that he did not recall any discussion with Cashman regarding the admissibility of an eyewitness identification expert. He did not recall it was even an issue that "was contemplated." (V6, 896). McClellan noted that his client was identified not only by an eyewitness, Lewis, from a lineup, but that prior to that he had provided a description to a sketch artist. The resulting "picture was almost a portrait of our client. And that came shortly after McLean's arrest. (V6, 909). There was also DNA evidence that linked McLean to the crime scene. (V6, 909-10). McLean's DNA was found on a pillow sham that had been taken from the victim's apartment. (V6, 911-12). The pillow sham was recovered from the car with marijuana in it. The fact that the DNA profile came from blood made it different from other transient sources, like hair. (V6, 931-32).

In addition, a cell phone was recovered which was linked to McLean through his girlfriend. (V6, 911). McClellan also agreed that two other individuals who participated in the robbery had identified McLean, one of whom, Lewin, was McLean's cousin. (V6, 934). While he did not recall any particular conversation about hiring an identification expert, McClellan testified: "Well, there was enough identifying information that it didn't seem

reasonable to use an expert. I mean, there wasn't - - there wasn't an issue in my mind that gave rise to the need for an expert to explain away - - that there was any way an expert could explain away that identification that was made and/or the other pieces of identification that had been there." (V6, 921).

McClellan participated in efforts to obtain the Crimeline tipster's identity in this case. He was not able to obtain that information. (V6, 896). McClellan understood that the people call the number anonymously and their identity "remains anonymous." (V6, 897). The Crimeline tape itself is routinely erased or destroyed. (V6, 897). McClellan did not recall having a discussion with co-counsel about filing a motion to preserve the tip. (V6, 898).

McClellan testified that in utilizing a mental health expert to develop mitigation he would first provide all the background information to that expert, including family background and schooling. (V6, 901). Cashman had worked with Dr. Eisenstein before and took the lead in preparing him to testify. (V6, 901-02). McClellan was confident that Dr. Eisenstein knew what to look for with respect to mental conditions or diseases that may be relevant to the penalty phase. (V6, 903). McClellan did not place any limitations on where Dr. Eisenstein could go in his evaluation. (V6, 903). He explained: "We wouldn't have

limited him on anything." (V6, 903). If Dr. Eisenstein had asked to conduct additional testing, the defense position was to "do the additional testing." (V6, 919). McClellan did not recall Dr. Eisenstein ever emphasizing to him that attention deficit disorder was an issue in the case. (V6, 919).

McClellan thought he was present during a phone conference with Dr. Eisenstein wherein ADD was mentioned. (V6, 898). However, he did not recall any specific conversations with Dr. Eisenstein. (V6, 898). In notes McClellan took from a conversation with Dr. Eisenstein, McClellan observed: "It talks about that - - IQ testing that was done, the memory quotient testing, visual versus auditory language measures, the MMPI, the Halstead - - and I think it's the Halstead-Reitan test, some neuro diagnostics, the projective drawings, depression, dysfunctions, and that's about it." (V6, 906). The notes did not mention or reference ADHD. Id. Notes from a later phone conversation did reference ADD, but, that reference was not more prominent than any other of Dr. Eisenstein's conclusions. (V6, 908).

Neither McLean nor his family were particularly helpful in developing mitigation. McLean did sign releases for relevant records and provided the name of a friend. McLean himself indicated that he had no contact with his family and when

contacted, "the family decided they didn't want to cooperate with us, they didn't want to provide any live testimony or an affidavit on McLean's behalf. (V6, 915). McLean could sometimes be a difficult client; McClellan's notes reflect that McLean terminated one conference by climbing over counsel, exiting the conference room and pulling the door shut.[2] (V6, 918).

At one point a plea offer was made to life, and, a plea form was filled out. The plea hearing was set in the morning, but, when McLean was brought up to court, he indicated that he had no intention of entering a plea at that time. (V6, 918). McClellan's advice to McLean was to plead guilty and attempted to persuade him, along with Ms. Cashman, to accept a life offer in this case. (V6, 926-27). "[I]t would have been a group effort to get him to accept the plea." (V6, 927).

Social psychologist Dr. John Brigham was called by McLean as an expert in the area of eyewitness identification. (V6, 936-39). Dr. Brigham acknowledged that he holds no professional licenses and that there were no formal certifications one needed to hold himself out as an eyewitness identification expert. In

[2] McLean was adamant that he did not want to put on any witnesses in the penalty phase. (V7, 1005). Nonetheless, the defense continued to investigate and prepare for the penalty phase despite the lack of cooperation from McLean. (V6, 1006-09).

fact, there was not even an informal board that regulates or oversees this subject area. (V6, 964).

Dr. Brigham testified that when scientists look at memory they see it in terms of three stages, acquisition or encoding, retention, and retrieval. (V6, 947). He further opined that six factors can affect acquisition and coding. Those factors are witness opportunity to observe the perpetrator, level of stress, presence of a weapon, race of the perpetrator, witness age, and influence of alcohol or drugs. (V6, 948). Another six factors can effect retention. One of those factors is the attempt to create a facial composite. Dr. Brigham explained that the process of creating a composite sketch can turn from a configural or holistic style to a "featural style." (V6, 949). Dr. Brigham testified that research has shown that "feature analysis is a less accurate way of storing things in memory than is a configural or holistic approach, that is where it's stored as one single thing." (V6, 949).

Dr. Brigham thought that this case had a number of factors shown by research to be important in affecting the likely accuracy of an eyewitness memory. He thought they included weapon focus, divided attention (two perpetrators), motion, and time interval. (V6, 960). Other factors included creation of a

composite sketch, and exposure to a live lineup after previously seeing a photograph of the suspect. (V6, 961-62).

On cross-examination, Dr. Brigham agreed that eyewitness identification testimony can be separated into a witness who actually knows a person, and, a person who was previously unknown to him. Dr. Brigham agreed that his identification factors do not come into play in a case where a person is identified by someone who is acquainted with, or personally knows the perpetrator. (V6, 966). Dr. Brigham agreed with the assistant attorney general, that if I know my cousin and I am within five feet of him, I can identify him. "Probably so, yes." (V6, 966).

Dr. Brigham also agreed that another way of identifying a person is by physical or forensic evidence, such as a fingerprint. (V6, 967). Dr. Brigham did not review the testimony of the co-defendants in this case or the physical or forensic evidence. (V6, 968). Dr. Brigham did not view as relevant to his role in the case the other evidence that might identify McLean as the perpetrator. (V6, 972). However, Dr. Brigham agreed that it would certainly constitute relevant evidence to the jury. (V6, 972). Dr. Brigham agreed that the more corroborating evidence presented, the more likely it is that the eyewitness identification of McLean was correct. "Presumably so, yes." (V6,

972). Dr. Brigham was then provided a hypothetical which included facts tending to corroborate the identification of McLean, including co-defendant testimony and physical evidence from the car tied to McLean. (V6, 975). Assuming those "hypothetical" assumptions were true, Dr. Brigham agreed that "it looks pretty likely, yeah" that the eyewitness identification of McLean was correct. (V6, 975). However, Dr. Brigham added that those facts would be irrelevant to his limited testimony. (V6, 975).

Dr. Brigham agreed that the perpetrator, identified as McLean, ordered Lewis into the apartment from the hallway and was "very close" to McLean. (V6, 977). Lewis estimated that the total time McLean was available for observation was 12 to 15 minutes. (V6, 977). Dr. Brigham could not tell if the photo lineup in this case was unduly suggestive or not. (V6, 979). While Dr. Brigham put in his report there was a biased pre-lineup instruction, Dr. Brigham agreed that the trial transcript refuted that assertion. Lewis did not receive a suggestive instruction. (V6, 983).

McLean also called Dr. Hymen Eisenstein, a clinical psychologist, who testified during the penalty phase on behalf of McLean. (V6, 820). He has practiced in the field of psychology for thirty years. (V6, 821). Dr. Eisenstein recalled

from a phone discussion with trial counsel and the state attorney on September 4, 2007, that McLean had ADHD. (V6, 822). Dr. Eisenstein testified that ADHD is related to executive functioning that that it has several hallmarks, including "inattention, distractibility, hyperactivity, disinhibition, impulsivity and disorganization." (V6, 823).

Dr. Eisenstein testified that his main focus at trial was "my diagnosis and my understanding, which really consisted of organic brain injury and borderline personality impairment." (V6, 824-25). The topic of ADHD was not brought out on direct examination during the penalty phase. (V6, 825). It was, however, brought out on cross-examination. (V6, 825).

Dr. Eisenstein testified that he has more recently administered a number of self-report inventories or tests to McLean to confirm or corroborate his diagnosis. (V6, 826-27). However, he testified that these self-report inventories were available in 2007. (V6, 827). Dr. Eisenstein agreed that such inventories rely upon an individual's self report. (V6, 829). He also administered a test called the T.O.V.A. [Test of Variables of Attention] to McLean which reflected a score "in the range of individuals independently diagnosed with attention deficit disorder." (V6, 848-49). Dr. Eisenstein also talked to McLean's girlfriend and cousin, Maurice Lewin, who provided information,

such as McLean's enjoyment of video games, and poor work history which could support his attention deficit disorder diagnosis. (V6, 854-55). McLean would also go into a rage and his responses would be disproportionate to the situation such as when someone cut him off while driving. (V6, 856).

Dr. Eisenstein thought there was some nexus between ADHD and the crimes in this case. Eisenstein "hypothesize[d]" that McLean's inability to think things through in a stressful situation led to "the response" which was "something counterintuitive to what he would have wanted to do." (V6, 863). McLean lacked the "emotional flexibility to think things through in a - - in a clear and in a better way." (V6, 864).

On cross-examination, Dr. Eisenstein acknowledged that at the time of trial he had been retained to evaluate capital defendants in probably close to a hundred cases. (V6, 866). At the time of trial he consulted with Cashman and McClellan, the trial attorneys, and talked to them about his diagnosis and how best to present his testimony. (V6, 866). He administered a number of tests to McLean including a neuropsychological battery and the MMPI.[3] He did not believe the trial attorneys precluded him from administering any tests to McLean. (V6, 867). He

[3] Notably, scale 9 of the MMPI, which measures energy, irritability and restlessness was within normal limits. (V6, 874).

acknowledged that he does not rely upon trial attorneys to tell him what tests to administer and that attorneys are not experts on something like attention deficit disorder. (V6, 859-60). While he asserted the three tests he administered recently to McLean to measure attention deficit disorder were in existence in 2007, he admitted that he had never previously administered those tests. (V6, 875, 887). Dr. Eisenstein acknowledged that he was not prevented from administering those tests at the time of trial and that the trial attorneys were relying upon his judgment. (V6, 875).

Dr. Eisenstein acknowledged that on direct examination by Ms. Cashman she asked what his diagnosis of McLean was. He answered "organic brain damage and borderline personality disorder." (V6, 868). However, Dr. Eisenstein acknowledged that he did mention attention deficit disorder later in his testimony. (V6, 868-69). Dr. Eisenstein testified that he had no school records diagnosing McLean with attention deficit disorder and to his knowledge, he is the first professional to do so. (V6, 869). ADHD is not classified as an Axis I, major mental disorder. (V6, 870). Dr. Eisenstein acknowledged that McLean was also evaluated by another psychologist, Dr. Toomer, who testified during the penalty phase. Dr. Toomer did not testify

that McLean suffered from attention deficit disorder. (V6, 869-70).

Dr. Eisenstein admitted that McLean fit six of the seven criteria or characteristics necessary to diagnosis an individual with antisocial personality disorder. (V6, 873). Dr. Eisenstein was cross-examined on the facts of these offenses, which, he acknowledged, came from the Florida Supreme Court's opinion. (V6, 877). He admitted that the crimes occurred as the result of a plan to commit a robbery and that they armed themselves, and obtained masks and gloves. McLean was not wearing a mask. Dr. Eisenstein acknowledged that McLean ordered his co-defendant to shoot a woman they had seen earlier in the hallway. (V6, 877). After that, McLean shot Jahvon who was a compliant victim, and, attempted to murder Lewis who was also sitting on the sofa. (V6, 878). Dr. Eisenstein acknowledged that McLean had a plan which he carried through to commit robbery. (V6, 878). It was possible, "perhaps" that it could also be part of McLean's plan to eliminate witnesses who could identify him. (V6, 878).

Dr. Eisenstein testified that he thought attention deficit disorder did not cause the crime but could explain his "mindset" and how he "responded." (V6, 879). But, it was also a "possibility" that it could be a reckless disregard for the rights of others that one sees in an individual with antisocial

traits. (V6, 879). Dr. Eisenstein acknowledged that it was reported that McLean wanted to know what it was like to "kill somebody[]" (V6, 879). He thought it might just have been McLean's "joking nature, making trivial of something, making light of something." (V6, 879).

SUMMARY OF THE ARGUMENT

ISSUE I--Trial counsel was not ineffective for failing to retain an eyewitness identification expert. Expert identification testimony is inherently suspect when the defendant's identification does not rely solely upon eyewitness testimony, as in this case. Since such testimony would, under the facts of this case, not have been admissible, trial counsel cannot be considered ineffective for failing to offer the general expert critique of the identification testimony offered by surviving victim Lewis. The eyewitness identification was supported by the testimony of McLean's co-defendants, Jaggon and Lewin, as well as compelling physical evidence. McLean's claim does not meet either the deficient performance or prejudice prongs of Strickland.

ISSUE II--Defense counsel cannot be ineffective for failing to obtain a Crimeline tip implicating McLean where there is no reason to believe, even now, such a record would have been helpful to the defense or, that the State would be required to divulge such information. McLean's allegations fall far short of a threshold showing of either deficient performance or resulting prejudice.

ISSUE III—McLean's assertion that counsel was ineffective for failing to ensure his presence during a brief bench conference is procedurally barred as it was raised and rejected on direct appeal. Further, McLean presented no evidence to support this claim during the evidentiary hearing. In any case, McLean was given a full and fair opportunity to air his grievances against counsel during the Nelson hearing below.

ISSUE IV--McLean's claim that trial counsel was ineffective for failing to either present or provide adequate support for Dr. Eisenstein's diagnosis of attention deficit disorder is without merit. Trial counsel placed no limitation or restriction upon Dr. Eisenstein at the time of trial. The jury learned of Dr. Eisenstein's diagnosis during the penalty phase. The fact that he has now conducted additional testing to provide additional support for this diagnosis is of little consequence. This claim does not meet either the deficient performance or prejudice prongs of Strickland.

ISSUES V thru VII--These claims are without merit as a matter of clearly established law.

ISSUE VIII--McLean has not established any error to cumulate in this case. Accordingly, his claim of cumulative error must be rejected.

ARGUMENT

I.

WHETHER TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO RETAIN AN EYEWITNESS IDENTIFICATION EXPERT?

McLean's first issue attacks defense counsel's performance for failing to retain an eyewitness identification expert to aid the jury in considering the testimony of the surviving victim. The lower court properly denied relief as McLean failed to meet his burden of establishing either deficient performance or resulting prejudice under Strickland v. Washington, 466 U.S. 668 (1984).

A. The Standard Of Review On Appeal And The Ineffective Assistance Standard

When reviewing a trial court's ruling on an ineffectiveness claim, this Court must defer to the trial court's findings on factual issues, but reviews the trial court's ultimate conclusions on the deficiency and prejudice prongs *de novo*.[4] Bruno v. State, 807 So. 2d 55, 62 (Fla. 2001); Sochor v. State, 883 So. 2d 766, 771-72 (Fla. 2004).

Of course, pursuant to Strickland, 466 U.S. at 690, a defendant must identify particular acts or omissions of the lawyer that are shown to be outside the broad range of

[4] This standard of review applies to all issues of ineffectiveness addressed in this brief.

reasonably competent performance under prevailing professional standards. Second, the clear, substantial deficiency shown must further be demonstrated to have so affected the fairness and the reliability of the proceeding that confidence in the outcome is undermined. In any ineffectiveness case, judicial scrutiny of an attorney's performance must be highly deferential and there is a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. Strickland,466 U.S. at 694. A fair assessment of attorney performance requires every effort be made to eliminate the distorting effects of hindsight. Id. at 696.

In Harrington v. Richter, 131 S. Ct. 770, 788 (2011), the Supreme Court recently reiterated (emphasis added) how difficult it is to meet Strickland's ineffective assistance standard:

> Surmounting *Strickland*'s high bar is never an easy task." *Padilla v. Kentucky*, 559 U.S. ----, ----, 130 S.Ct. 1473, 1485, 176 L.Ed.2d 284 (2010). An ineffective-assistance claim can function as a way to escape rules of waiver and forfeiture and raise issues not presented at trial, and so the *Strickland* standard must be applied with scrupulous care, lest "intrusive post-trial inquiry" threaten the integrity of the very adversary process the right to counsel is meant to serve. *Strickland*, 466 U.S., at 689–690, 104 S.Ct. 2052. **Even under de novo review, the standard for judging counsel's representation is a most deferential one.** Unlike a later reviewing court, the attorney observed the relevant proceedings, knew of materials outside the record, and interacted with the client, with opposing counsel, and with the judge. It is "all too tempting" to "second-guess counsel's assistance

> after conviction or adverse sentence." *Id.*, at 689, 104 S.Ct. 2052; *see also Bell v. Cone*, 535 U.S. 685, 702, 122 S.Ct. 1843, 152 L.Ed.2d 914 (2002); *Lockhart v. Fretwell*, 506 U.S. 364, 372, 113 S.Ct. 838, 122 L.Ed.2d 180 (1993). The question is whether an attorney's representation amounted to incompetence under "prevailing professional norms," not whether it deviated from best practices or most common custom. *Strickland*, 466 U.S., at 690, 104 S.Ct. 2052.

As for the second prong of the Strickland test, defendant's "burden of establishing that his lawyer's deficient performance prejudiced his case is also high." Van Poyck v. Fla. Dep't of Corr., 290 F.3d 1318, 1322 (11th Cir. 2002). The prejudice prong is clearly a significant hurdle for a defendant to overcome. See Wellington v. Moore, 314 F.3d 1256, 1260 (11th Cir. 2002) ("The petitioner's burden of demonstrating prejudice is high.") (citing Strickland, 466 U.S. at 693, 104 S. Ct. at 2067).

B. McLean Did Not Establish Either Deficient Performance Or Resulting Prejudice From Counsel's Failure To Present The Testimony Of An 'Identification Expert'

The trial court issued a detailed order denying post-conviction relief. The court stated, in part:

> Mr. McLean's assertion is without merit. First, Patricia Cashman's testimony at the evidentiary hearing contradicts Mr. McLean's assertion that counsel failed "to investigate the use of an eyewitness expert due to a mistaken view of the status of the law." At the hearing, Ms. Cashman testified that she was aware of existing case law at the time of trial that generally precluded the introduction of such expert identification testimony. She did not say that she thought she was precluded from consulting with or presenting such an expert at trial. In fact,

Ms. Cashman testified that she had consulted an eyewitness identification expert in the past on an unrelated case and thought it may have been Mr. Brigham. She reasoned that under the facts of this case, such an expert would provide little additional value and could actually undermine the overall defense strategy. Thus, as a tactical, strategic decision based upon a thorough review of other identifying evidence, counsel made a reasonable choice in deciding not to consult or call an eyewitness identification expert. *See Strickland*, 466 U.S. at 691 (finding that "counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.").

Second, Dr. Brigham's testimony did not reveal any deficiencies in the surviving victim's identification of Mr. McLean. Instead, Dr. Brigham testified that he would have provided jurors with information regarding scientific factors that affect eyewitness memory. As a general policy, he does not disclose probabilities on eyewitness conclusions or identifications; he simply provides the jury with factors to augment common knowledge that may be incomplete. Furthermore, he confirmed that the surviving victim's extended exposure to the suspect at a close distance would impact the accuracy of his identification and that the additional corroborating identification evidence would certainly be relevant to a jury.

Third, identification expert testimony of the nature that Mr. McLean proposes is subject to exclusion as a matter of trial court discretion. The Florida Supreme Court explained in *Simmons v. State*, 934 So. 2d 1100, 1116-117 (Fla. 2006):

. . . [Excerpt omitted] . . .

Finally, the defendant's identification did not rest solely upon eyewitness testimony. The victim's identification of Mr. McLean was supported by the following additional evidence:

1. Mr. Lewis' initial production of a police sketch with a notable likeness to Mr. McLean;

2. DNA matching Mr. McLean's profile found on the pillow sham used to transport marijuana to the car;

3. A cell phone found near the suspect's car that belonged to Mr. McLean's girlfriend, which Mr. McLean used, and which contained a record of recent calls with co-defendant Lewin's cell phone;

4. DNA matching Mr. McLean's profile found on the gloves with the cell phone; and

5. Testimony of co-defendants Mr. Lewis and Mr. Jaggon identifying Mr. McLean as the shooter.

Mr. McLean has not only failed to show that counsel was deficient but that he was prejudiced as a result of said deficiency. Dr. Brigham provided no testimony directly challenging the surviving victim's identification testimony. The surviving victim provided a thorough description to police, worked with a police sketch artist to develop a composite sketch of his assailant, identified Mr. McLean in a photo lineup and separate live lineup, and made an in court identification of Mr. McLean as the shooter. Additionally, counsel actively cross- examined the surviving victim at trial challenging his identification of Mr. McLean. *See Rimmer v. State*, 59 So. 3d 763, 777 (Fla. 2010) ("Because counsel conducted an effective cross-examination of the eyewitnesses and consistently attacked the eyewitness identifications and the process of making those identifications, Rimmer has not demonstrated that he was prejudiced by counsel's failure to obtain an eyewitness identification expert.") (citing *Rose v. State*, 617 So. 2d 291, 297 (Fla. 1993)).

In sum, Mr. McLean has failed to meet his burden of establishing either deficient performance or resulting prejudice. The surviving victim's testimony identifying Mr. McLean was supported by an abundance

> of corroborating evidence and Dr. Brigham's testimony was largely speculative and not likely to have been admissible at trial. Claim I is denied.

(V7, 1166-69). McLean has not identified any legal or factual errors in the lower court's order denying relief. It should be affirmed.

McLean's burden of establishing ineffective assistance in this case is an especially difficult one as he was represented by two very experienced defense attorneys. See Chandler v. United States, 218 F.3d 1305, 1316 (11th Cir. 2000) (*en banc)* ("When courts are examining the performance of an experienced trial counsel, the presumption that his conduct was reasonable is even stronger."). Lead counsel, Patricia Cashman, has not only a wealth of experience in capital litigation, but, also teaches other attorneys how to handle capital cases. (V7, 1074). At the time of McLean's trial she was in private practice but prior to that time, had spent thirteen years as a public defender in the capital or special crimes litigation division. She rose to division chief of that section and has continued to represent capital defendants after leaving the public defender's office. (V7, 1068-69). Mr. McClellan also possessed significant experience representing criminal defendants at the time of McLean's trial.

The first hurdle for McLean to overcome is the fact that identification expert testimony such as that he faults counsel for not presenting, is subject to exclusion as a matter of trial court discretion. Indeed, at the time of McLean's trial, the case law took a decidedly negative view of such testimony. For example, this Court explained in Simmons v. State, 934 So. 2d 1100, 1116-1117 (Fla. 2006):

> In his next issue on appeal, Simmons argues that the trial court erred in refusing to admit Dr. John Brigham's expert testimony concerning the psychological factors that contribute to erroneous witness identifications when law enforcement officers use suggestive techniques.
>
> In *Johnson v. State*, 438 So. 2d 774 (Fla. 1983), this Court found no error in a trial court's refusal to allow such expert testimony:
>
> > A trial court has wide discretion concerning the admissibility of evidence and the range of subjects about which an expert can testify. *Jent v. State*, 408 So. 2d 1024 (Fla. 1981), *cert. denied*, 457 U.S. 1111, 102 S.Ct. 2916, 73 L.Ed.2d 1322 (1982); *Johnson v. State*, 393 So. 2d 1069 (Fla. 1980), *cert. denied*, 454 U.S. 882, 102 S.Ct. 364, 70 L.Ed.2d 191 (1981). Expert testimony should be excluded when the facts testified to are of such nature as not to require any special knowledge or experience in order for the jury to form its conclusions. We hold that a jury is fully capable of assessing a witness' ability to perceive and remember, given the assistance of cross-examination and cautionary instructions, without the aid of expert testimony.
>
> *Id.* at 777 (citation omitted). Subsequently, in *McMullen v. State*, 714 So. 2d 368 (Fla. 1998), this

> Court considered whether the same expert witness, Dr. Brigham, was improperly excluded as a witness when offering similar testimony. This Court concluded "that the admission of such testimony is within the discretion of the trial judge and that ... the trial judge did not abuse that discretionary authority by refusing to allow the introduction of the expert testimony." *Id.* at 369. This Court stated in *McMullen* that Florida follows the "discretionary" view articulated in *Johnson* regarding the admissibility of expert witness testimony concerning the reliability of eyewitness testimony. *Id.* at 370–71. Dr. Brigham stated in his proffered testimony in the present case that he would testify at trial to issues similar to those in McMullen. Under our case law we conclude the trial judge did not abuse his discretion in disallowing Dr. Brigham's testimony.

Simmons, 934 So. 2d at 1116-1117. See also U.S. v. Fred Smith, 122 F.3d 1355, 1357 (11th Cir. 1997) ("This Court has consistently looked unfavorably on such [expert identification] testimony."); Howard v. Clark, 608 F.3d 563, 574 (9th Cir. 2010) ("We have repeatedly affirmed district court decisions to exclude the testimony of eyewitness-identification experts from federal criminal trials.").

Expert identification testimony is inherently suspect when the defendant's identification does not rely solely upon eyewitness testimony, as in this case. Since such testimony would, under the facts of this case, not have been admissible, trial counsel cannot be considered ineffective for failing to offer the general expert critique of the identification testimony offered by surviving victim Lewis in this case. The

eyewitness identification was supported by the testimony of McLean's co-defendants, Jaggon and Lewin, as well as compelling physical evidence. Moreover, victim Lewis had ample opportunity to observe McLean from close range before he was shot and was certain of his identification of McLean as the shooter.

Under the circumstances presented in this case, the experienced defense attorneys cannot be faulted for failing to retain such an expert. McLean's contention that counsel failed to investigate the use of an eyewitness expert due to a mistaken view of the status of the law is not an accurate view of testimony introduced during the evidentiary hearing. Ms. Cashman testified that she was generally aware of case law existing at the time of trial upholding the exclusion of such expert identification testimony. (V7, 1045-46). However, that did not mean Ms. Cashman believed that she was precluded from consulting with, or presenting such an expert as McLean contends. Indeed, Ms. Cashman had in the past consulted with an identification expert, on another case, and, thought it may have been Dr. Brigham. (V7, 1049-50, 1047). Ms. Cashman did, however, believe that under the facts of this case such an expert would be of little benefit, and, indeed, could be detrimental to the credibility of defense counsel. (V7, 1122, 1123-24, 1158). As a strategic matter, counsel's decision is virtually immune from

post-conviction challenge. Chandler, 218 F.3d at 1314 (a reviewing "court must not second-guess counsel's strategy."); Johnson v. State, 769 So. 2d 990, 1001 (Fla. 2000)("Counsel's strategic decisions will not be second guessed on collateral attack.").

McLean's contention that there is doubt as to his identification as the shooter in this case is simply not supported by any facts developed at trial, or, more importantly, for this appeal, the post-conviction hearing. McLean's post-conviction testimony did not challenge, much less cast any doubt upon the co-defendants' testimony or the physical evidence arrayed against him. Notably, while McLean mentions the possibility that the DNA evidence was somehow "contaminated" no such evidence of contamination was presented during the evidentiary hearing. Moreover, DNA was obtained from McLean's blood located on the pillow sham taken from the victim's apartment. He does not explain how McLean's blood could innocently have been deposited on the pillow sham in the brief period between the crimes and the crash. Finally, Dr. Brigham's testimony in this case did not reveal any legitimate deficiency in Lewis's identification of McLean.

Dr. Brigham did not level any specific criticism of the composition of the photo or live lineups conducted in this case.

(V6, 979). Instead, he offered that the ideal lineup would have included the same individuals in the photo and live lineups. This general statement of what might have been ideal, is hardly a compelling or even serious criticism of the lineups used by the detectives in this case. And, Dr. Brigham was forced to admit that one of his primary criticisms of Lewis's identification of McLean from the lineups, the so-called, biased identification instructions by the detectives, cited in his report which collateral counsel reproduces in its entirety in his brief, was in fact, not present in this case. Dr. Brigham acknowledged that the detective did not provide a biased instruction to Lewis prior to the lineup. (V6, 983). The fact that one of Dr. Brigham's prominent criticisms of the identification of McLean was demonstrably false, must cast doubt upon the credibility of his testimony.

Dr. Brigham acknowledged that Lewis was able to view McLean from a very close range and that his identification of him was not tainted by the "cross-cultural" issues which research has shown can negatively affect eyewitness identifications. Further, while generally asserting that eyewitness sketches have not been shown to enhance subsequent identifications and may actually cloud the identification process, the eyewitness sketch in this case very closely resembles McLean. A fact that Dr. Brigham

ignored in this case, but certainly a fact which would not be lost on the jury assessing Dr. Brigham's testimony. Ultimately, Dr. Brigham could not, and, did not place any probability on the likelihood or confidence in victim Lewis's identification of McLean as the man who committed the charged offenses.

Finally, perhaps the most compelling reason for rejecting Dr. Brigham's testimony in this case is the fact he narrowly tailored his testimony to only one piece of evidence, the eyewitness identification of victim Lewis. This is not, however, solely an eyewitness identification case. U.S. v. Moore, 786 F.2d 1308, 1312-1313 (5th Cir. 1986) (recognizing that where the defendant's conviction does not rely solely upon eyewitness identification, an eyewitness identification expert will not be relevant to the outcome of the case). There is a wealth of evidence, including two accomplices who identified McLean as the primary participant in the home invasion robbery and murder which renders his testimony superfluous, or, frankly, ridiculous. Tactically, it would make no sense to present Dr. Brigham and allow the State on cross-examination to parade all of the other evidence in the case, including accomplice testimony and physical evidence, which corroborates Lewis's identification testimony. Indeed, while Dr. Brigham stated he was not an expert in DNA and was not familiar with other aspects

of the evidence arrayed against McLean, ultimately, he was forced to agree that the more corroborating evidence which exists, the more likely it is that victim Lewis's identification of McLean was accurate. (V6, 972; 975).

Dr. Brigham's testimony did not establish any deficiency on the part of the defense attorneys, much less a serious deficiency which could have prejudiced McLean. See Harrington v. Richter, 131 S. Ct. 770, 789 (2011) (state court could reasonably determine "that defense counsel could follow a strategy that did not require the use of experts to challenge the State's forensic evidence); Smithers v. State, 18 So. 3d 460, 470 (Fla. 2009) (counsel made reasonable strategic decision to cross-examine state's expert on cause of death rather than hire an independent expert).

Aside from failing to establish deficient performance, given the other unchallenged evidence establishing Lewis's identification of McLean was correct, Dr. Brigham's testimony, even if admissible, does not undermine confidence in the outcome of McLean's trial. See Maxwell v. Wainwright, 490 So. 2d 927, 932 (Fla. 1986) (citations omitted) ("Second, the clear, substantial deficiency shown must further be demonstrated to have so affected the fairness and reliability of the proceeding that confidence in the outcome is undermined."). The prejudice

prong is a rather serious and insurmountable hurdle for McLean under the facts of this case.

First, Dr. Brigham provided no testimony directly challenging Lewis's identification testimony. Lewis provided a description of McLean to the police. (XIX 811). Lewis also worked with a police sketch artist to develop a composite sketch of his assailant. (XIX 811). Lewis picked photo number five, identifying McLean as his attacker. (XIX 819). Lewis had no doubt that the individual he picked out was the shooter. (XIX 820). Lewis also made an in court identification of McLean as the shooter.[5] (XIX 821). Defense counsel did challenge Lewis's identification of Mclean on cross-examination, primarily on the basis of having earlier said that McLean's cousin, looked something like the shooter. See Rimmer v. State, 59 So. 3d 763, 777 (Fla. 2010) ("Because counsel conducted an effective cross-examination of the eyewitnesses and consistently attacked the eyewitness identifications and the process of making those identifications, Rimmer has not demonstrated that he was prejudiced by counsel's failure to obtain an eyewitness

[5] A detective testified that on December 9th, the photo lineup including McLean was presented to Lewis and Lewis identified McLean as the shooter. (XX 951). Lewis also identified McLean from a live lineup. (XX 951). When a detective asked if Lewis was sure it was McLean, Lewis answered: "yes, hell, yes." (XX 957).

identification expert.") (citing Rose v. State, 617 So. 2d 291, 297 (Fla. 1993)).

In light of Mr. Lewis' independent in-court identification of McLean as the shooter (XX 951), co-defendant James Jaggon's independent in-court identification of McLean as his armed accomplice inside the murdered victim's apartment (XX 1036; XXI 1048-1050, 1058-1059), and his cousin Maurice Lewin's testimony linking him to the crimes, as well as physical evidence, McLean suffered no prejudice from the failure to retain an identification expert. Indeed, aside from his unsupported claim that the DNA evidence may have been contaminated, he conspicuously avoids discussing the wealth of corroborating physical evidence presented by the State.

Law enforcement K-9 units recovered gloves and a shirt in the woods adjacent to the car crash. (XX 925, 930). DNA recovered from the back of one batting glove matched McLean's profile at 12 loci, with the odds of someone other than McLean having that profile being "one in 1.1 quintillion Caucasians, one in 500 trillion African-Americans, or one in 32 quadrillion Southeastern Hispanics." (XXII 1290). The blue pillow sham, taken from the victim's apartment, [Exhibit 50] with reddish brown stains tested presumptively positive for blood. (XXII 1303). The largest blood stain matched the DNA profile of McLean

at all loci; the odds of anyone other than McLean being the source of that DNA was "one in 28 quintillion Caucasians, one in 9.1 quadrillion African Americans, or one in 790 quintillion – or, quadrillion Southeastern Hispanics." (XXII 1292-93, 1303).

An FDLE firearms examiner determined that spent shell casings, exhibits 27, 28, 29, 30, 31, 32, 33 and 34 were all fired from the same firearm. (XXII 1328-30). He also examined bullets or projectiles recovered from the murder scene, and was able to determine that those were consistent with having been fired from a .380 Hi-Point firearm. (XXII 1332-33). Only Hi-Point .380 firearms have the width of "the lands and grooves" marks that he observed on the casings. (XXII 1343-44).

The firearms expert was shown a photograph of McLean with a handgun, and, indicated that it was very similar to the .380 Hi-Point he examined in this case. (XXII 1340-41). It had the same overall shape and same gray stripe in both the photograph and the Hi-Point he examined. (XXII 1449).

Marilyn Nieves was McLean's girlfriend back in 2004. She testified that McLean had a Nokia cell phone at that time and identified a cell phone in evidence as belonging to McLean. (XXII 1348). She was in charge of paying for his cell phone and was aware of its phone number [407-342-6030]. (XXII 1349).

McLean told her he had lost the cell phone "in his cousin's car" around November, December of 2004. (XXII 1352).

Detective Joel Wright testified that he retrieved Nokia cell phone records for the phone recovered from the wooded area south of the crash site. (XXII 1371-72). The records indicated that there were calls between Lewin's and McLean's phones on November 24, 2004. The first call occurred at 11:06 in the morning and lasted only two minutes. The second call lasted "13 minutes and 42 seconds" and occurred at 12:33 pm. (XXII 1380). The distance from the scene of the vehicle crash to McLean's girlfriend's apartment is only 1.8 miles. (XXII 1385). He also noted that images of the semi automatic pistol were found on the Nokia cell phone recovered after the crash. (XXII 1391-92).

In light of the record, there is no possibility that McLean suffered any prejudice as a result of failing to present such weak and speculative testimony offered by Dr. Brigham. Accordingly, this claim was properly denied below.

II.

WHETHER THE DESTRUCTION OF ANONYMOUS CRIME TIP INFORMATION GIVES RISE TO ANY COGNIZABLE POST-CONVICTION CLAIM?

McLean next asserts that he did not have access to crime tip information which identified him as a suspect in this case. He complains that records relating to the anonymous tip have been destroyed and that the destruction of such evidence amounts to a violation of his due process rights under Arizona v. Youngblood, 488 U.S. 51 (1988). The lower court properly denied this claim after providing him an evidentiary hearing below.

Initially, the trial court below properly recognized that the substantive claim regarding the destruction of evidence was procedurally barred from review. The court stated:

> To the extent Mr. McLean claims his state and constitutional rights were violated by the institutional destruction of the Crimeline tape, this is an issue that should have been raised at trial and, if properly preserved, on direct appeal. Therefore, this claim is procedurally barred from collateral attack in a motion for postconviction relief. *See Schoenwetter v. State*, 46 So. 3d 535, 561 (Fla. 2010) ("[I]ssues that could have been raised on direct appeal, but were not, are not cognizable through collateral attack") (citations omitted); *Hannon v. State*, 941 So. 2d 1109, 1141 (Fla. 2006) (finding the claim at issue procedurally barred where the facts that formed the basis for the claim were known to the defendant at the time of trial and could have been and should have been presented on direct appeal).

(V7, 1172).

The trial court properly recognized that this claim is procedurally barred. Defense counsel below filed a motion to obtain this information and was informed that the recording of the tip itself had been destroyed or taped over. (V6, 897-98; V7, 1111). Consequently, this is an issue which should have been raised, if at all, at trial and on direct appeal. See Schoenwetter v. State, 46 So. 3d 535, 561 (Fla. 2010) ("[I]issues that could have been raised on direct appeal, but were not, are not cognizable through collateral attack.") (citing Torres-Arboleda v. Dugger, 636 So. 2d 1321, 1323 (Fla. 1994) (citation omitted); Hannon v. State, 941 So. 2d 1109, 1141 (Fla. 2006) (finding the claim procedurally barred where "the facts that formed the basis for this alleged conflict of interest were known to Hannon at the time of his trial and, therefore, could have been and should have been presented on direct appeal"). Thus, it is procedurally barred from review in this motion for post-conviction relief.

Recognizing the procedural bar, McLean cryptically asserts that trial counsel was ineffective in presenting or preserving this claim. However, this claim fails to meet either prong of Strickland.

In denying the ineffective assistance of counsel claim, the trial court stated:

Mr. McLean's assertion that counsel was ineffective for failure to raise the issue of the destruction of the Crimeline tape at trial is without merit. Crimeline is a program which allows anonymous persons to supply police agencies with information regarding criminal activity. *State v. Poole*, 665 So. 2d 1065, 1066 (Fla. 5th DCA 1995). "[T]he disclosure of the identity of a confidential informant invades an important governmental privilege and implicates the public's interest in effective law enforcement." *State v. Harklerode*, 567 So. 2d 982, 985 (Fla. 5th DCA 1990). A defendant must show "that disclosure of identities or of the contents of the communications is relevant and helpful to the defense of the accused, or is essential to a fair determination of the cause." *Poole*, 665 So. 2d at 1066. Here, counsel cannot be ineffective for failure to obtain the tip records when there is no indication that said records would have been particularly helpful to the defense or that the State would have been required to produce such information. Mr. McLean has simply alleged that the tipster may have had a personal agenda against him but fails to state how the tipster's identity or the Crimeline tape itself would have been evidence favorable to Mr. McLean. "Postconviction relief cannot be based on speculative assertions." *Jones v. State*, 845 So. 2d 55, 64 (Fla. 2003). Clearly the information obtained identifying Mr. McLean and implicating him in the robbery and murder is incriminating, but there is no indication or argument that the tip was "exculpatory" constituting Brady' material or even subject to disclosure pursuant to Harklerode.

Mr. McLean has also failed to show that the tape still existed at the time when counsel became involved in the case. Both William McClellan and Ms. Cashman stated that they were interested in the name of the tipster and had discussed obtaining the information. Ms. Cashman testified that it was her understanding that the tape would have been destroyed within 30 days of being made. However, counsel still filed a Motion to Compel production of the Crimeline tape and the identity of the tipster several months later as part of conducting full and complete discovery even though she reasonably believed the tape would have already

been erased. She further testified that she alternatively deposed Detective Joel Wright about the information obtained from the tip and how it was used in his investigation.

Finally, Mr. McLean has not established that the destruction of the Crimeline tape constitutes bad faith destruction of evidence. In *Guzman v. State*, 868 So. 2d 498 (Fla. 2003), the Florida Supreme Court detailed the burden a defendant must meet to establish a constitutional violation on the basis of bad faith destruction of evidence. The court stated:

> The loss or destruction of evidence that is potentially useful to the defense violates due process only if the defendant can show bad faith on the part of the police or prosecution. *See Arizona v. Youngblood*, 488 U.S. 51, 58, 109 S.Ct. 333, 102 L.Ed.2d 281 (1988). Under *Youngblood*, bad faith exists only when police intentionally destroy evidence they believe would exonerate a defendant. *Youngblood* explained that the "presence or absence of bad faith ... must necessarily turn on the police's knowledge of the exculpatory value of the evidence at the time it was lost or destroyed." *Id.* at 57 n. ", 109 S.Ct. 333. Evidence that has not been examined or tested by government agents does not have "apparent exculpatory value" and thus cannot form the basis of a claim of bad faith destruction of evidence. *See id.* at 57, 109 S.Ct. 333 (rejecting a due process claim based on the government's failure to preserve evidence "of which no more can be said than that it could have been subjected to tests, the results of which might have exonerated the defendant"); *see also King v. State*, 808 So. 2d 1237, 1242 (Fla. 2002) (holding that a defendant failed to show bad faith on the part of the State in destroying hair and tissue evidence, in part because the defendant failed to show the police made a "conscious effort to prevent the defense from securing the evidence"); *Merck v. State*, 664 So. 2d 939, 942 (Fla. 1995) (holding that the defendant failed to show bad faith in a police detective's failure to preserve

> a pair of pants found at a crime scene, because the detective believed they did not have evidentiary value).
>
> *Guzman*, 868 So. 2d at 509. The Crimeline tape was destroyed pursuant to institutional policy, not in bad faith.
>
> Mr. McLean has failed to show that counsel was deficient because he has not proven the tape to be exculpatory in nature or that it was even available for production. He has also not proven that the destruction of the tape was in bad faith. Claim III is denied.

(V7, 1172-74). The court's detailed order is well reasoned, and should be affirmed on appeal.

As an initial matter, it is clear that such Crimeline tips as at issue in this case are anonymous. In Proctor v. State, 319 S.W. 3d 175, 185 (Tex. App.–Houston [1 Dist.] 2010) the court recognized the public's compelling interest in retaining the confidentiality of such tips:

> Here, appellant made no showing to the trial court that the crime stoppers report would be either exculpatory or material or that it would create the probability of a different outcome under the circumstances of this case and would therefore have served appellant's due process interest in the production of exculpatory information. *See Mitchell*, 977 S.W. 2d at 578. The subpoena of the crime stoppers report under these circumstances could only have undermined the State's compelling interest in furthering law enforcement by intimidating informants from coming forward with information as to where an accused could be found. *See Thomas*, 837 S.W. 2d at 114 (holding that allowing unrestricted access to crime stoppers information could compromise State's efforts to protect identity of crime stoppers informants). We

> hold that the trial court was not required to subpoena the crime stoppers records in this case, and thus it did not abuse its discretion in not conducting an in camera review of the information in the crime stoppers tip.

See State v. Poole, 665 So. 2d 1065, 1066 (Fla. 5th DCA 1995) (noting the privilege of non-disclosure of confidential informants and the burden on the defendant to prove the content of communications with an informant is necessary to a fair determination of the cause).

Defense counsel cannot be ineffective for failing to obtain Crimeline records where there is no reason to believe, even now, such records would have been helpful to the defense or, that the State would be required to divulge such information. McLean's allegations fall far short of a threshold showing of either deficient performance or resulting prejudice. Moreover, McLean was provided an evidentiary hearing on this claim and completely failed to support his allegations with any evidence to suggest, much less establish that any beneficial evidence could have been obtained with further information about the Crimeline tip. Accordingly, this claim is facially insufficient to merit post-conviction relief, much less meet either prong of Strickland.

In any case, McLean failed to prove such records still existed at the point in time when trial counsel became involved in the case. Cashman testified at the evidentiary hearing that

it was her understanding that the tapes in question would normally have been erased and would no longer have been in existence for her to obtain by the time she filed a motion to compel. (V7, 1111). McClellan testified that the Crimeline tape recording itself is routinely erased or destroyed. (V6, 898). Counsel attempted to obtain this information and cannot be faulted for failing to do more, where no evidence was introduced to establish such information was either material or would have been available had counsel filed an earlier request to obtain this information.[6]

Mclean has not established any plausible legal theory which would entitle him to post-conviction relief in this case. Indeed, much of McLean's brief on this issue addresses a general statement of the law without an attempt to apply that law to the facts of this case. (Appellant's Brief at 32-35). While McLean cryptically asserts a bad faith destruction of evidence claim which is procedurally barred, he completely fails to meet his burden of establishing entitlement to relief under this theory. In Guzman v. State, 868 So. 2d 498, 509 (Fla. 2003), this Court recognized the defendant bears a heavy burden to establish a

[6] Cashman filed a motion to compel, but, it was her understanding that the tape had already been destroyed. (V7, 1111).

constitutional violation on the basis of destruction of evidence. The court stated:

> The loss or destruction of evidence that is potentially useful to the defense violates due process only if the defendant can show bad faith on the part of the police or prosecution. *See Arizona v. Youngblood*, 488 U.S. 51, 58, 109 S.Ct. 333, 102 L.Ed.2d 281 (1988). Under *Youngblood*, bad faith exists only when police intentionally destroy evidence they believe would exonerate a defendant. *Youngblood* explained that the "presence or absence of bad faith ... must necessarily turn on the police's knowledge of the exculpatory value of the evidence at the time it was lost or destroyed." *Id.* at 57 n. *, 109 S.Ct. 333. Evidence that has not been examined or tested by government agents does not have "apparent exculpatory value" and thus cannot form the basis of a claim of bad faith destruction of evidence. See *id.* at 57, 109 S.Ct. 333 (rejecting a due process claim based on the government's failure to preserve evidence "of which no more can be said than that it could have been subjected to tests, the results of which might have exonerated the defendant"); *see also King v. State*, 808 So. 2d 1237, 1242 (Fla. 2002) (holding that a defendant failed to show bad faith on the part of the State in destroying hair and tissue evidence, in part because the defendant failed to show the police made a "conscious effort to prevent the defense from securing the evidence"); *Merck v. State*, 664 So. 2d 939, 942 (Fla. 1995) (holding that the defendant failed to show bad faith in a police detective's failure to preserve a pair of pants found at a crime scene, because the detective believed they did not have evidentiary value).

Guzman, 868 So. 2d at 509.

McLean's allegations do not show that the tip line or reward information would have been useful, or, that the destruction of "evidence" was in bad faith. Obviously, the

information identifying McLean as a participant in the robbery and murder is incriminating. At no point has McLean offered a credible scenario to suggest, much less establish that information favorable to the defense was contained in the confidential tip line or reward information. Post-conviction relief cannot be obtained on the basis of speculation and theoretical conjecture. See Spencer v. State, 842 So. 2d 52, 63 (Fla. 2003) (In rejecting an ineffectiveness claim this Court noted that reversible error cannot be predicated on "conjecture.") (citing Sullivan v. State, 303 So. 2d 632, 635 (Fla. 1974)). Further, since the tip implicating McLean was certainly not "exculpatory" it cannot constitute Brady v. Maryland, 373 U.S. 83 (1963) material. Kelley v. State, 3 So. 3d 970, 973 (Fla. 2009) (evidence disposition forms which had been destroyed did not constitute Brady material where the forms were neither favorable to Kelley or offer means to impeach or implicate someone else); Jennings v. State, 782 So. 2d 853, 856 (Fla. 2001) (The first requisite element of a Brady violation is evidence favorable to the accused.).

In sum, the instant claim lacks merit as a matter of law and fact. Accordingly, the trial court's order denying post-conviction relief should be affirmed.

III.

WHETHER MCLEAN WAS DEPRIVED OF THE EFFECTIVE ASSISTANCE OF COUNSEL WHEN HE WAS EXCLUDED FROM A PORTION OF A BENCH CONFERENCE DURING A HEARING TO REPLACE OR DISCHARGE COUNSEL?

McLean claims that trial counsel was ineffective in failing to ensure that McLean was present during a bench conference during the hearing on his motion to discharge or replace trial counsel. However, McLean presented no evidence in support of this claim during the evidentiary hearing below. The trial court properly denied this unsupported and procedurally barred claim below.

In rejecting this claim, the trial court stated:

> Claim 4 is denied for several reasons. First, Mr. McLean presented no evidence in support of this claim at the postconviction evidentiary hearing. Therefore, it remains legally insufficient. Second, this issue was raised on direct appeal and the Florida Supreme Court found it was not error to exclude Mr. Mc Lean from the bench conference because he was not entitled to a *Nelson* hearing on the issue in the first place. *McLean v. State*, 29 So. 3d 1045, 1050 (Fla. 2010). Thus, the claim is procedurally barred. *See Sired v. State*, 469 So. 2d 119, 120 (Fla. 1985) ("[c]laims previously raised on direct appeal will not be heard on a motion for post-conviction relief simply because those claims are raised under the guise of ineffective assistance of counsel"). Claim IV is denied.

(V7, 1174-75).

As found by the trial court, this claim is procedurally barred. This Court specifically addressed the apparent exclusion

of McLean from the bench conference on direct appeal and found no error under these facts. McLean v. State, 29 So. 3d 1045, 1050 (Fla. 2010) ("No error occurred when McLean could not hear a portion of the Nelson hearing proceedings because McLean was not entitled to a Nelson hearing on the issue being discussed."). Indeed, McLean essentially concedes application of the procedural bar, when, attempting to excuse his complete failure to present evidence in support of this claim below, he states the "record support for this claim" comes from the trial record. (Appellant's Brief at 37). Accordingly, the claim is procedurally barred here. See Reaves v. State, 826 So. 2d 932, 936 (Fla. 2002) (noting that claims are procedurally barred from review in a motion for postconviction relief where they were either raised on direct appeal or should have been raised on direct appeal); Sireci v. State, 773 So. 2d 34, 41 (Fla. 2000) (finding claims procedurally barred because they either were or could have been raised in prior proceedings and noting that "to the extent that Sireci uses a different argument to relitigate the same issue, the claims remain procedurally barred.").

Further, McLean presented no evidence in support of this claim during the hearing below. Consequently, there is no record upon which either the deficiency or prejudice prongs of Strickland can be met. There is no evidence to suggest, much

less establish that the outcome of McLean's trial would have been different if only he had been present during the bench conference. Again, reversible error cannot be obtained on the basis of speculation and conjecture. Spencer, 842 So. 2d at 63.

The State notes that McLean's apparent absence from a brief bench conference did not amount to exclusion from a "critical stage" of the proceeding. Kentucky v. Stincer, 482 U.S. 730, 745 (1987) ("a defendant is guaranteed the right to be present at any stage of the criminal proceeding that is critical to its outcome if his presence would contribute to the fairness of the procedure."). McLean was in fact "present" in court during the hearing at issue. He had a full and fair opportunity to air his grievances against trial counsel.[7] McLean offers nothing that he could have added during the conference wherein defense counsel briefly stated her efforts to pursue an alibi defense. Indeed, on appeal, McLean did not even take issue with the underlying decision not to remove or replace defense counsel See e.g. Kormondy v. State, 983 So. 2d 418, 436 (Fla. 2007) (even if counsel was deficient in failing to object to defendant's absence from conference, Kormondy failed to demonstrate prejudice or how his presence would have altered any decision

[7] At the end of the brief bench conference with the judge, the judge asked McLean if he had anything to add regarding his counsel's perceived deficiencies. (III 269).

which could have resulted in a life sentence); Vining v. State, 827 So. 2d 201, 218 (Fla. 2002) ("In relation to this claim, Vining has failed to show how he was prejudiced by his absence during the pretrial and pre-penalty phase proceedings, nor has he asserted how he could have made a meaningful contribution to counsel's legal arguments during these preliminary proceedings."). Under these facts, McLean has not come close to meeting either the deficiency or prejudice prongs of Strickland.

For all of the foregoing reasons, this claim should be denied.

IV.

WHETHER DEFENSE COUNSEL RENDERED INEFFECTIVE ASSISTANCE OF COUNSEL FOR FAILING TO ENSURE AN ADEQUATE MENTAL HEALTH EXAMINATION BECAUSE COUNSEL FAILED TO PROPERLY ELICIT OR SUPPORT A DIAGNOSIS OF ATTENTION DEFICIT DISORDER?

McLean contends that his counsel was ineffective for failing to ensure his mental health expert, Dr. Eisenstein, testified more completely that he suffered from Attention Deficit Disorder. This claim is without merit and was properly denied following an evidentiary hearing below.

The trial court issued a detailed order rejecting this claim which included credibility findings. In rejecting the

claim that counsel's performance was deficient, the court stated, in part:

> At the postconviction evidentiary hearing, evidence was presented that Dr. Eisenstein's diagnosis of ADD was first discussed during a question and answer phone call with the prosecutor and defense counsel in September 2007, while the trial was taking place. That evidence included Dr. Eisenstein's bill and the file notes of Mr. McClellan and Ms. Cashman of their phone conversations with Dr. Eisenstein.
>
> Ms. Cashman testified that her decision on the mental health status mitigation to be presented at the penalty phase hearing was entirely shaped by what Dr. Eisenstein thought pertinent. The open ended style of her questions to Dr. Eisenstein at the penalty phase hearing strongly support this contention. TR. 1709-1756.
>
> Ms. Cashman and Mr. McClellan both testified that they would not have placed any limits on Dr. Eisenstein's evaluation of Mr. McLean and that if he had indicated additional testing was required, they would have discussed it and conducted the testing or attempted to do so.
>
> Dr. Eisenstein testified that he did not discuss ADD with counsel prior to trial. He further testified that counsel did not tell him to pursue a certain avenue of testing and that he was allowed to use his professional judgment however he deemed appropriate. The jury heard Dr. Eisenstein's opinion that Mr. McLean suffered from ADD. The fact that Dr. Eisenstein has now conducted additional testing and prepared supplemental reports to provide additional support for his original diagnosis is of little consequence. *See Downs v. State*, 740 So. 2d 506, 515-16 (Fla. 1999) (rejecting an ineffective assistance of counsel claim for failing to present mitigating evidence where most, if not all, of the evidence was, in fact, presented); *Maxwell v. State*, 490 So. 2d 927, 932 (Fla. 1986) ("The fact that a more thorough and detailed

presentation could have been made does not establish counsel's performance as deficient.").

Dr. Eisenstein was free to focus on Mr. McLean's ADD during his direct examination testimony. The record suggests he did not do so because, as he later explained on cross examination, the ADD was only a portion of the "organic brain impairment" diagnosis. TR. 1757. At the penalty phase, Dr. Eisenstein emphasized his findings of impulsivity and instability on several occasions. TR. 1764-1766, 1769.

As the following portion of the sentencing order indicates, the Court considered the issue of organic brain impairment, finding that the mitigation had been established but gave it little weight because the facts of the case established that the mitigation had little relationship to Mr. McLean's conduct during the actual commission of the crime.

> The evidence suggests that the murder and home invasion robbery did not occur as a result of any extreme mental or emotional disturbance. Rather, the evidence shows that the defendant made very deliberate choices that day. He participated in the planning of the robbery with James and Maurice. He brought a gun, mask and gloves to the scene. He ransacked Jahvon's apartment and left with a bag full of marijuana. The defendant was able to escape capture on the day of the murder by running through the woods. Along the way, he discarded his shirt, batting gloves, cellular telephone and guns. Obviously, he knew that he committed a crime and did everything he could to distance himself from it. These actions themselves demonstrate a very clear thought process. Thus, the court finds that this mitigator was reasonably established but gives it little weight.

November 7, 2007 sentencing order, 11-12, excerpt.

The Court also found that the mitigator of brain injury had been reasonably established.

> Numbers 11 and 20 address a head injury suffered by the defendant when he was struck in the head with a bat, which allegedly resulted in organic brain injury. The defense argued that the defendant suffers from organic brain damage or dysfunction caused by being hit in the head by a baseball bat as a child. Dr. Eisenstein and Dr. Toomer testified that there were factors in their evaluations of the defendant that indicated the existence of organicity. However, there was no direct proof of an actual brain injury since the defendant did not receive any medical treatment at the time. Although defendant has reasonably established these mitigators, they are given little weight.

November 7, 2007 sentencing order, 11-12, excerpt.

At the postconviction evidentiary hearing, Mr. McLean failed to establish that ADD, standing alone, had any different behavioral characteristics not contemplated by Dr. Eisenstein's original overarching diagnosis of brain impairment which encompassed impulsivity. As indicated above, the Court has previously found that brain impairment was reasonably established and Mr. McLean had the benefit of that consideration. The Court's sentencing order found that the mental status mitigation was of little weight because Mr. McLean's behavior showed a "very clear thought process." The additional testimony provided by Dr. Eisenstein simply added additional support to the diagnosis this court already considered and found to be of "little weight." Given the facts surrounding Mr. McLean's decision to shoot the victims admitted at trial, his attempt to relate ADD to the offense in retrospect is not credible. *See Kokal v. Secretary, Department of Corrections*, 623 F.3d 1331, 1349 (11th Cir. 2010) ("Thus, as we have said before, '[a] psychological defense strategy at sentencing is unlikely to succeed where it is inconsistent with the defendant's own behavior and conduct.'") (quoting *Tompkins v. Moore*, 193 F.3d 1327, 1338 (11th Cir. 1999) (additional cites omitted); *Davis v. State*, 604 So. 2d 794, 798 (Fla. 1992) (statutory mitigating circumstances properly rejected, despite the testimony

> of two defense experts, where the defendant's methodical behavior was inconsistent with alleged mental incapacity).
>
> Here, counsel retained two qualified mental health experts, Dr. Toomer and Dr. Eisenstein, who provided favorable testimony in the penalty phase of the proceedings. Counsel placed no limits on Dr. Eisenstein's evaluation of Mr. McLean and asked open ended questions at trial to facilitate a narrative of his mental health condition. Additionally, counsel submitted 48 mitigating factors, including several mental health factors, detailing Mr. McLean's organic brain impairment and brain injury. Counsel cannot be said to be deficient.

(V7, 1178-80). The record provides ample support for the trial court's ruling.

As found by the trial court, there is no evidence that Dr. Eisenstein lacked the training, knowledge, qualifications, or experience to conduct a forensic evaluation of the defendant. Defense counsel was entitled to rely upon his mental health expert in this case. Stewart v. State, 37 So. 3d 243, 252-253 (Fla. 2010) ("This Court has established that 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.") (citing State v. Sireci, 502 So. 2d 1221, 1223 (Fla. 1987); Dufour v. State, 905 So. 2d 42, 58 (Fla. 2005) ("Simply presenting the testimony of experts during the evidentiary hearing that are inconsistent with the mental health opinion of an expert

retained by trial counsel does not rise to the level of prejudice necessary to warrant relief."). Indeed, Dr. Eisenstein provided favorable mitigation testimony on McLean's behalf in the penalty phase. See generally Darling v. State, 966 So. 2d 366, 377 (Fla. 2007) (counsel is entitled to rely upon qualified experts). Further, this case presents the somewhat unusual position of collateral counsel simply recalling one of the trial defense experts, to buttress, or support an opinion that expert already possessed at the time of trial. The State doubts that such an attempt at establishing trial counsel's ineffectiveness would ever be appropriate under these circumstances.[8]

McLean sums up his ineffectiveness claim on appeal by stating that "[c]ounsel was ineffective for failing to investigate the Defendant's background, hire the necessary mental health experts, provide experts with available background material, supervise the administration of available mental health tests, and present a wealth of available mitigation to the jury in this case." (Appellant's Brief at 46). However, this is simply not true. McLean did not plead much less establish any failure of his trial attorneys to retain appropriate experts, investigate McLean's background, or, provide their experts with

[8] To date, there is no cognizable constitutional claim of psychologist ineffectiveness.

background material. The only evidence presented by McLean in support of his claim was that Dr. Eisenstein failed to support more fully his attention deficit diagnosis and administer specific tests relating to ADHD. Indeed, the defense acknowledged below that Dr. Eisenstein's testimony was "going to be very limited to the ADHD." (V6, 820).

The substance of what was presented at the evidentiary hearing on McLean's instant 3.851 motion suggests strongly that Dr. Eisenstein first expressed the Attention Deficit Disorder diagnosis during a question and answer phone call with prosecutors and defense counsel that was conducted while the trial was taking place. Neither Dr. Eisenstein's bill, the notes of defense counsel William McClellan of a phone conversation with Eisenstein, nor the notes of defense counsel Trish Cashman of her phone conversation with Dr. Eisenstein --- all of which were placed in evidence at the evidentiary hearing, contain any reference to testing applicable to, or a diagnosis of ADHD. (V6, 898). At the evidentiary hearing Mr. McClellan identified his notes of the later phone conversation with Eisenstein and prosecutors. (V6, 898). Those notes contained the first recorded reference to "ADD", and appear to be the first time that such a diagnosis was referenced by Dr. Eisenstein.

Trish Cashman testified at the evidentiary hearing that her approach to what mental status mitigation would be presented at the penalty phase hearing was entirely shaped by what Dr. Eisenstein thought pertinent. (V7, 1083, 1093). It is undisputed that Dr. Eisenstein was not precluded or restrained in any manner by the defense attorneys from conducting appropriate tests which he thought were relevant to his evaluation of McLean. (V7, 1103). Dr. Eisenstein was able to administer any tests that he thought relevant without any restriction from trial counsel. That Dr. Eisenstein has now, with hindsight, administered additional tests specifically designed to assess ADHD, does not establish any deficiency in defense counsel's representation of McLean. Stewart, 37 So. 3d at 252-253 (This Court "has established that defense counsel is entitled to rely on the evaluations conducted by qualified mental health experts[]").

As noted by the trial court, the extremely open ended style of Cashman's questions to Dr. Eisenstein at the penalty phase hearing strongly supports her testimony on this point at the evidentiary hearing. (XI 1709-1756). At the penalty phase hearing nothing prevented Dr. Eisenstein from focusing in direct examination testimony on what he described on cross to be an ADD component of his organic brain disorder diagnosis. (XI 1757).

At the evidentiary hearing Dr. Eisenstein simply added additional factual support for that diagnosis. Of course, every single expert could probably embellish or improve upon his or her penalty phase testimony with the benefit of time and hindsight. McLean's allegations do not suggest Dr. Eisenstein overlooked or failed to diagnose any serious or compelling mental disorder. In fact, the evidence at trial suggested strongly that McLean's decision to shoot Theo Lewis and Jahvon Thompson was preconceived and not a result of impulse or reaction. This was not a quick or frenzied murder following a robbery gone bad. Given the facts of McLean's decision to shoot the victims admitted at the trial, Dr. Eisenstein's belated attempt to relate ADHD to the offense was simply not credible; a finding specifically made by the post-conviction court below. See V7, 1180 ("Given the facts surrounding Mr. McLean's decision to shoot the victims admitted at trial, his attempt to relate ADD to the offense in retrospect is not credible."). See Kokal v. Secretary, Dept. of Corrections, 623 F.3d 1331, 1349 (11th Cir. 2010) ("Thus, as we have said before, "[a] psychological defense strategy at sentencing is unlikely to succeed where it is inconsistent with the defendant's own behavior and conduct.") (quoting Tompkins v. Moore, 193 F.3d 1327, 1338 (11th Cir. 1999) (additional cites omitted). A credibility finding that

collateral counsel has not acknowledged, much less shown to be erroneous on appeal. See State v. Fitzpatrick, 118 So. 3d 737, 748 (Fla. 2013) (noting that "[p]ostconviction courts hold a superior vantage point with respect to questions of fact, evidentiary weight, and observations of the demeanor and credibility of witnesses.") (citing Cox v. State, 966 So. 2d 337, 357-58 (Fla. 2007)).

The jury learned that Dr. Eisenstein believed that McLean suffered from Attention Deficient Disorder at the time of trial. The fact that he now has conducted additional testing to provide additional support for this diagnosis is of little consequence. See Downs v. State, 740 So. 2d 506, 515-16 (Fla. 1999) (rejecting ineffective assistance claim for failing to present mitigating evidence where most, if not all, of the evidence was, in fact, presented.); See Maxwell v. State, 490 So. 2d 927, 932 (Fla. 1986) ("The fact that a more thorough and detailed presentation could have been made does not establish counsel's performance as deficient"). Indeed, counsel cannot be faulted for Dr. Eisenstein's own failure to administer tests to confirm or support his diagnosis. Again, counsel placed no restrictions on Dr. Eisenstein and asked open ended questions to elicit his diagnosis and opinions on McLean in the penalty phase. McLean failed to establish his experienced defense attorneys'

performance in this case fell below the wide range of reasonableness contemplated under Strickland.

In addition, McLean clearly failed to meet his burden of establishing prejudice under Strickland. The trial court made this finding below, stating:

> Mr. McLean has also failed to show that he was prejudiced by counsel's alleged deficient performance. No consequential mitigation was established at the evidentiary hearing through Dr. Eisenstein's testimony. Moreover, failing to expand upon or embellish his diagnosis of ADD, a non-statutory mitigating factor, does not undermine the confidence in the outcome of this case. With regard to the penalty phase, the Florida Supreme Court has stated that a defendant "must demonstrate that there is a reasonable probability that, absent trial counsel's error, 'the sentencer would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." *Cherry v. State*, 781 So. 2d 1040, 1048 (Fla. 2000) (quoting *Strickland*, 466 U.S. at 695). Under the facts of this case, and considering the previous evaluation of the mitigating circumstances presented, Mr. McLean's allegations fall short of establishing prejudice as required under *Strickland*.
>
> The testimony at trial established that after the robbery was completed, Mr. McLean deliberately, callously, and recklessly murdered Jahvon Thompson and attempted to murder Theothlus Lewis. Both men were unarmed, compliant, and posed no threat to Mr. McLean. Even before Mr. McLean shot Jahvon and Theothlus, he was contemplating the killing of the people associated with the robbery. The surviving victim, Theothlus, testified that, as Mr. McLean's co-participant in the robbery left the apartment, Mr. McLean told him "go to the car, and if you see the girl, to shoot her." TR. 805. This was confirmed by Mr. McLean's co-participant in the robbery, Mr. Jaggon, as he testified to the same. TR. 1049. This comment suggests strongly that

> Mr. McLean's subsequent decision to shoot the two victims in the apartment was not the result of mere impulse or a thoughtless reaction as proposed by Dr. Eisenstein. Compounding the evidence of Mr. McLean's deliberate actions, when Maurice asked Mr. McLean why he shot Jahvon and Theothlus, he simply replied "he wanted to see what it felt like to shoot and kill somebody." TR. 1107.
>
> Mr. McLean's sentence for his crimes is clearly supported by four aggravating circumstances: the instant crime was committed while he had been previously convicted of a felony and under sentence of imprisonment or placed on community control or felony probation; he had been previously convicted of another capital offense or felony involving the use of threat of violence to some person; the instant crime was committed while he was engaged in or was an accomplice in the commission of or an attempt to commit a home invasion robbery; and the instant crime was committed for financial gain.
>
> For the reasons set forth above, the outcome of the penalty phase is not undermined by the minimal additional mitigation factor of ADD contemplated in the instant motion, Claim VII is denied.

(V7, 1181-82). The trial court's ruling is reasonable and supported by the record.

Dr. Eisenstein's failure to expand upon or embellish his diagnosis of Attention Deficit Disorder, a non-statutory mitigating factor, does not undermine confidence in the outcome of this case. With regard to the penalty phase, this Court has stated that a defendant "must demonstrate that there is a reasonable probability that, absent trial counsel's error, 'the sentencer ... would have concluded that the balance of

aggravating and mitigating circumstances did not warrant death.'" Cherry v. State, 781 So. 2d 1040, 1048 (Fla. 2000), cert. denied, 534 U.S. 878 (2001) (quoting Strickland, 466 U.S. at 695). Under the facts of this case, McLean's allegations fall far short of establishing prejudice under Strickland.

The trial court found three aggravating circumstances in this case. The trial court found that McLean had been on probation for approximately 20 months when he committed the murder and gave it moderate weight. The trial court gave great weight to McLean's prior violent felony convictions, which included a prior armed robbery and includes the contemporaneous home invasion robbery and the attempted murder of Theothlus Lewis. (XI 1769-70).

The testimony at trial established that after the robbery was completed, McLean deliberately and callously murdered 16 year-old Jahvon and attempted to murder Theothlus. Both men were unarmed, compliant, and posed no threat to McLean. James Jaggon Jr., testified that when McLean told him to leave if he saw the lady outside, he was to "shoot her." (VIII 1049). This comment suggests strongly that McLean's subsequent decision to shoot the two victims was not the result of mere impulse or thoughtless reaction as suggested by Dr. Eisenstein. Moreover, when Maurice asked McLean why he shot Jahvon and Theothlus, he simply replied

"he wanted to see what it felt like to shoot and kill somebody." (XXI 1107) The outcome of the penalty phase is not undermined by the minimal additional mitigation [Attention Deficit Hyperactivity Disorder] mentioned in McLean's motion for post-conviction relief. Accordingly, this claim, was properly denied below.

V., VI.

WHETHER FLORIDA'S PROCEDURES FOR EXECUTION BY LETHAL INJECTION ARE UNCONSTITUTIONAL?

McLean acknowledges that these claims are not supported by current case law. (Appellant's Brief at 47 n.2). The State agrees with McLean's candid assessment. McLean's challenges to Florida's lethal injection procedures are procedurally barred and without merit as a matter of established law.

Although the trial court rejected McLean's claims below on the merits by citing controlling case law (V7, 1182-83), the State maintains that these claims are also procedurally barred from review in a motion for post-conviction relief. A substantive challenge to the constitutionally of the statute exempting the identity of the executioners from disclosure should have been raised, if at all, on direct appeal. See Israel v. State, 985 So. 2d 510, 520 (Fla. 2008); Fla. R. Crim. P. 3.851(e)(1) ("This rule does not authorize relief based upon

claims that could have or should have been raised at trial and, if properly preserved, on direct appeal of the judgment and sentence."). An Eighth Amendment challenge to Florida's lethal injection statute and three drug protocol, also should have been made on direct appeal. Consequently, these claims are procedurally barred here. In any case, the claims are without merit.

First, McLean is not entitled to know the identity of the execution team members. Henyard v. State, 992 So. 2d 120, 130 (Fla. 2008) (rejecting constitutional challenge to "section 945.10, Florida Statutes, which exempts the disclosure of the identity of an executioner from public records. . ."). See also Troy v. State, 57 So. 3d 828, 840 (Fla. 2011) (affirming summary denial of lethal injection claim). Second, this Court has repeatedly rejected challenges to lethal injection similar to those lodged by McLean in this case.[9] See e.g. Tompkins v. State, 994 So. 2d 1072, 1081 (Fla. 2008) ("This Court has repeatedly rejected appeals from summary denials of Eighth Amendment

[9] McLean conceded below that his claims could be resolved without a hearing. On appeal, he presents facts and argument not presented or litigated in the trial court below. Accordingly, such "facts" should not considered on appeal. See e.g. Booker v. State, 969 So. 2d 186, 195 (Fla. 2007) ("When a defendant fails to pursue an issue during proceedings before the trial court, and then attempts to present that issue on appeal, this Court deems the claim to have been abandoned or waived.") (citing Mungin v. State, 932 So. 2d 986, 995 (Fla. 2006)).

challenges to Florida's August 2007 lethal injection protocol since the issuance of Lightbourne v. McCollum, 969 So. 2d 326 (Fla. 2007).") (string cites omitted); Valle v. State, 70 So. 3d 530 (Fla. 2011) reaffirming lethal injection as constitutional under Florida law after the protocol substituted pentobarbital for sodium thiopental.). Accordingly, this claim was properly denied below.[10]

VII.[11]

WHETHER MCLEAN IS INCOMPETENT AND HIS EXECUTION WILL VIOLATE THE EIGHTH AMENDMENT?

Florida law is clear that the issue of competency for execution is not properly raised until such time as the Governor has issued a death warrant. See Griffin v. State, 866 So. 2d 1, 21-22 (Fla. 2003) (affirming summary denial of competency claim because the claim was not ripe for review); Hunter v. State, 817 So. 2d 786, 799 (Fla. 2002); Brown v. Moore, 800 So. 2d 223, 224 (Fla. 2001). Moreover, McLean has offered no facts to suggest that he is in fact, incompetent. The present claim must be denied.

[10] This case was resolved below before the State substituted Midazolam Hydrochloride for Pentobarbital in the lethal injection protocol.

[11] McLean incorrectly numbered this claim as "X."

VIII.

WHETHER CUMULATIVE ERROR DEPRIVED MCLEAN OF A FUNDAMENTALLY FAIR TRIAL?

McLean finally asserts that cumulative errors denied him the right to a fundamentally fair trial. This claim lacks any merit.

In rejecting this claim, the trial court stated, in part:

> However, the Court finds no such error.
>
> Where the individual claims of error alleged are either procedurally barred or without merit, the claim of cumulative error also necessarily fails. As discussed in the analysis of the individual issues above, the alleged errors are either meritless, procedurally barred, or do not meet the Strickland standard for ineffective assistance of counsel. Because the alleged individual errors are without merit, the contention of cumulative error is similarly without merit. *Israel v. State*, 985 So. 2d 510, 520 (Fla. 2008) (citations omitted).

The trial court properly rejected this claim below. McLean failed to show his entitlement to relief under any of his claims. Accordingly, this claim must be rejected on appeal. See Troy v. State, 57 So. 3d 828, 844 (Fla. 2011) ("However, where the allegations of individual error are procedurally barred or meritless, a claim of cumulative error also fails."); Gore v. State, 24 So. 3d 1, 15 (Fla. 2009) (stating that "because Gore's individual claims of error are without merit, any cumulative error analysis would be futile.").

CONCLUSION

WHEREFORE, the State respectfully requests that this Honorable Court AFFIRM the denial of post-conviction relief.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished electronically to Mark S. Gruber and Julie Morley, Assistants CCRC-M, Law Office of the Capital Collateral Regional Counsel - Middle, 3801 Corporex Park Dr., Suite 210, Tampa, Florida 33619-1136 (gruber@ccmr.state.fl.us, morley@ccmr.state.fl.us and support@ccmr.state.fl.us), on this 9th day of December, 2013.

CERTIFICATE OF FONT COMPLIANCE

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

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