IN THE SUPREME COURT OF FLORIDA

CHARLES GROVER BRANT,

Appellant,

v. **Case No. SC14-787**
L.T. No. 04-CF-12631
STATE OF FLORIDA, **DEATH PENALTY CASE**

Appellee.
_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE THIRTEENTH JUDICIAL CIRCUIT,
IN AND FOR HILLSBOROUGH COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

PAMELA JO BONDI
ATTORNEY GENERAL

SARA MACKS
Assistant Attorney General
Florida Bar No. 0019122
Concourse Center 4
3507 E. Frontage Rd., Suite 200
Tampa, Florida 33607-7013
Telephone: (813) 287-7910
Facsimile: (813) 281-5510
capapp@myfloridalegal.com
sara.macks@myfloridalegal.com

COUNSEL FOR APPELLEE

TABLE OF CONTENTS

TABLE OF CITATIONS

Cases

Other Authorities

STATEMENT OF THE CASE AND FACTS

Plea and Direct Appeal

On July 1, 2004, Charles Brant murdered, S.R., his young neighbor. Brant gained access to her apartment by convincing her that he wanted to take photographs of tile work he had done in the kitchen. Once inside, he violently raped and kidnapped her. He burglarized her home and stole her vehicle. Eventually, in 2007, Brant decided to plead guilty to his crimes, and he was sentenced to death. Brant v. State, 21 So. 3d 1276, 1277 (Fla. 2009). The facts presented before the penalty phase judge (Brant waived his right to a penalty phase jury) were outlined in this Court's opinion on direct appeal,

> On July 2, 2004, law enforcement officers found [S.R.] dead in her home. A rear window of her duplex was open, and the front door was locked from the inside. [S.R.] was in her bathtub with water running over her. Jacqueline Lee, M.D., Associate Medical Examiner for the Hillsborough County Medical Examiner's Department, testified that while performing the autopsy, she found a plastic bag over the victim's head, and she also found a dog leash, an electrical cord from a heating pad, and a woman's stocking around the victim's neck. Dr. Lee stated that bruises on the victim's body could be interpreted as defensive wounds and that hemorrhages involving the eyes and eyelids were indicative of strangulation. She testified that the cause of death was strangulation and suffocation.
>
> Deputy Rodney Riddle of the Hillsborough County Sheriff's Office and Kathy Frank

Smith, previously a homicide detective for the Hillsborough County Sheriff's Office, testified that on July 2, 2004, they each spoke with Brant, who lived near [S.R.], as part of neighborhood surveys. Brant told the officers that on the night of the homicide, he saw a man with long hair in a white button-down shirt with the victim and that the next day he saw a man in a yellow raincoat and black pants running behind his residence. Deputy Riddle testified that during their conversation, Brant was calm, cordial, and coherent and did not appear to be under the influence of drugs or alcohol. Smith likewise testified that during their conversation, Brant was coherent and that she did not notice any signs of the influence of drugs or alcohol. One of Brant's neighbors, who spoke briefly with Brant around 5 p.m. on July 2, 2004, similarly testified that Brant did not appear to be under the influence of drugs or alcohol during their conversation.

Detective Smith also testified that as part of the homicide investigation, law enforcement officers collected garbage from Brant's porch and from a garbage can by Brant's mailbox. The officers retrieved, among other items, a debit card with the victim's name and photograph on it, a man's white cotton shirt, a yellow raincoat, a pair of black pants, a mass of long, brown hair, four latex gloves, and a box that had contained women's stockings. Smith stated that Brant had short, dark hair when he spoke with her.

Detective Frank Losat of the Hillsborough County Sheriff's Office testified that he interviewed Brant during the early morning hours on July 4, 2004. Detective Losat stated that Brant was cooperative and spoke willingly. Detective Losat testified that at first, Brant repeated the story he had told Officers Riddle and Smith about a person

running through his backyard wearing a raincoat. After being informed that law enforcement officers had discovered items in his trash belonging to the victim, Brant changed his story, admitting his involvement in the homicide.

Detective Losat testified that Brant explained that he went to [S.R.'s] home on July 1, 2004, to take pictures of her tile floor, which he had installed, for his portfolio. [S.R.] let him in, and while he was taking photographs of the tile, [S.R.] walked into the bathroom. Brant grabbed [S.R.], dragged her into one of the bedrooms, and sexually assaulted her. Brant stated that he put a sock in [S.R.'s] mouth to quiet her and then started to choke and suffocate her. He explained that when he thought [S.R.] had either lost consciousness or died, he started walking around in the house. When she regained consciousness and ran to the front door, Brant dragged her back into the bedroom. At that point, Brant again began to choke and suffocate her. He stated that the choking and suffocation went on for some time. Brant next took [S.R.] to the bathroom. He said that she was hiccupping and breathing a little bit as he put her in the tub. Brant then grabbed a stocking, a dog leash, and an electrical cord from a heating pad, and wrapped those items around [S.R.'s] neck. Brant told the officers that [S.R.] died while in the tub. He also stated that after her death, he started to clean up the duplex, changed into clothing he found in the home, left through the front door, moved [S.R.'s] car, and walked home. Brant further explained that on the next day, he went back into [S.R.'s] residence and tried to wipe down any fingerprints that he may have left. Brant stated that he was going to leave through the front door when he observed a deputy approaching the door. He then turned the deadbolt on the door, fled through a rear

window, and jumped the privacy fence to go back to his house.

Detective Losat testified that during the interview, he did not detect any evidence that Brant was under the influence of drugs, alcohol, or medication. Brant was coherent. Christi Esquinaldo, a corporal for the Hillsborough County Sheriff's Office, testified that she was present during Detective Losat's July 4, 2004, interview with Brant. She stated that she did not observe any evidence that Brant was intoxicated at that time.

In addition to hearing testimony from Detective Losat and Corporal Esquinaldo, the trial court accepted into evidence a transcript of the July 4, 2004, interview. The trial court also accepted a stipulation from the parties regarding DNA evidence collected during the homicide investigation. The stipulation provided that "analysis of [S.R.'s] vaginal swab taken from the rape kit at the Medical Examiner's Office demonstrated the presence of semen. The DNA analysis of the semen revealed that it matched the defendant's DNA. In other words, Charles Brant was the source of the semen."

The State also called Melissa Ann McKinney, Brant's former wife, who testified that she and Brant were married from June 1991 until December 2004 and that they have two sons together. McKinney explained that she and Brant met in 1990 when they were students at a Bible college in Virginia but left the school voluntarily before either graduated. McKinney testified that at the time of Brant's arrest, Brant did not have a full-time job but did renovation and maintenance work for their landlord. McKinney confirmed that Brant installed tile in the duplex occupied by [S.R.] and that in July 2004, he began compiling a portfolio in an effort to get more tile work.

McKinney explained that she and Brant separated eight or nine times during their thirteen-year marriage due to Brant's drug use. Brant used marijuana continuously and began using ecstasy around 1999. McKinney testified that Brant began using methamphetamine about six months before the murder. He obtained a package of it "like every week." McKinney explained that while using methamphetamine, Brant would stay up for four or five nights in a row without sleep and then crash. During the first few days of a cycle, he would be very productive and "cheerful . . . in a better mood but he was always fidgety." When Brant would start coming off the drug, he would not finish tasks because he was looking for more drugs. By day four or five, he was "[i]rritable, snappy." McKinney explained that during the six months Brant was using methamphetamine, "he became a different person" and "it seemed like he didn't care anymore. He didn't - all he wanted was that drug, and he didn't care if he finished jobs. He didn't care about his family. I mean, he just he became obsessed with sex." Beginning about two weeks before the murder, McKinney noticed Brant talking to himself while he worked.

McKinney also testified that in approximately 2000, Brant asked her to participate in sex games involving force. About two years before the murder, the games became rougher, and because she was afraid she would be hurt, McKinney began to object. Brant would surprise McKinney by hiding in the house, wearing a mask and latex gloves, and grabbing her from behind. McKinney stated that she believed Brant sometimes would even hide his car to give the impression that he was not at home in order to surprise her more effectively. She explained that during that two-year period, they had intercourse almost daily and that

Brant "would get violent" and "do the scaring" every couple of weeks.

McKinney testified that Brant became sneakier and more violent when he began using methamphetamine. For example, on Wednesday, June 30, 2004, the night before the murder, Brant hid in a closet and attacked McKinney when she came into the room. He put her on her stomach on the bed, bound her hands, and attempted to put a sock in her mouth. McKinney explained that she was able to get away from Brant and stayed in the bathroom that night. McKinney stated that she believed Brant was on methamphetamine when he attacked her. He had started staying up on Sunday of that week and had "been up for quite a few days." McKinney further explained that on the morning of Thursday, July 1, 2004, she threatened to go to the police if the games did not stop.

McKinney further testified that on Thursday, Brant was at home when she returned from work at around 6 or 6:30 p.m. McKinney took their sons to see a movie that evening. Brant was invited to attend, but he declined. McKinney stated that they returned home at around 11 p.m. Brant was in the kitchen washing dishes. He was acting nice, which surprised McKinney because they had been angry with each other for a few days. McKinney testified that Brant seemed to be under the influence of drugs when she returned - he was "speedy" and "fidgeting." Brant asked McKinney to cut his hair, which she did. McKinney testified that Brant slept in the bed with her that night, but they did not have sex. McKinney testified that she next saw Brant between 6 and 7 p.m. on Friday. Brant was writing a statement for the police. McKinney testified that he appeared to be under the influence of drugs at that time. She said that "[h]e was acting nervous. He was just acting all over the

place, like he was on the drug."[1]

The defense called several lay witnesses and two mental health experts to establish mitigating circumstances.

Crystal Florence Coleman, Brant's mother, testified that their family had a history of depression and other mental health conditions. She also testified about Brant's childhood. She stated that once Brant could walk, "he started beating his head against the floor" and "pounding holes in the walls." She stated that Brant ate plaster and fertilizer as a child. When Brant was around five, Crystal married Marvin Coleman. Crystal testified that Marvin, who drank heavily, would spank or whip Brant over trivial matters until he bled, would threaten Brant, and "was very derogatory toward" Brant.

Sherry Lee Brant-Coleman, Brant's older sister, similarly testified that Brant's stepfather was an alcoholic and "a bully" to Brant. Sherry testified that Marvin singled Brant out from the other children for more criticism and physical abuse. Sherry also testified about Brant's behavior shortly after the murder. She saw Brant at their mother's Orlando home in early July 2004. She was informed that Brant had told their half-brother, Garett Coleman, that he was involved in what happened to [S.R.] and "that he was hallucinating and he had - was going to turn himself in." Sherry explained that she and several family members and friends went with Brant to a police substation, which was closed because it was a holiday weekend. They then drove to another station. Brant and Garett went into the station but returned twenty minutes later. They claimed that the law enforcement

[1] McKinney also testified during the Spencer hearing along with her brother, Garett Coleman. Brant, 21 So. 3d at 1283.

officers told them there was no information at that station about the [S.R.] homicide and that Brant would have to go to a Tampa area station.

Two witnesses, Reverend John Hess, III, a minister affiliated with Blue Ridge Bible College in Rocky Mount, Virginia, and Pastor Leon Wendall Jackson, of the Faith Family Worship Center Assembly of God Church in Citrus Park, testified that Brant had spoken to them about having a drug use problem. Reverend Hess testified that Brant was a student at the Bible college, then known by a different name, for one semester in 1990. Reverend Hess explained that in approximately 1997, Brant contacted Hess about reapplying to the school, stating that he had gotten reinvolved in drugs and was looking to straighten out his life. Hess assured Brant that he could reapply, but Brant did not pursue the option. Pastor Jackson met with Brant and McKinney in 2003 when they were having marital troubles and Brant was having problems with drugs, particularly cocaine. Pastor Jackson counseled Brant about his drug problem and looked into placing Brant in an eighteen-month treatment program. Brant declined to enter treatment because he did not think that he could afford to not work.

Other witnesses testified that they had known Brant to be a nonviolent person, a good father to his children, and a good craftsman. Still other witnesses testified about the grief and remorse that Brant had expressed since being incarcerated.

Defense expert witness Michael Scott Maher, M.D., a physician and psychiatrist, diagnosed Brant as suffering from severe methamphetamine dependence associated with psychotic episodes, sexual obsessive disorder, and chronic depression. Dr. Maher described Brant as a lifestyle user of

methamphetamine and explained that lifestyle users begin using methamphetamine to support working long hours but that the use "almost inevitably results in a dependency and a deterioration," ultimately leading to psychosis. Dr. Maher opined that Brant's dependency had reached the point of causing psychosis:

> I'm not suggesting that he was legally insane; but I am certainly suggesting that he had - I'm offering the opinion that he had periods of psychosis associated with his methamphetamine use and that those periods were a significant part of his experience at and around the time of the offense.

Dr. Maher explained that during a period of methamphetamine-induced psychosis, Brant would be highly energized, would have a pattern of irritability and behavioral fidgetiness, and would hear, see, or feel things that he was not entirely sure were real. Dr. Maher identified poor impulse control as "a substantial hallmark of methamphetamine abuse." Dr. Maher further explained that because Brant's "purpose and motivation for using the drugs was to work and ultimately to promote and participate in his idea of being a good husband and a good father and a good worker," Brant would have been "making a very substantial effort to use the mental functioning that he still had in a way to appear normal." Dr. Maher testified that after his arrest, Brant was given "antipsychotic medications and some other medications to help him calm down."

Dr. Maher concluded that Brant suffered from sexual obsessive disorder based on descriptions of the "psychological force of those sexual urges" provided by Brant and McKinney. Dr. Maher stated that Brant's

"pattern of sexual behavior with his wife which predated this incident and . . . his severe use of methamphetamines . . . are consistent with an obsessive pattern of sexual interest." Dr. Maher explained that the sex games between Brant and his wife had "a general effect of creating lower inhibitions to this kind of link between surprise, violence and sex" and that these lowered inhibitions were "clinically significant in understanding" Brant's behavior at the time of the sexual battery and murder.

Dr. Maher further testified that Brant had a history of depression and relationship problems going back into childhood. Dr. Maher opined that Brant's relationships with his mother, grandmother, stepfather, and wife all showed significant patterns of pathology. Dr. Maher testified that Brant began to use marijuana and alcohol as an adolescent to self-medicate and "escape from his chronically depressed and anxious state of mind."

Finally, Dr. Maher testified that Brant might suffer from abnormal brain functioning. Dr. Maher explained that the twenty-five point difference between Brant's verbal and performance IQs was indicative of abnormal brain functioning. He also stated that a PET scan of Brant's brain showed four areas of suppressed glucose uptake that could indicate underactivity in those parts of the brain. Dr. Maher identified those portions of the brain as being important to impulse control and good judgment. Dr. Maher stated that while Brant previously was diagnosed with attention deficit disorder, he did not think a diagnosis of adult attention deficit disorder was warranted.

Based on the foregoing, Dr. Maher opined that Brant, while legally sane at the time of the sexual battery and murder, "had, as a

result of mental disease, defect, a substantial impairment and limitation in his ability to conform his behavior to the requirements of the law."

Another defense witness, Dr. Valerie R. McClain, a psychologist, testified as an expert in forensic neuropsychology. Dr. McClain diagnosed Brant with polysubstance dependence, major depression recurrent, and cognitive disorder not otherwise specified. Dr. McClain explained that Brant's overall intellectual functioning was in the "low average" range. She testified that school records documented signs of a learning disorder and that Brant's language skills were in the sixteenth percentile compared to other students and his non-language skills were in the sixth percentile. She explained that Brant had problems in the areas of learning, memory, and executive planning or organizational skills. Psychological testing showed signs of depression, pessimism, suicidal ideation, preoccupation with health problems, problems with poor judgment, passive, dependent style in relationships, and problems with insecurity, inadequacy, and a sense of inferiority. The testing also indicated that Brant was quick-tempered and may have had "some tendency to magnify or exaggerate his current difficulties." Dr. McClain further testified that at the time of their interview in October 2005, Brant was being prescribed Benadryl, Haldol, Pambalor, and Wellbutrin.

Dr. McClain testified that Brant stated that before the sexual battery and murder, he had consumed alcohol and had been "doing significant amounts" of crystal methamphetamine for approximately eight days and ecstasy for two days. Brant also told Dr. McClain that he had not been sleeping well before the murder. Dr. McClain explained that in people such as Brant, who already have underlying anger problems,

methamphetamine use is going to make them more likely to be "[i]mpulsive or to not be able to control their anger." Dr. McClain opined that due to Brant's deficits in brain functioning, Brant's capacity to conform his conduct to the requirements of law was substantially impaired on July 1, 2004.

After the defense rested, the State presented a witness to rebut witness McKinney's claim that she and Brant left college voluntarily. The State's witness established that Brant and McKinney may have been asked to leave the school for violating the school's policy against sexual activity among students. The State also presented a mental health expert and victim impact statements.

Specifically, Donald R. Taylor, Jr., M.D., an expert in forensic psychiatry, testified that in July 2004, Brant suffered from substance dependence disorder (primarily involving alcohol, cannabis, ecstasy, and methamphetamine), a learning disorder, and sexual sadism. Aside from rough sex with McKinney, Dr. Taylor was not aware of Brant acting violently prior to July 1, 2004. Dr. Taylor testified that during the first several days or weeks after arrest, Brant experienced symptoms of alcohol and drug withdrawal and that during the first several weeks or months, Brant experienced symptoms of anxiety or depression. Dr. Taylor stated that Brant was treated with psychotropic medications beginning after his arrest in July 2004 until May 2007. Dr. Taylor defined sexual sadism as a "type of sexual disorder in which somebody derives sexual arousal or pleasure from causing physical humiliation or suffering to a person that is not consenting to the sexual act." Dr. Taylor explained that in most cases, sexual sadism arises out of a genetic predisposition and unhealthy childhood environment. Dr. Taylor testified that Brant's childhood contained

> factors that can contribute to a diagnosis of sexual sadism.
>
> Concerning the sexual battery, Dr. Taylor opined that Brant did have "a substantial impairment in his ability to conform his conduct with the requirements of the law" due to his sexual sadism and the influence of methamphetamine. Dr. Taylor explained that due to a sexual disorder, Brant had sexual impulses that were difficult for him to control and that this difficulty would have been exacerbated by the use of methamphetamine. With regard to the murder, in contrast, Dr. Taylor opined that Brant was not "substantially" impaired. He explained that there was no "similar disorder that was causing [Brant] any type of uncontrollable or difficult to control urges to kill." Moreover, Dr. Taylor stated that Brant's actions of preventing the victim from leaving the duplex, putting on gloves, putting the body in the tub and turning on the water, and changing clothes before leaving were not consistent with substantial impairment. Still, Dr. Taylor testified that there was "some level of impairment related to being under the influence of methamphetamines" during the murder. Dr. Taylor summarized that Brant "did have a mental disorder, which in my opinion substantially impaired his ability to refrain from committing rape but that he did not have any similar corresponding mental disorder which . . . caused a similar type of impairment in his able [sic] to refrain from committing murder."

Brant, 21 So. 3d at 1277-83.

On appeal to this Court, Brant raised one issue on appeal, that his death sentence was not proportionate. Id. at 1283-84. This Court rejected Brant's claim that because his mental

illness and drug addiction were causally related to his attack on the victim, his responsibility for his violent actions was substantially diminished and, therefore, his death sentence was disproportionate. Id. at 1284-88. This Court also concluded that Brant's plea was freely and voluntarily made. Id. at 1288. The trial court repeatedly asked Brant if he understood what he was agreeing to – if he understood that there was no agreement for a sentence, that he was giving up certain rights, that there were consequences of the plea – and Brant explained that he understood. Id. at 1288-89. Brant told the trial court that he was satisfied with his attorneys, and there was nothing further he wanted them to do. Id. at 1289.

Postconviction Action

Brant filed his first postconviction motion on February 9, 2011. (V2/291) Brant filed multiple amendments. (V3/543;V4/759; V6/1014) Brant also filed a motion claiming that a confidential informant (CI) provided information about Brant's location to the sheriff's office and that information was being withheld in violation of Brady v. Maryland, 373 U.S. 83 (1963).[2] (V4/610)

[2] Extensive litigation occurred in the trial court because of this motion. The State filed a motion requesting that Brant's postconviction counsel comply with Rule 3.852 because she had requested public records without notifying all parties. (V4/672;V30/197-204) The court ordered Brant's counsel to comply with Rule 3.852 and held a hearing on the Brady issue. (V4/728;V30) During this hearing, counsel from the Orange County

Brant's third amended motion is the one that Brant finally proceeded forward with at the evidentiary hearing. Brant filed seven claims: 1) counsel was ineffective during guilt phase for failing to investigate Brant's brain damage, for failing to investigate the jury's reaction to the sexual violence and murder and for failing to discover that Brant's brother was a CI, 2) counsel was ineffective during penalty phase for failing to present developmental, familial and community mitigation, failing to present evidence of Brant's ability to adapt to

---

Sheriff's Office objected to Brant's public records request for documents about Brant's brother being a confidential information because his brother was not a confidential informant during the time that Brant turned himself into law enforcement. (V30/161-62,170-71) The court agreed to look at the records in camera and decided to deny Brant access to the records because the records showed that Brant's brother was not a confidential informant at the time of Brant's arrest. (V33/260-61) When the court made such statements, Brant's counsel became extremely agitated, making allegations against the prosecutor, the sheriff's office and even the court. (V33/262,264-66) The court rescheduled the hearing so counsel could calm down. (V33/266)

Eventually the court did allow Brant to receive some records from Orange County, but Brant's counsel continued to complain that the records were not complete because they did not provide details about controlled buys. (V34/274;V35/290) Because counsel was unaware of what record she had, the court asked her to look through them and come back to court another day. (V35/310-11) At the next hearing, Brant's counsel continued to argue that she was not provided with all the records from Orange County. (V36/318) The court told counsel to request additional records. (V36/342-43) The court reminded counsel to be nice. (V36/344) Orange County did provide a detailed list of their records, explaining that Brant's request was overly burdensome and irrelevant. (V39/365-70) The court agreed to look through the list and determine what needed to be turned over to the defense. (V39/391,395)

prison, failure to investigate sexual homicide offenses, failure to present brain damage evidence, failure to present a psychopharmacologist as a witness and failure to present information that Brant's brother was a CI, 3) counsel was ineffective for failing to prepare for jury selection, 4) ineffectiveness of counsel by failing to present the testimony of a nueropharmacologist on the issue of interrogation's effect on Brant, 5) cumulative ineffective assistance, 6) Brant will be incompetent at the time of execution and 7) Brady violation for failing to disclose that Brant's brother was a CI. (V6/1014)

For the evidentiary hearing, Brant presented 11 days of testimony. Three different attorneys represented Brant during the time he had pending charges in this case. The first attorney, Jerry Luxemberg, was only hired for one day by Brant's mother and had no contact with Brant or his family. (V43/443,450) Rick Terrana and Robert Fraser were appointed to represent Brant early in his case and worked on his case through verdict and sentence. (V43/451,500) Both were highly experienced death penalty attorneys, practicing for many years and litigating numerous death penalty trials. Mr. Terrana had practiced since 1988 and tried around 25 death penalty cases. (V43/452-53) Mr. Fraser had practiced law since 1976 and tried at least 25 first degree murder cases. (V43/501,510)

From the beginning of their representation with Brant, his attorneys discussed all trial and sentencing options (pleas, jury trials, guilt phase, sentencing phase, waiving jury, etc.); these discussions continued through their representation of Brant. (V43/489,493-94,508) Both attorneys wanted to ensure, and knew that, all Brant's decisions involving his guilty plea and waiving the jury for sentencing were freely, knowingly and voluntarily made. (V43/494-96,562) Brant's attorneys did not advise him to plead guilty and waive a penalty phase jury. (V43/455) In fact, the opposite occurred, Brant was adamant about entering a guilty plea. (V43/494)

When asked about jury selection, Mr. Fraser explained that he was never able to ask a single question before the panel got struck. (V43/562) Mr. Fraser had developed a jury questionnaire and voir dire questions, but he never got to use them because the panel was struck. (V51/1549-53) When Brant came into court the next day and waived his right to a jury, his decision was not based on counsel's advice; his attorneys never advised him to waive his right to a jury for penalty phase. (V51/1557) Once Brant decided on his course of action (to waive his jury), Mr. Terrana had no concerns about trying the case in front of Judge Fuente; he was confident that the judge would be impartial and follow the law based on his prior experience with him. (V43/476-

77)

During penalty phase, Mr. Fraser used mitigation witnesses from the Hillsborough County Jail and records from the jail as evidence of positive prison adjustment. (V43/545-46) After communicating with Dr. Wu and Dr. Woods, Mr. Frasier had concerns about using them to present the PET scans; this was especially true after his deposition with the State's expert, Dr. Mayberg. (V43/567-68) Knowing that Brant's perverse sexual fantasies would be a concern, Mr. Fraser presented the testimony of two experts, thoroughly cross-examined the State's expert and provided testimony from Brant's ex-wife to address the issue, all in a manner most favorable to the defense. (V43/570,572)

Mr. Fraser and Mr. Terrana hired Richard Bracewell, Richard Walker and Toni Maloney to investigate possible mitigation evidence. (V43/584;V44/596,658) Mr. Bracewell, Ms. Maloney and the defense attorneys met often to strategize about the investigation. (V44/660) Mr. Bracewell knew Brant's biological father had passed away; he discovered this information early in his investigation. (V43/587;V44/668) Mr. Walker attempted to contact people that Brant worked with or people he lived near, but most of those "people either didn't want to speak to me and/or they just didn't know him well enough[.]" (V44/601,603) Ms. Maloney contacted two doctors about Brant's methamphetamine

abuse; Dr. Kadehjian told her that he did not do forensic work and she sent Dr. Piasecki's information on to Mr. Fraser. (V44/676-77) Mr. Fraser did remember speaking to one of the doctors, who was unavailable. (V43/534) Ms. Maloney testified that she knew Brant had an accident while working on an elevator and recalled discussions about obtaining the medical records. (V44/677) Ms. Maloney had never been told by anyone she spoke with that Eddie Brant was not Brant's biological father. (V44/681)

Dr. Valerie McClain and Dr. Michael Maher were the two experts that testified for Brant during the penalty phase of his trial; they testified again during his postconviction hearing. (V44/605,637) Dr. Maher had worked with substance abuse disorders, specifically amphetamines, as a physician and as a psychiatrist. (V44/642) Dr. McClain diagnosed Brant with a substance abuse disorder. (V44/609) Although not an expert on sexual disorders, Dr. McClain had training on sexually violent crimes. (V44/608) Dr. McClain knew Brant ingested lead paint and banged his head as a child. (V44/610-11) Dr. McClain and Dr. Maher testified that Brant's brain injury and substance abuse created impulse control problems. (V44/605,651) The PET scans supported that conclusion, and Dr. Maher testified about the PET scans during the sentencing hearing. (V44/651) Even with those

impulse control problems, Brant could formulate a plan and carry out the plan to its conclusion. (V44/624-25) Dr. McClain and Dr. Maher were aware that the use of PET scans in a forensic setting is controversial. (V44/623,653-54) Dr. Maher admitted that Dr. Wu, who analyzed the PET scans, was sometimes difficult to understand because of his accent. (V44/656)

Brant's sister (Sherry) and his mother (Crystal) testified at the postconviction hearing; they had also testified during penalty phase of his trial. (V50/1400,1457) Brant's brother (Garett) refused to testify at Brant's trial, even when issued a subpoena. (V50/1451-52,1525-26) Besides one occurrence in Maryland, Sherry was not aware any physical confrontations between Crystal and Brant's step-father (Marvin). (V50/1412-13) Crystal testified that she had forgotten some of the abuse she endured from Marvin. (V50/1073) Brant never had any knowledge that Marvin sexually abused his sister. (V50/1450-51) Brant was very close to his grandmother, and she provided care and support to him. (V50/1452-53)

Crystal talked to Ms. Maloney several times. (V50/1513) Crystal did not want people to investigate her past and got upset when Brant's postconviction counsel did. (V50/1514-15) Even after the DNA results came back about Sherry and Brant possibly not being full siblings, Crystal continued to deny that

anyone except Eddie Brant was Brant's father. (V50/1453-54)

Officer Christine Nicoson, from the evidence department of at HCSO explained that prosecutors and detectives had signed out the evidence from their evidence room. (V44/629) She did not testify about who accompanied those people when they viewed the evidence.

Brant had the following friends and relatives, who had never met or barely knew Brant, testify at the postconviction evidentiary hearing: Jerry Crane (Brant's maternal uncle), Sue Berry (friend of Brant's mother), Annice Crookshanks (Eddie Brant's sister), Fred Coleman (Marvin Coleman's brother), Bryan Coggins (Brant's neighbor), Mary Kay Brant (Eddie's wife), Gloria Milliner (friend of Brant's mother), Nita Meseros (Marvin's ex-wife), Dawn Masters (Brant's step-sister), Robert Coleman (Brant's cousin), Carol Coleman (Fred Coleman's ex-wife), Darlene Sloan (childhood neighbor), Charles Crites (hunting partner) and Meridith Carsella (classmate). (V48/1158,1187,1197,1214,1227,1243;V49/1272,1289,1319,1370,1382; V50/1535,1559,1570)

Fred Coleman testified that his brother, Marvin Coleman, drank, although rarely to excess, and was a hard worker for the Disney Corporation. (V48/1222) He never knew his brother to be abusive, but did admit that his favorite child was Garett.

(V48/1223-24) Ms. Milliner testified that the only incident of "abuse" she ever witnessed was a fight between Marvin and Garett when Garett was an adult. (V49/1291) Even though Ms. Milliner and Ms. Brant were good friends, Ms. Brant never told Ms. Milliner about being raped until three weeks before the postconviction evidentiary hearing. (V49/1291-92) Brant's mother had a job in management with Circle K. (V49/1292) The family had a nice home with a pool, and Brant played sports growing up. (V49/1293,1326,1377) Ms. Meseros testified that Marvin Coleman was never abusive to their children. (V49/1304,1309) Bob Coleman stated that Brant was given structure by having chores around the home and taught the importance of contributing to the household. (V49/1374,1377) Bob did not think of Marvin as a mean person, although he did once see him "play punch" Brant. (V49/1375-76)

Brant hired the following consultants, who also testified at the postconviction evidentiary hearing: Terence Lenamon, Toni Blake, Dr. Joseph Wu, Heidi Hanlon-Guerra, Dr. Wayne Hoffman, Dr. Edward Barbieri, Dr. Frank Wood, Dr. Mark Cunningham, Dr. William Morton and Dr. Ruben Gur. (V44/684;V45/760;V46/965; V46/1054;V52/1588,1624;V53/1654,1691;V56/1956;V57/2028) Mr. Lenamon testified that there are no absolute rules as how an attorney should proceed in a capital case, which included

whether to hire a jury consultant. (V44/733-34) Mr. Lenamon had never tried a case in Hillsborough County. (V44/743) Ms. Blake believed that an attorney could never properly advise his client without expert consultation. (V45/804) Ms. Blake stated that trying a case before a jury was different than trying a case before a judge, although Judge Fuente appeared to be impartial because he was willing to strike the whole jury so Brant had a level playing field. (V45/777,800) Ms. Blake thought juries should hear about family drug history during mitigation. (V45/806) Ms. Hanlon testified that mental health and substance abuse were two areas of concern in Brant's life. (V47/1060,1071) Brant told Ms. Hanlon that he began using drugs to help him work. (V47/1089) Brant's maternal grandmother was one of his primary caregivers, and he would run to her when upset about his mother's lack of affection. (V47/1096) Brant had no connection with Eddie Brant before his death, and Brant's mother never provided Ms. Hanlon, or Brant's trial attorneys, information about Eddie. (V47/1086-87) Brant's mother first told Ms. Hanlon that Eddie was not Brant's father in a phone conversation on October 9, 2013 (right before Ms. Hanlon testified). (V47/1088)

Dr. Cunningham only reviewed one of the two sworn statements from Brant's sister and did not review sworn statements from Brant's brother and mother. (V56/1936-37) Dr.

Cunningham also did not review OCSO's documentation about Garett's CI status. (V56/1937-38) Dr. Cunningham agreed that attorneys can only investigate once they receive information from the family. (V56/1938-39) In death penalty cases, family stories do change over time to provide a defendant additional mitigation and minimize negative history. (V56/1940-41) In Dr. Cunningham's opinion, Brant was not "doomed to be a murderer[,]" but a variety of factors combined to set him on a possibly negative course. (V56/1943) Dr. Cunningham spoke with Brant's mother many times before she told him, in February 2013, that Brant was a product of a rape. (V56/1944-45) Dr. Cunningham did not speak with Brant about the rape and murder Brant committed; nor did he conduct any testing on Brant. (V56/1951)

Dr. Barbieri explained that the drug testing he did on Brant's hair did not provide information on how often or when Brant used drugs. (V52/1643-44) Nor could the testing reveal if Brant was under the influence of any drugs right before the hair was obtained. (V52/1644) Dr. Morton did not discuss the murder, or its aftermath, with Brant. (V56/2016) Dr. Morton stated that a person "high" on stimulants, like methamphetamines, could act normal. (V56/2014-15) Dr. Hoffman explained that it was slightly more likely, based on the sample testing, that Brant and his sister were only half siblings rather than full siblings.

(V52/1617) He could not say that they were actually half or full siblings. (V52/1618-20)

Dr. Wu may be able to determine the cause of the brain abnormalities if he had information besides just the PET scans; although it may be impossible to ever make such a determination. (V46/1035-36) Any brain abnormality Brant has does not actually cause him to commit murder. (V46/1037) Nor does the inability to control impulses, including aggression, impair the ability to plan a series of actions and complete the objective. (V46/1037-38) Dr. Wu was aware of the controversy surrounding the use of PET scans in a forensic setting. (V46/602-03) Dr. Wu did share his PET scans and findings with Ms. Maloney and Dr. McClain during Brant's trial. (V46/1041)

Dr. Wood testified that methamphetamine use and lead poisoning (from eating plaster) could contribute to brain damage. (V53/1682) Brain damage was less likely from an elevator accident or childhood head banging. (V53/1682) Brant's PET scans could not show what caused any brain damage. (V53/1684) Nor could Dr. Wood pinpoint how much various factors contributed to any brain dysfunction. (V53/1684-86) Even with brain damage, Brant could still plan and carry out a goal. (V53/1688)

Dr. Gur believed the snake bite to be the biggest risk factor for brain damage in Brant's history even though he had no

knowledge of what occurred, including whether the snake was poisonous. (V57/2132-33,2137) Dr. Gur stated that the brain scans alone could not determine what caused Brant's brain damage; anecdotal evidence was need. (V57/2134-35) Dr. Gur admitted that the behavior imaging he conducts is controversial and is not generally accepted science. (V57/2135)

Brian Ritchie, Jan Bates, Deputy Estaban Rodriguez and Sergeant John LeBoeuf, witnesses with knowledge of Brant's activities while housed at the Hillsborough County Jail, also testified at the postconviction hearing. (V44/744;V45/871; V46/941,955) James Aiken testified about Brant's ability to behave while in prison. (V47/1102)

Patricia Mack and Agent Neil Clarke from OCSO testified about the Sheriff's Office work with Garett Coleman, a CI, from January 2006 until June 2008. (V45/822) Garett was not a CI before January 2006. (V45/832) Agent Clarke knew no one at HCSO involved in this case. (V45/828)

Lieutenant Christi Esquinaldo, Lieutenant Frank Losat and Major J.R. Burton of HCSO testified about how they discovered Brant in Orange County. (V45/838,853,862) A relative of Brant's ex-wife told a deputy at the crime scene about Brant's location. (V45/842,863) The relative, James McKinney, had information on Brant because Garett contacted him to inform Brant's ex-wife

that Brant wanted her to call. (V45/847) None of the officers had any contact with Garett. (V45/850-51,855,868)

Garett Coleman's testimony encompassed family history and what occurred after Brant raped and murdered S.R. (V46/885) Garett explained that his brother wanted to turn himself in after they took a trip to the beach. (V46/896) While at the beach, Brant told Garett about the murder, and the two returned to their parent's home to meet with the family. (V46/896) After praying and discussing options, the family decided the best course of action would be to take Brant to the closest jail. (V46/896-97)

Garett believed he was working as a confidential informant prior to his brother's arrest. (V44/496) At the time of Brant's trial, Garett kept telling people that he did not remember anything because of his drug use because he did not want to be involved in his brother's case. (V44/937-38) Garett claimed that one of reasons he refused to testify at his brother's trial was because he was a confidential informant. (V44/906) Garret explained that his mother's gambling problem began only after Brant got arrested and his father (her husband) became terminally ill. (V44/920)

After the evidentiary hearing, the court allowed both parties to submit written closing arguments. (V16/3119-3200;

V17/3201-45,3252-30) On February 5, 2014, the postconviction court denied Brant's Rule 3.851 motion. (V17/3380) Brant filed a motion for rehearing, which was denied. (V18/3499-506) This appeal then followed. (V18/3547)

SUMMARY OF THE ARGUMENT

I. The trial court properly denied Brant's claim of ineffective assistance of counsel with regard to Brant's decision to plead guilty. Based on the testimony presented at the evidentiary hearing, the court below determined that Brant has failed to demonstrate either deficient performance or prejudice. At the hearing, there was conflicting testimony presented as to communications between Brant and his attorneys about the plea. The judge found that Brant's attorneys were more credible, defeating Brant's claim. As the court's rejection of this issue is supported by substantial, competent evidence, this Court must affirm the ruling.

II. The trial court properly denied Brant's claim of ineffective assistance of counsel at the penalty phase of Brant's capital trial. The testimony at the evidentiary hearing established that counsel conducted a reasonable investigation into mitigation, assisted by expert mental health professionals and mitigation specialists. Much of the testimony at the evidentiary hearing was cumulative to evidence presented at the penalty phase. The "new" evidence was remote, speculative, and unpersuasive. The court's determination that Brant failed to demonstrate either deficient performance or prejudice is supported by competent, substantial evidence, and should not be

disturbed on appeal.

III. The trial court properly denied Brant's claim of ineffective assistance of counsel with regard to preparation for jury selection. Once again the court's factual findings defeat Brant's allegations of deficient performance and prejudice. The findings are supported by the evidence and confirm that no relief is warranted on this claim.

IV. The trial court properly denied Brant's claimed violation of Brady v. Maryland, 373 U.S. 83 (1963). The court resolved the conflicting testimony from the evidentiary hearing in favor of witnesses who affirmatively refuted Brant's claim.

V. The trial court properly denied Brant's claim of cumulative error. This Court must affirm as there are no substantive errors to consider cumulatively.

VI. The trial court properly denied Brant's claim of incompetence for execution as premature. As Brant acknowledges, this Court has repeatedly rejected this argument when it is not ripe for consideration.

ARGUMENT

CLAIM I

THE INEFFECTIVE ASSISSTANCE OF COUNSEL (IAC)/GUILT PHASE CLAIM

Brant has failed to establish any deficient performance and prejudice under Strickland v. Washington, 466 U.S. 668 (1984). Under Strickland, the burden is on a defendant to demonstrate counsel's performance fell below an objective standard of reasonableness. 466 U.S. at 686-88. In order to establish ineffective assistance, a defendant must demonstrate 1) deficient performance by counsel and 2) prejudice to the defendant. Id. at 687. As to the first prong, deficient performance, a defendant must establish conduct on the part of counsel that is outside the broad range of competent performance under prevailing professional standards. Strickland, 466 U.S. at 688. A fair assessment of performance of a criminal defense attorney:

> requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. . . . [A] court must indulge a strong presumption that criminal defense counsel's conduct falls within the wide range of reasonable professional assistance, that is, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy.

Strickland, 466 U.S. at 694-95. The ABA Guidelines, in evaluating ineffective assistance of counsel claims, are only "guides." See Mendoza v. State, 87 So. 3d 644, 652-53 (Fla. 2011).

Strategic choices made by criminal defense counsel after thorough investigation of law and facts relevant to plausible options are "virtually unchallengeable." Strickland, 466 U.S. at 690-91. They may only be overturned if they were "so patently unreasonable that no competent attorney would have chosen it." Haliburton v. State, 691 So. 2d 466, 471 (Fla. 1997) (citing Palmes v. Wainwright, 725 F.2d 1511, 1521 (11th Cir. 1984)).

Second, as to the prejudice prong, the deficient performance must be shown to have so affected the fairness and reliability of the proceedings that confidence in the outcome is undermined. Strickland, 466 U.S. at 694; Gore v. State, 846 So. 2d 461, 467 (Fla. 2003). The test for prejudice requires the defendant to show that, but for counsel's unprofessional errors, the result of the proceeding would have been different, or, alternatively stated, whether there is a reasonable probability that, absent the errors, the fact finder would have had a reasonable doubt respecting guilt. Strickland, 466 U.S. at 694. "When a defendant fails to make a showing as to one prong, it is not necessary to delve into whether he has made a showing as to

the other prong." Waterhouse v. State, 792 So. 2d 1176, 1182 (Fla. 2001); Zakrzewski v. State, 866 So. 2d 688, 692 (Fla. 2003).

When a defendant alleges ineffective assistance following a guilty plea, the following standard is utilized:

> An ineffective assistance of counsel claim involving a guilty plea is determined by the same deficient performance prong as Strickland while the second prong involves the defendant demonstrating "a reasonable probability that, but for counsel's errors, the defendant would not have pleaded guilty and would have insisted on going to trial." Grosvenor v. State, 874 So. 2d 1176, 1179 (Fla. 2004) (quoting Hill v. Lockhart, 474 U.S. 52, 59 (1985)). This Court has found strategic decisions do not constitute ineffective assistance of counsel if alternative courses of action have been considered and rejected and counsel's decision was reasonable under the norms of professional conduct. See Robinson v. State, 913 So. 2d 514, 524 (Fla. 2005); Brown v. State, 894 So. 2d 137, 147 (Fla. 2004).

Barnhill v. State, 971 So. 2d 106, 111 (Fla. 2007). Where, as here, a guilty plea is involved, the Strickland test for determining ineffective assistance of counsel claims is slightly modified. While the deficient performance prong remains the same, the United States Supreme Court in Hill v. Lockhart, 474 U.S. 52, 59 (1985), held that when a defendant challenges his guilty plea based on ineffective assistance of counsel, under the prejudice prong of Strickland, "the defendant must show that

there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial."

The postconviction court denied this claim. (V17/3397-99) The court found that Brant failed to establish deficiency or prejudice. The court stated,

> [T]he Court finds the testimony of Mr. Terrana and Mr. Fraser to be credible. Defendant and his trial counsels considered the alternatives to entering a guilty plea; however, after their original strategy to attack the confession was unsuccessful and after further discussions, they agreed Defendant would plead guilty and proceed with a penalty phase jury. The November 17, 2006 letter reflects that Defendant, Mr. Terrana and Mr. Fraser came to this decision after considering such factors as the lack of doubt as to Defendant's guilt, and that such a plea would demonstrate his remorse and lessen the likelihood of incurring the jury's ire by "contesting an uncontestable case." The Court further finds Mr. Terrana's testimony that Defendant did not wish to proceed to a jury trial "from day one" to be credible. Additionally, Defendant benefited from his guilty plea where the trial court found in mitigation that Defendant "pled guilty to all crimes and did not require the State to prove the charges to a jury beyond a reasonable doubt" and gave that moderate weight. As to Defendant's argument that counsel's advice was based on an unreasonable mitigation investigation,... the Court finds counsel' mitigation investigation as not unreasonable. Finally, as to the remaining allegations in claim 1A, the Court finds Defendant has failed to demonstrate that counsel performed deficiently by failing to meet with

Defendant promptly or maintain ongoing and meaningful contact with Defendant. Although the decision to enter the plea was ultimately made by Defendant, the Court finds that in light of the facts of this case, counsels' advise was reasonable. Defendant has failed to show that counsel performed deficiently pursuant to Strickland.

Additionally, the Court finds Defendant has failed to establish prejudice. The Court finds there is no reasonable probability that Defendant would have insisted on going to trial if counsel had consulted with or retained a jury selection expert a develop a cohesive theory of guilt for both phases and how [to] present the case to a jury, indentify potential juror issues, develop a juror questionnaire and questions for voir dire, and how to help jurors better understand Defendant.

As aforementioned, the Court finds Mr. Terrana's testimony that Defendant did not wish to proceed to a jury trial "from day one" to be credible; the Court also finds Defendant's testimony that he did not recall telling his attorneys that he wanted to plead guilty is not credible. Counsels sought to enter a plea in avoidance of the death penalty, but the State would not agree. The plea colloquy clearly reflects that Defendant was aware of all the rights he was giving up in pleading guilty as well as the penalty – death – that he faced, and that his plea was knowingly, voluntarily and intelligently entered. The court is not convinced by [the jury consultant's] testimony that having a jury hear the facts of this case in both a guilt and penalty phase would systematically desensitize the jury, and nothing in her testimony would lead this Court to conclude that Defendant would have insisted on preceding to trial if such a jury selection expert has been

> retained. Furthermore, the Court does not find Defendant's testimony to be credible that he would not have pleaded guilty, but would have proceeded to trial, if counsel had advised him of all of the potential mitigation information.... [T]he Court also finds there is no reasonable probability Defendant would have insisted on going to trial if he had been aware of the additional mitigation evidence.

(V17/3397-99) (citations omitted)

Brant has failed to establish deficient performance and resulting prejudice under Strickland and Hill. He argues that counsel was ineffective for failing to consult with a jury selection expert to determine the jury's reaction to his sexual violence and murder. Brant alleges that trial counsel was ineffective because Brant received "no benefit" for his guilty plea, counsel's concerns to Brant were not supported by scientific investigation, and counsel's advice caused Brant to enter his plea.

To establish deficient performance, Brant "must demonstrate that counsel's representation fell below an objective standard of reasonableness." See Wiggins v. Smith, 539 U.S. 510, 521 (2003). Trial counsel's conduct is given a strong presumption of reasonableness, i.e., that counsel "made all significant decisions in the exercise of reasonable professional judgment." Strickland, 466 U.S. at 689-90.

Brant's attorneys wrote a letter, after meeting with him,

to explain their strategy along with the costs and benefits of having a penalty phase before a jury. (V10/1880-83;V43/465-66) The letter, dated November 2006, explained:

> First, virtually no doubt exists as to your guilt, especially in light of your confession. Second, by admitting your guilt you are showing some remorse to the jury and are less likely to incur its ire by contesting an uncontestable case. In other words, Rick and I are concerned that a full blown trial on the issues of guilt will predispose the jury to impose death since you will be pleading not guilty when you clearly are guilty.

(V10/1880-83;V43/489/508-09)

Brant has never disputed his trial attorneys' assessment that "virtually no doubt" exists as to his guilt. In view of the DNA identifying Brant as the source of semen found inside the victim's vagina, the physical evidence (including Brant's recently cut hair and the discovery of the victim's car keys, house keys and debit card in Brant's garbage), Brant's attempt to deceive law enforcement by describing for them a stranger lurking around the neighborhood (which looked suspiciously like him before he cut his hair) and his confession (which revealed the horrendous crimes) any defense claim of reasonable doubt would be lack any credibility before a jury. Brant cannot show that trial counsel's assessment was unreasonable.

Brant argues that capital lawyers are "strongly encouraged"

not to advise a client to enter a plea without an agreement for a life sentence, and that his counsel was deficient because he still faced the death penalty. What Brant fails to consider is that his guilty plea was given moderate weight as a mitigating circumstance. In addition, according to his attorneys, Brant's mind was made-up, from the beginning, he wanted to enter a plea, and they could not get the State to agree to a life sentence. (V43/493-94) They only option they had was to enter a plea and proceed to penalty phase before a judge or jury.

And there was not any indication by Brant that he believes his attorneys could have negotiated a plea offer for him under these circumstances. The undisputed evidence shows that the State had no interest in extending a plea offer to Brant, but he wanted to enter a plea. Brant had "the ultimate authority" to determine "whether to plead guilty, waive a jury, testify in his or her own behalf, or take an appeal." Jones v. Barnes, 463 U.S. 745, 751 (1983). Attorney Fraser testified that he gave Brant his options and the plea was "the one he selected." (V43/508) Likewise, Attorney Terrana explained that he did not advise Brant to plead guilty and his penalty phase jury. (V43/455) Brant's attorneys were comfortable that he "knew exactly what he was doing and understood everything that went along with it." (V43/495)

As acknowledged by the postconviction court in its written order, the trial judge conducted a comprehensive colloquy with Brant on the day he entered his plea. (V17/3392-97) The trial judge ensured that Brant knew he still faced the possibility of a death sentence, that he understood the rights he would be waiving and that there was no plea agreement with the State. (V17/3392-94,3396) On direct appeal, the Florida Supreme Court found the record "contains competent, substantial evidence showing that Brant's plea was knowingly, intelligently, and voluntarily made." Brant, 21 So. 3d at 1288-89.

Brant also has never disputed that he was given an advantage by admitting his guilt, which was he showed remorse. The trial court gave that remorse moderate weight during penalty phase, one of the strongest of all Brant's mitigators. Id. at 1283. Even Brant's postconviction jury consultant described remorse as "a big deal." (V45/783-84) Brant ignores that and tries to focus on his attorneys' suggestion that he would be "less likely to incur ire by contesting an uncontestable case." Brant and his attorneys discussed the decision to plea at length, knowing that his detailed, damaging confession would be played for the jury. (V43/465) They decided that it was better for the jury to hear it once, than twice. (V43/465) Again, "[s]trategic decisions do not constitute ineffective assistance

of counsel if alternative courses have been considered and rejected and counsel's decision was reasonable under the norms of professional conduct." Long v. State, 118 So. 3d 798, 805 (Fla. 2013) (quoting Occhicone v. State, 768 So. 2d 1037, 1048 (Fla. 2000)).

Brant complains that the trial attorneys discussed with him their beliefs about how the jury would react to the evidence without supporting their belief with research. Yet, Brant's attorneys were highly experienced. Attorney Terrana had tried up to 25 capital cases. (V43/53) Attorney Fraser had tried around 25 first-degree murder cases. (V43/510) "When courts are examining the performance of an experienced trial counsel, the presumption that his conduct was reasonable is even stronger." Chandler v. United States, 218 F.3d 1305, 1316 (11th Cir. 2000). They were well-equipped to gauge a jury's likely reaction to Brant attempting to achieve an acquittal or a lesser charge; they were able to make a strategic decision to limit the damaging nature of Brant's confession. "[I]n evaluating an attorney's performance, a reviewing court must be highly deferential and should indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Strickland, 466 U.S. at 689.

In the same vein, Brant's jury consultant stated that his

attorneys had not "done a proper investigation and consulted with the right types of experts about the facts of the case and studies on juror decision making." (V45/804) The suggestion that Brant's experienced trial attorneys could not reasonably give advice to Brant without consulting an expert is patently incorrect. See Harrington v. Richter, 131 S. Ct. 770, 788-789 (2011). Although Attorney Terrana agreed there's no "downside" to using jury selection experts, he knew, from his extensive experience, that requests for funds to hire one were usually denied. (V43/470-71) The Supreme Court has rejected the proposition that an attorney must pursue a strategy if there is "nothing to lose." See Knowles v. Mirzayance, 556 U.S. 111, 122 (2009). As Attorney Terrana explained, if the jury consultants aren't getting paid, "they aren't coming. I can assure you of that." (V43/471) He even provided an example of obtaining a jury selection expert to volunteer for another death penalty case, i.e., he did not have to request funding (that volunteer was not available for Brant's case). (V43/471)

Even if Brant's attorneys hired a "jury selection" consultant, Brant has not shown that 1) a request for funds for one would have been granted from the trial court, 2) the consultant would insist that Brant contest guilt, even with his confession detailing these horrific crimes repeated at guilt and

penalty phase, 3) Brant's attorneys would have believed a jury consultant's theory over their decades of criminal jury trial experience, and 4) Brant would have abandoned his adamant position of admit his guilt. Brant has not overcome the "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance," and has not shown that counsel's conduct was objectively unreasonable under Strickland. Furthermore, as a practical matter, much of Brant's jury consultant claim is moot because he waived the jury's recommendation at the penalty phase.

As to the prejudice prong, Brant's claim also fails. Brant cannot demonstrate that, but for counsel's errors, he would not have pled guilty and would have insisted on going to trial. See Hill, 474 U.S. at 59. The postconviction court reviewed totality of circumstances surrounding the plea and determined that no reasonable probability existed that Brant would have insisted on going to trial instead of pleading guilty. See Grosvenor v. State, 874 So. 2d 1176, 1181–82 (Fla. 2004).

Brant has never denied his guilt. Brant never sought a jury trial on the guilt phase, but, as explained by his attorneys, was adamant about admitting his guilt. Brant never testified that he would not have entered a guilty plea but for counsel's advice; instead, he claimed that he would not have entered a

guilty plea if his attorneys had told him about "all of the mitigation" presented in postconviction. (V57/2150) Such a statement is not sufficient to establish prejudice. See Winkles v. State, 21 So. 3d 19, 23 (Fla. 2009) (declining to find prejudice where defendant did not testify during the evidentiary hearing that he would not have pleaded guilty but for counsel's advice). Even if Brant's statement at the postconviction evidentiary hearing, conditioned on testimony pertaining to penalty phase evidence, is somehow construed as a statement that he would not have entered his guilt phase plea, the postconviction court made a factual finding that it did not find Brant credible. (V17/3399) The court's finding is bolstered by all of the objective evidence that unequivocally support Brant's decision to enter his plea.

In addition, Brant does not dispute trial counsel's assessment that Brant had virtually no chance of avoiding his convictions at trial. Therefore, looking at the totality of the evidence against Brant (DNA, confession, items found in his trash, etc.), he cannot show that if he went to trial, the outcome would have been any different (nor does he even try) because there was overwhelming, uncontroverted evidence that Brant was the one who brutally raped and murdered the victim.

Brant cannot show prejudice. He fails to show "that there

is a reasonable probability" that, but for counsel's alleged errors, he "would not have pleaded guilty and would have insisted on going to trial." Hill, 474 U.S. at 59. Moreover, under Strickland and Hill, prejudice analysis "focuses on whether counsel's constitutionally ineffective performance affected the outcome of the plea process." Id. Brant was adamant, from the beginning of his case, about admitting his guilt, the evidence in this case showed that there was "virtually no doubt" as to his guilt and Brant was fully aware of the consequences of his plea (including that he faced a sentence of death). Brant's experienced trial counsel looked at the cards they were dealt and provided appropriate advice to their client. Because Brant failed to establish both deficient performance and resulting prejudice, his claim should be denied.

CLAIM II

THE IAC/INVESTIGATION AND PRESENTATION OF MITIGATION CLAIM

In this claim, Brant argues that, for various reasons, trial counsel provided ineffective assistance of counsel during the penalty phase in failing to adequately investigate and present mitigation. The Federal Constitution only imposes one general requirement for IAC claims, "that counsel make objectively reasonable choices." Bobby v. Van Hook, 558 U.S. 4, 9 (2009) (quoting Roe v. Flores-Ortega, 528 U.S. 470, 479 (2000)). With respect to the investigation and presentation of mitigation evidence, the Supreme Court observed that "Strickland does not require counsel to investigate every conceivable line of mitigating evidence no matter how unlikely the effort would be to assist the defendant at sentencing. Nor does Strickland require defense counsel to present mitigating evidence at sentencing in every case." Wiggins, 539 U.S. at 533.

When evaluating claims that counsel was ineffective for failing to investigate or present mitigating evidence, the Florida Supreme Court has phrased the defendant's burden as showing that counsel's ineffectiveness "deprived the defendant of a reliable penalty phase proceeding." Asay v. State, 769 So. 2d 974, 985 (Fla. 2000). Moreover, the ABA Guidelines are not "inexorable commands... but 'only guides' to what reasonableness

means, not its definition." Van Hook, 558 U.S. at 8.

For prejudice, the standard is whether "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, 466 U.S. at 694. In analyzing IAC/penalty phase claims, the "question is whether there is a reasonable probability that, absent the errors, the sentencer . . . would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." Strickland, 466 U.S. at 695. Thus, the reviewing court must "consider 'the totality of the available mitigation evidence — both that adduced at trial, and the evidence adduced in the [post-conviction] proceeding' — and 'reweig[h] it against the evidence in aggravation.'" Porter v. McCollum, 558 U.S. 30, 41 (2009) (quoting Williams v. Taylor, 529 U.S. 362, 397-98 (2000)). To satisfy the prejudice prong, the "likelihood of a different result must be substantial, not just conceivable." Richter, 131 S. Ct. at 792. Strickland places the burden on the defendant, not the State, to "show 'a reasonable probability that, but for counsel's unprofessional errors, the result would have been different.'" Wong v. Belmontes, 558 U.S. 15, 19 (2009) (quoting Strickland, 466 U.S. at 694).

In this case, the trial court entered a detailed sentencing

order which summarized both the aggravating and mitigating factors. (V18/3472-75) The aggravating factors of HAC and committed during a sexual battery are substantial and afforded great weight. Brant, 21 So. 3d at 1283. Despite all the mitigation presented at trial, Brant argues that his counsel should have piled on even more. Brant argues that additional mitigation should have been presented on: A) his background and family history, B) prison adjustment, C) sexual homicide risk factors, D) neuropsychological testing, and E) effects of methamphetamine and MDMA use. In addition, Brant argues that trial counsel failed to F) "ensure a reasonably competent mental health evaluation" and G) discover his brother's status as a CI.

A. Brant's Background and Family History

Brant first argues that trial counsel failed to conduct a reasonable investigation into Brant's background, including his conception, childhood and multi-generational history. The postconviction court denied this claim. (V18/3475-77) The court found,

> [M]uch of the testimony and evidence presented during the instant postconviction proceedings is cumulative. For example, during the penalty phase, witnesses testified to the following: Defendant's maternal family history of mental health issues, alcohol abuse and physical violence, including Lawrence's alcoholism and mental and physical abuse of Delphia and the children, Delphia's history of depression

for which she was medicated, Crystal's grandmother's hospitalization in a mental institution, and Crystal's own history of depression, hospitalization and psychotropic medications; Marvin's verbal and physical abuse of both Crystal and Defendant, and his sexual abuse of Sherry; Marvin's alcohol and substance abuse; Defendant's birth complications; Crystal's separation from and lack of bonding with Defendant; Defendant's history of attention deficit disorder; Defendant's substance abuse history and diagnoses of substance abuse or dependence; Defendant's use of methamphetamines at the time of the offenses and its effects, i.e., diminished impulse control; Defendant's brain abnormalities and difficulties with impulse control due to his brain deficits; Defendant's diagnoses of a sexual disorder and the genetic and environmental (factors over which Defendant had no control) link associated with sexual disorders; Defendant's own diagnosis and history of depression; Defendant was remorseful; and that Defendant's capacity to conform his conduct to the requirements of law was substantially impaired. Consequently, the Court further finds Defendant has failed to establish that counsel performed deficiently. See Darling v. State, 966 So. 2d 366, 377 (Fla. 2007) ("[T]his Court has held that even if alternate witnesses could provide more detailed testimony, trial counsel is not ineffective for failing to present cumulative evidence.").

As to the evidence regarding Defendant's paternity and the circumstances surrounding his conception, the Court finds Defendant has failed to show that counsel performed deficiently in failing to discover this information. The Court notes that in this case Eddie passed away approximately 8 months after Defendant's arrest and Eddie essentially had no contact with Defendant after the age of 7 weeks. Although a few

> paternal family members may have been aware Eddie was not Defendant's biological father, it was clear that Crystal kept it a secret from everyone except Aunt Jenny and Eddie Brant. Neither Defendant, Sherry, Garett, or Ms. Milliner (Crystal's best friend) was aware of Defendant's paternity until postconviction proceedings. Crystal even testified under oath during the penalty phase that Eddie Brant was Defendant's father. When finally confronted with DNA evidence, Crystal continued to insist Eddie was Defendant's father. Under such circumstances, counsel cannot be expected to verify paternity through other family members nor seek DNA testing to confirm parentage.
>
> Although trial counsel did not introduce expert testimony explaining how Defendant's history/background affected his psychological and emotional development and, therefore, Defendant's moral culpability, the Court finds he has failed to establish prejudice. The Court first notes the trial court found in aggravation that the homicide was committed in the course of a sexual battery and HAC, an especially weighty aggravator. See Butler v. State, 100 So. 3d 638, 667 (Fla. 2012) ("HAC is considered one of the weightiest aggravators in the statutory scheme."). The Court finds there is no reasonable probability the trial court would have imposed a life sentence.

(V18/3475-77)

Under Strickland, there is a strong presumption that counsel's performance was not ineffective. Strickland, 466 U.S. at 690. A fair assessment of an attorney's performance requires that every effort be made to eliminate the distorting effects of hindsight and to evaluate the conduct from counsel's perspective

at the time. The defendant carries the burden to "overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" Id. at 689. Counsel cannot be deemed to be ineffective for failing to raise a nonmeritorious issue. Kokal v. Dugger, 718 So. 2d 138, 143 (Fla. 1998); Breedlove v. Singletary, 595 So. 2d 8, 10-11 (Fla. 1992).

Brant's attorneys retained two investigators for the penalty phase in this case. Neither the investigators nor the attorneys were ever informed by any family members that Brant may have been conceived during a rape. Nor does Brant ever allege that he was aware of that fact. Brant was almost 40 years old when he murdered his young neighbor; that he may have been conceived from rape was unknown to him during the murder and during his trial. Brant's mother kept his conception a secret long after he was convicted in this case. Trial counsel cannot be deemed ineffective for failing to discover that secret, especially when her own sworn testimony at penalty phase was that Eddie Brant was the defendant's father.

Any alleged mitigation based on the identity of Brant's biological father and the circumstances surrounding his conception, although unknown to Brant during the murder and trial, is of negligible value. See State v. Conaway, 453 S.E. 2d 824, 854 (N.C. 1995) ("[T]he fact that defendant was conceived

through a rape has no logical relationship to his moral culpability for these murders. . . . there was no evidence that defendant even knew of the circumstances of his conception prior to the murders."). Even investigating the man Brant thought was his biological father, the defendant's putative father, Eddie Brant, was not important to his trial counsel because he had not been a part of his life since he was an infant. Attorney Fraser did not believe Eddie would assist the defense in preparing for penalty phase. (V43/564)

During the penalty phase, Brant's attorneys did present evidence of what occurred during Brant's childhood, including abusive treatment by his step-father, Marvin Coleman. The trial court gave the mitigation moderate weight, the highest weight he gave to a mitigating circumstance. (V18/3437) Brant moved out of his step-father's home 22 years before he brutally murdered the victim in this case. In postconviction, Brant presented lay witnesses who had not seen Brant in decades, which was hardly compelling. Any remote acquaintances who believed that Brant was a good young man could not have been more mistaken. The presentation of additional testimony about Brant's childhood was largely cumulative to the evidence that was already presented by his attorneys at the penalty phase. A defendant "cannot satisfy the prejudice prong of the Strickland test with evidence that is

merely cumulative of evidence already presented at trial." Rose v. McNeil, 634 F.3d 1224, 1243 (11th Cir. 2011).

Brant's multi-generational mitigation theory is based on remote events that occurred to family members long before Brant was born or involved people who had not met him or had not seen him in decades. "[T]here comes a point at which evidence from more distant relatives can reasonably be expected to be only cumulative, and the search for it distractive from more important duties." Van Hook, 558 U.S. at 11. As Attorney Fraser noted, "I only needed a certain number of mitigation witnesses. I'm not going to parade his family tree through the penalty phase." (V43/526-27) Brant has not argued that his trial attorneys failed to interview his closest relatives. The trial court's sentencing order acknowledged that, based on the evidence presented from the experts, his drug dependence, depression and family history created a "diminished capacity to control his impulses" and substantial impairment in his "capacity to appreciate the criminality of his conduct" or "conform his conduct to the requirements of the law." (V18/3473)

Any criticism of Brant's trial counsel for failing to present an expert to explain why the lay witness testimony was relevant to an assessment of his "moral culpability" is unwarranted because trial counsel hired experts (Dr. Maher and

Dr. McClain) who did exactly that. In Belmontes, 558 U.S. at 23-24, the defendant argued counsel was ineffective for failing to present expert testimony to "make connections between the various themes in the mitigation case and explain to the jury how they could have contributed to Belmontes's involvement in criminal activity." The Court concluded that the mitigating evidence "required only that the jury make logical connections of the kind a layperson is well equipped to make. The jury simply did not need expert testimony to understand the 'humanizing' evidence; it could use its common sense or own sense of mercy." Belmontes, 558 U.S. at 23-24.

B. Prison Adjustment

Brant has not shown counsel was ineffective for failing to present mitigation regarding his adjustment to prison life. The postconviction court denied this claim. (V18/3477) In making this claim, Brant recognizes that future dangerousness is not an aggravating factor in Florida and the State has never made such an argument. The court stated,

> [I]t is unclear why counsel did not present Skipper evidence. However, the Court finds counsel's failure to present Skipper evidence did not affect the outcome of the proceedings. Although there was no testimony or evidence presented at the penalty phase regarding Defendant's adaptability to prison, in light of the trial court's finding of HAC and that the murder was committed during a sexual battery, the Court

> finds there is no reasonable probability that the trial court would have imposed a life sentence if such Skipper evidence had been presented.

(V18/3477)

Attorney Fraser asked his mitigation investigator to find a prison expert. (V43/539-40) According to that investigator, she contacted "James Aiken out of North Carolina" but did not know why he was not retained or what his opinion was regarding Brant's adjustment to prison. (V44/669-70). Mr. Aiken did testify at the postconviction proceeding and could not recall any contact from Attorney Fraser or his investigator. (V47/1133-34) Mr. Aiken believed Brant's status as a trustee in the jail showed he "avoid[ed] trouble." (V47/1122) Mr. Aiken thought Brant would be a compliant inmate, in part, because he is too old for "games," and opined that he could be housed "in a high security facility for the remainder of his life without causing an unusual risk of harm to staff, inmates, or the public." (V47/1131,1132)

The evidence that Brant's attorneys did present at penalty phase included the testimony of Thomas Rabeau, former volunteer chaplain at the Hillsborough County Jail, who met with Brant often. (V17/3462) Brant expressed extreme remorse and concern for his family to Chaplain Rabeau. (V18/3462)

Brant has failed to demonstrate deficiency of counsel and

resulting prejudice due to the failure to present even more testimony on prison adjustment as non-statutory mitigation. Providing further information about Brant's relatively good behavior while in jail, which the judge already knew at the time of his sentence, along with information about prison adjustment to a high risk facility would not change the outcome of this case, especially when viewed against the weighty aggravators (HAC and during a sexually battery) these horrific crimes produced.

C. Sexual Homicide Risk Factors

Brant argues his attorneys were ineffective for not presenting an expert in sexual offenses and homicide risk factors. Brant discusses the circumstances of his conception, his step-father's abuse, and his drug use. The postconviction court denied this claim. (V18/3477-78)

> As to claim 2C, to the extent Defendant asserts that if counsel had retained an expert in sexual offenses, counsel would have been aware of the need to conduct tests to check testosterone levels, pituitary gland function and other physical and paper-based tests and could have established that Defendant's strong sex drive was caused by biological/physiological factors, the Court finds Defendant has failed to show that counsel performed deficiently; Defendant did not present testimony or evidence of such physical tests or results.
>
> To the extent Defendant alleges counsel failed to present objective and statistical

> analyses indicating Defendant met several significant risk factors for sexual homicide or that his sexual deviance was a result of emotional and psychological factors which he could not control, the Court finds Defendant has failed to establish prejudice. Even if counsel had presented testimony that Defendant had an increased risk for committing such an offense, the Court finds there is no reasonable probability such evidence would have affected the outcome of the proceedings. As mentioned in claim 2A above, the trial court was already aware of the existence of the facts underlying the risk factors and such testimony was cumulative. Additionally, Dr. Cunningham acknowledged that Defendant was not "doomed to be a murderer."

(V18/3477-78)

As to the long-held secret held by Brant's mother concerning his conception, trial counsel was not ineffective for failing to discover information so steadfastly withheld. The trial court was well-aware of Marvin Coleman's mistreatment of Brant (and Crystal and Sherry), Brant's methamphetamine abuse, Dr. Maher's conclusion that Brant suffered from severe methamphetamine dependence and sexual obsessive disorder and Dr. Taylor's conclusion that Brant suffered from substance dependence disorder (primarily involving alcohol, cannabis, ecstasy and methamphetamine), a learning disorder and sexual sadism. See Brant, 21 So. 3d at 1281-82. Trial counsel was not required to continue searching for another, even more defense-favorable assessment of Brant when they already hired experts to

assess his mental status. See Anderson v. State, 18 So. 3d 501, 512 (Fla. 2009). Furthermore, highlighting sexual homicide risk factors has an inherent downside by forcing the fact finder to analyze the grizzly details of the crime, possibly making this mitigator more harmful than helpful for the defense.

D. Neurological Testing

Brant attempts to argue that his trial counsel was ineffective for failing to put on various types of neurological testing (MRI, PET, etc.). The postconviction court denied this claim, finding

> As to claim 2D, the Court finds the testimony of Mr. Fraser to be credible. Mr. Fraser considered introducing the PET scan evidence through the testimony of Dr. Wu and Dr. Wood, but made a strategic decision to bring in the PET scan evidence through the testimony of Dr. Maher. Mr. Fraser had concerns as to the presentation of Dr. Wu and Dr. Wood and was further concerned that the State's expert, Dr. Mayberg, would be more credible. Mr. Fraser also had concerns regarding the use of PET scans in a forensic setting, and the experts each acknowledged that this was an issue of some debate in the scientific community. Additionally, because neither Dr. Wu nor Dr. Wood testified at the hearing, the State did not call Dr. Mayberg to testify. The Court finds Mr. Fraser's strategic decision was reasonable, therefore, counsel has failed to show that counsel performed deficiently by not introducing the PET scan images or the testimony of Dr. Wu or Dr. Wood at the penalty phase, and instead presenting the PET scan evidence through Dr. Maher. See Occhicone v. State, 768 So. 2d 1037, 1048

> (Fla. 2000) ("[S]trategic decisions do not constitute ineffective assistance of counsel if alternative courses have been considered and rejected and counsel's decision was reasonable under the norms of professional conduct.").

(V18/3478-79)

Trial counsel presented PET evidence through Dr. Maher, not Dr. Wu or Dr. Woods. This was a reasoned, strategic decision. Counsel knew the State planned on calling Dr. Helen Mayberg in rebuttal if Dr. Wu or Dr. Wood testified. Defense counsel also deposed Dr. Mayberg on August 14, 2007. (V16/3038-44;V57/1589) And when Dr. Wu did testify at postconviction, he made comments like, "you can actually put a cadaver in an MRI machine and get a perfectly normal MRI scan." (V45/985) Although Brant's collateral counsel may not agree with trial counsel's strategic decisions, hindsight evaluation and second-guessing those decisions are warned against in Strickland. See Griffin v. State, 866 So. 2d 1, 15-16 (Fla. 2003). Trial counsel's strategic decisions about what mitigation evidence to present fell within "the wide range of professionally competent assistance." Strickland, 466 U.S. at 690.

To the extent Brant relies on the experts who testified at his postconviction hearing about brain damage, none of them could identify any evidence relating to the murder or rape which supported the mitigating factor of "under the influence of an

extreme mental or emotional disturbance." The actual evidence of Brant's behavior on the night of the murder contradicted the mitigator because it showed he was in control of his actions. Even if Brant had shown proof of this mitigator, it would not overcome the egregious aggravating circumstances in this case. Brant has not demonstrated deficiency or prejudice.

E. Effects of Methamphetamine & MDMA Use

Next, Brant alleges that trial counsel was ineffective in failing to present a psychopharmacologist to discuss the effects of methamphetamine & MDMA. The postconviction court denied this claim. (V18/3479-80)

> As to claim 2E, Mr. Terrana and Mr. Fraser testified that they did not seek drug testing of the Defendant's hair or clothing that was obtained as evidence in this case because there was no dispute that Defendant used methamphetamines; the only dispute was how such methamphetamine use affected him. The Court finds the testimony of Mr. Terrana and Mr. Fraser to be credible. The Court notes that all 3 penalty phase mental health experts, including the State's expert, diagnosed Defendant with substance abuse/dependence; Dr. Maher specifically diagnosed him with severe methamphetamine dependence, associated with psychotic episodes. Although Defendant's hair tested positive for amphetamine, methamphetamine and MDA, Dr. Barbieri testified that the testing could not distinguish between a chronic or acute user, when the drugs were taken or the toxicological effects experienced prior to the collection of the evidence. Additionally, Mr. Fraser attempted to find a methamphetamine expert but

ultimately made a strategic decision to introduce testimony regarding the effects of methamphetamine use through Dr. Maher. Although Dr. Maher testified that he told Mr. Fraser he had general knowledge and training regarding the effects of methamphetamine use and may have suggested that he consult with a specialist, Dr. Maher did not advise Mr. Fraser that he was unable or not competent to testify to such. The postconviction testimony was essentially cumulative; the crux of Dr. Morton's testimony - that Defendant's methamphetamine use and abuse diminished his ability to control his impulses - was conveyed through Dr. Maher.... Consequently, the [] Defendant has failed to show that counsel performed deficiently under Strickland.

Additionally, the Court finds Defendant has failed to show that he was prejudiced by counsel's failure to obtain drug testing or retain a psychopharmacologist. As aforementioned, testing of the hair or clothing in evidence would not have indicated whether Defendant was a chronic or acute user, when he ingested the drugs, or what toxicological effects he experienced at the time of the offense or prior to the collection of the evidence. Furthermore, as mentioned previously, the sum and substance of Dr. Morton's testimony - that Defendant's methamphetamine use and abuse diminished his ability to control his impulses - was conveyed through Dr. Maher. The trial court found the following mitigators: Defendant had diminished impulse control due to his drug dependency; Defendant had diminished impulse control and was not able to make sound decisions because of his methamphetamine abuse; Defendant recognized his drug dependence problems and sought help; Defendant used methamphetamine before, during and after the instant offenses; as a result of drug dependency, Defendant's capacity to conform his conduct to the

> requirements of law was substantially impaired. The trial court gave those mitigators moderate weight. There is no reasonable probability the trial court would have imposed a life sentence had counsel tested the evidence for drugs or retained a psychopharmacologist.

(V18/3479-80)

All of the mental health experts at the penalty phase addressed Brant's methamphetamine abuse. Both Dr. Maher and Dr. McClain discussed Brant's methamphetamine dependence along with psychotic episodes, sexual obsessive disorder, poor impulse control and depression that resulted from his abuse of the drug. Brant, 21 So. 3d at 1281-82. Even the State's expert discussed the influence of Brant's methamphetamine use. Id. at 1283. Brant's attorneys cannot be ineffective under Strickland for failing to present mitigation which is largely cumulative. A reasonable attorney could have decided, as Fraser did, to rely on the two mental health experts hired for penalty phase.

There is an additional concern that over emphasizing the effect of Brant's drug abuse would highlight his propensity to commit violence acts toward women. Both the state and federal courts have recognized that drug abuse can have negative consequences during mitigation. In Ponticelli v. State, 941 So. 2d 1073, 1095 (Fla. 2006), this Court determined the defendant's cocaine abuse would have been harmful evidence because

"[i]nstead of being a young man who naively experimented with drugs for a short period of time," the jury would have heard that he "escaped the ill effects of drugs for a substantial period of time in Florida and then returned to a habit he knew was evil." Likewise, in Crawford v. Head, 311 F.3d 1288, 1321 (11th Cir. 2002), the court found that drug abuse "has little mitigating value and can do as much or more harm than good in the eyes of the jury."

F. "Ensure a Reasonably Competent Mental Health Evaluations"

Brant argues his trial attorneys failed to ensure he received a reasonably competent mental health evaluation. The postconviction court denied this claim. (V18/3480-82) The court found that

> Defendant has failed to demonstrate that counsel failed to ensure Defendant received a reasonably competent mental health evaluation. Counsel had Defendant evaluated by 2 mental health experts. Dr. McClain diagnosed Defendant with polysubstance abuse, major depression recurrent and cognitive disorder not otherwise specified; Dr. Maher diagnosed Defendant with methamphetamine dependence, severe, associated with psychotic episodes, sexual obsessive disorder and chronic depression. Defendant does not argue that their diagnoses were incorrect or otherwise lacking. As to Defendant's claim that counsel failed to obtain a biopsychosocial history of Defendant, as the Court discussed in claim 2A above, the testimony presented during postconviction proceedings was largely cumulative. As to his claim that

> counsel failed to retain an expert on methamphetamine use and the effect on Defendant's brain or an expert as to the extent of Defendant's brain damage, as the Court addressed in claim 2D and 2E above, counsel made reasonable a strategic decision in presenting PET scan evidence and evidence regarding methamphetamine use and its effects through Dr. Maher. The trial court found numerous mitigators based on the mental health evaluations of Defendant's experts. The Court finds Defendant has failed to show that counsel performed deficiently or that the outcome of the proceedings would have been different as required under Strickland.

(V18/3481-82)

The testimony presented at the evidentiary hearing refutes Brant's claim that his trial counsel was ineffective. Counsel made an informed, strategic decision to rely on experienced mental health experts, Dr. McClain and Dr. Maher. Defendants cannot second guess a reasoned, strategic decision from defense counsel. See Griffin, 866 So. 2d at 15-16. Besides, trial counsel did present evidence of chronic substance abuse and how it affected Brant's life and actions. Even the experts who testified at postconviction could not state that he was deprived of the ability to rationality commit the murder and cover it up. Furthermore, to the extent Brant relies on Dr. Gur's brain mapping/behavioral imaging, Dr. Gur agreed that it is controversial and not generally accepted. See also Foster v. State, 132 So. 3d 40, 58 (Fla. 2013) (noting testimony that

methodology used by Dr. Gur was not generally accepted in the field of neuropsychology). Trial counsel's performance was not deficient. Even if Brant established any deficient performance, which the State disputes, Brant has not demonstrated prejudiced.

To the extent that Brant is attempting to raise a substantive claim under Ake v. Oklahoma, 470 U.S. 68 (1985), it is procedurally barred.[3] See Dufour v. State, 905 So. 2d 42, 65-66 (Fla. 2005) ("[T]he extent that Dufour is asserting a true Ake claim, and is not simply reasserting his ineffective assistance of counsel claim, it is procedurally barred because it could have been presented on direct appeal.").

G. Discover Brant's Brother's Status as a CI

Brant claims that his counsel was ineffective for not discovering that his brother was a CI. The postconviction court denied the claim, finding

> [T]he testimony of Detective Clark and the OCSO records to be more credible and reliable than the testimony of Garett Coleman. Detective Clark's testimony that he did not meet Garett until late 2005 and Garett did not become a CI until 2006 is substantiated by OCSO records. Additionally, this Court finds credible the testimony of

[3] In Ake, the United States Supreme Court held that when a defendant demonstrates to the trial judge that his sanity at the time of the offense is to be a significant factor at trial, the State must, at a minimum, assure the defendant access to a competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense.

HCSO investigators that they learned of Defendant's location in Orlando through Garett's phone call to Defendant's father-in-law. Although it's conceivable that Garett may have contacted OCSO about Defendant's location. HCSO investigators learned of Defendant's location independent of Garett's tip to OCSO. The Court finds Defendant has failed to show Garett Coleman was a CI in July 2004. Although it is clear Garett was a CI at the time of the penalty phase hearing in 2007, Defendant has further failed to show how counsel was deficient in failing to discover this information when an HCSO report reflected they learned of Defendant's location through Defendant's father-in-law, there was no indication that a CI was involved in this case, and Garett's CI status with OCSO was not disclosed to counsel by the State, Garett or even Defendant. Consequently, the Court finds Defendant has failed to show that counsel performed deficiently in failing to investigate the Garett's status as a CI.

Furthermore, the Court finds Defendant has failed to demonstrate that he was prejudiced by counsel's failure to investigate Garett's status as a CI. As the Court finds Garett was not a CI at the time of Defendant's arrest in July 2004, Garett's lack of CI status in 2004 would not have served as a mitigating factor. Additionally, even if Garett had been a CI in 2004 and tipped law enforcement off as to Defendant's location, there is no evidence that he was acting as a CI or state agent where he did so entirely of his own accord to protect his parents and only because Defendant wanted to turn himself in, he was not paid for any information provided and he was not directed to question Defendant. Such information would not have served as mitigation or affected the outcome of the penalty phase where it is clear Defendant wanted to and had already attempted to turn himself in to

> law enforcement. Garett's subsequent status as a CI from 2006 to 2008 would have had no bearing on any mitigating factors at sentencing. The Court also finds Garett's testimony that his status as a CI was part of the reason that he did not appear for Defendant's trial is not credible. Both Crystal and Sherry testified at the penalty and/or postconviction proceedings that Garett was aware of the subpoena but he was travelling out-of-state - either working or looking for work. Even if his CI status was part of the reason he did not appear, it was clearly not the only reason and there is no indication whatsoever that he would have appeared but for his status as a CI. Therefore, Garett's failure to appear would also not have been a mitigating factor. As Defendant has failed to meet either prong of Strickland, no relief is warranted on claim 2G.

(V18/3482-83)

At the postconviction hearing, Garett testified that Brant decided to turn himself in while they were at the beach. (V46/894) When Brant sat down with his family, as a group, they decided how he should turn himself in. (V46/895-96) Brant did attempt to turn himself in with his sister, his brother and his sister's roommate. (V46/896-97,1000) When that failed, they returned to their parent's home. (V46/897)

Garett testified that he was a CI in Orange County during that time (July 2004), and when he was away from his family, he notified an officer of his brother's location. (V46/989-90) Yet, testimony from Agent Clarke and OCSO records prove that Garett

was not a CI until January 2006 (and until June 2008). (V45/818,822) Furthermore, according to HCSO, the tip on Brant's whereabouts came from Brant's father-in-law because Brant asked his brother to contact his father-in-law so he could get in touch with his wife. (V45/847) Even though Brant's claim that Garett was a CI who turned in his brother has been contradicted by evidence, it is also largely irrelevant. The sentencing judge knew Brant tried to turn himself in and cooperated with law enforcement. Any additional mitigation about Brant's brother being a CI long after Brant's arrest, or his brother's insistence that he turn himself in is of questionable relevance to Brant himself.

In conclusion, the evidence Brant presented in postconviction was largely cumulative of the evidence his trial counsel presented at the sentencing phase. The additional evidence he presented in the state collateral proceeding mostly supported and supplemented the themes presented by trial counsel. The cumulative nature of that evidence weakens its usefulness to Brant on the prejudice inquiry. See Cullen v. Pinholster, 131 S. Ct. 1388, 1409-10 (2011).

Furthermore, this is not a case where the additional evidence presented in postconviction "adds up to a mitigation case that bears no relation" to the mitigation case "actually

put before the jury." Rompilla v. Beard, 545 U.S. 374, 393 (2005). The State presented weighty aggravating evidence, including that the murder was "heinous, atrocious and cruel" and that the murder was "committed during a sexual battery." The evidence presented in postconviction did not undermine the two weighty aggravating factors. See Larkins v. State, 739 So. 2d 90, 95 (Fla. 1999) (finding the "heinous, atrocious, or cruel is one of the most serious aggravators set out in the statutory sentencing scheme."). Brant has failed to establish both deficient performance and resulting prejudice under Strickland.

CLAIM III

IAC/WAIVER OF JURY RECOMMENDATION CLAIM

In this claim, Brant argues that trial counsel was ineffective during jury selection resulting in Brant's waiver of a jury at the penalty phase. Before Brant waived his jury, the trial court conducted a lengthy colloquy with him, ensuring that he understood what he was doing (was he on any medications, was he competent, did he understand the choice he was making). (V18/3489-91) The trial judge explained the procedure they would follow in the penalty phase and the possible sentences he could receive. (V18/3491) Brant has failed to establish any deficient performance and prejudice under Strickland. The postconvicton court denied this claim. (V18/3492-93) The court stated,

> The Court finds the testimony of both Mr. Terrana and Mr. Fraser to be credible, and that neither Mr. Terrana nor Mr. Fraser advised Defendant to waive the penalty phase jury. As the letter indicates, counsel had discussions with Defendant explaining his various options. It was decided that they would proceed to a full-blown penalty phase before a jury. After the panel was stricken and Mr. Terrana and Mr. Fraser met with Defendant, counsel believed that they were still going to proceed with a jury in the penalty phase but, by the next morning, Defendant made the decision to waive the penalty phase jury and have the trial court alone determine his sentence. The Court finds Defendant has failed to show how counsel performed deficiently pursuant to Strickland.

> Although the exact standard for prejudice in such a case is unclear, Defendant argues that the Court should apply the standard set forth in Hill v. Lockhart, 474 U.S. 52 (1985), wherein the Court held that in order to satisfy the prejudice prong of Strickland when a defendant has pleaded guilty, the "defendant must show that there is a reasonable probability that, but or counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." Assuming arguendo that such a standard is appropriate, the Court finds that Defendant has failed to establish prejudice. The detailed colloquy regarding Defendant's waiver of penalty phase jury reflects that Defendant was aware of all the rights he was giving up in waiving a jury recommendation as well as the penalty that he faced; Defendant specifically advised Judge Fuente that he wanted Judge Fuente alone to decide his sentence. His decision to waive the penalty phase jury was knowing, intelligent and voluntary. The Court, therefore, finds there is no reasonable probability that Defendant would have insisted on proceeding with a penalty phase jury if counsel had developed rapport with defendant (who suffered from depression), moved for a change of venue, retained a jury selection expert, or advised Defendant of all the potential mitigation evidence presented during the postconviction proceedings. The Court further notes that Defendant also has failed to demonstrate that the outcome of the proceedings would have been different had [h]e proceeded to a penalty phase before a jury.

(V18/3492-93)

Brant utilizes the standards from Hill to analogize penalty-phase-jury-waiver claims to IAC/guilty plea claims but then presents no evidence or testimony to show that "but for"

his counsels' actions he would not have waived the penalty phase jury. Here, as in Winkles, 21 So. 3d at 24, Brant has not explained how conducting the penalty phase before a jury would have affected his sentences. Furthermore, waiving the jury for penalty phase did not result in, legally or factually, losing the right to contest his death sentence.

Besides, it was Brant's ***right*** to waive the jury's recommendation during penalty phase. See Grim v. State, 971 So. 2d 85, 101 (Fla. 2007) ("A defendant may waive the advisory jury in the penalty phase of a capital case, provided the waiver is voluntary and intelligent."). This Court has been consistent: a defendant has the right to control certain decisions in his case, including the waiver of a penalty phase jury recommendation and the presentation of mitigation. Boyd v. State, 910 So. 2d 167, 189-90 (Fla. 2005). See also Dessaure v. State, 55 So. 3d 478 (Fla. 2010) (finding that counsel was not ineffective for following a competent defendant's wishes in regards to presentation of mitigation). Any suggestion that his waiver of penalty phase jury was involuntarily based on counsel's performance is meritless; the trial court's exchange with Brant demonstrates that Brant's waiver "with sufficient awareness of the relevant circumstances and likely consequences" of his action. Brady v. United States, 397 U.S. 742, 748 (1970).

The standard of review for a waiver of the penalty phase jury is "similar to that determining the validity of a plea. . . Consequently, we look to the procedures and body of law dealing with pleas and challenges associated therewith in determining the validity of a waiver." See Griffin v. State, 820 So. 2d 906, 912 (Fla. 2002). See also Dessaure v. State 891 So. 2d 455, 472 (Fla. 2004). A defendant seeking to withdraw a plea after sentencing must "demonstrate a manifest injustice requiring correction." State v. Partlow, 840 So. 2d 1040, 1042 (Fla. 2003). Brant has not demonstrated deficient performance or prejudice in this waiver of a penalty phase jury claim. Accordingly, this Court must affirm the denial of relief on this issue.

CLAIM IV

THE BRADY V. MARYLAND CLAIM

Brant argues that the State violated Brady v. Maryland, 373 U.S. 83 (1963) by failing to disclose allegedly favorable impeachment or exculpatory evidence concerning Garett Coleman (Brant's half-brother). Brant claims that the allegedly favorable impeachment or exculpatory evidence is Garett's status as a confidential informant in another Orange County from January 2006 through June 2008. Brant is not entitled to any relief. The postconviction court denied this claim. The court found,

> [T]he Court finds the testimony of Detective Clark and the OCSO records to be more credible and reliable than the testimony of Garett. Detective Clark's testimony that Defendant did not meet Garett until late 2005 and he became a CI in 2006 is substantiated by the OCSO records. Additionally, the Court finds credible the testimony of HCSO investigators that they learned of Defendant's location in Orlando trough Garett's phone call to Defendant's father-in-law. Although it is conceivable that Garett may have contacted OCSO about Defendant's location, HCSO investigators learned of Defendant's location independent of Garett's tip to OCSO. The Court finds Defendant has failed to show Garett was a CI in July 2004. As the Court finds Garett was not a CI at the time of Defendant's arrest in July 2004, Garett's lack of CI status in 2004 was neither exculpatory nor impeaching favorable evidence, and was immaterial to and would not have had any effect on

> Defendant's motion to suppress or served as a mitigating factor. Additionally, even if Garett had been a CI in 2004 and tipped law enforcement off as to defendant's location, there is no evidence that he was acting as a state agent where he did so entirely of his own accord only because Defendant wanted to turn himself in and to protect his elderly parents, and Garret was not paid for any information proved and was not directed to question Defendant. Even if he was a CI who purportedly told officers about Defendant's location, such information would not have served as mitigation or affected the outcome of the penalty phase where it is clear Defendant wanted to and had already attempted to turn himself into law enforcement. Garett's subsequent status as a CI from 2006 to 2008 would have had no bearing on Defendant's motion to suppress or any mitigating factors at sentencing. As Defendant has failed to show Garett's CI status was favorable evidence (either mitigating or impeaching) or material, the Court finds Defendant has failed to establish that a Brady violation occurred.

(V18/3496-97)

The State first points out that Brady does not apply to Brant's guilty plea. Brant entered his guilty plea in 2007. Well before 2007, in 2002, the United States Supreme Court determined that the Constitution does not require pre-guilty plea disclosure of impeachment information. United States v. Ruiz, 536 U.S. 622, 629 (2002). "Brady is a trial right." United States v. Mathur, 624 F.3d 498, 507 (1st Cir. 2010). Brant gave up his right to the guilt phase of trial by entering his plea; therefore, he gave up all adjoining rights, including the right

to disclosure of exculpatory evidence. See Orman v. Cain, 228 F.3d 616, 617 (5th Cir. 2000).

As to Brant's penalty phase Brady violation claim (i.e., that Garett's status as a CI was evidence that could be used during mitigation and was withheld by the State), he must show that 1) favorable evidence, exculpatory or impeaching, 2) was willfully or inadvertently suppressed by the State, and 3) he was prejudiced (materiality). See Rimmer v. State, 59 So. 3d 763, 785 (Fla. 2010) (citing Strickler v. Greene, 527 U.S. 263, 281-82 (1999)). Brant has not demonstrated the existence of any of these three requirements.

As to the first requirement, favorable impeachment or exculpatory evidence, Garett did not become a confidential informant until January 2006. (V45/818,821-22,831,833) Brady applies only when withheld information is favorable to the accused. Garett's work as a CI in Orange County, well after Brant's arrest for the rape and murder of his neighbor, is so unrelated and irrelevant that it is not material. And Garett failed to appear and testify at the penalty phase, even after being served with a subpoena. (V46/906;V50/1451-52,1526). Thus, even if Brant's trial counsels had obtained this information, they would not have been able to use it against a witness that

did not appear and testify at trial.[4] See Bryant v. United States, 120 F.2d 483, 484-85 (5th Cir. 1941); Cox v. State, 50 So. 875, 876 (Fla. 1909) (evidence showing bias not admissible until after witness testified). Nothing about Garett's mere status as a CI in another jurisdiction constitutes admissible impeachment or exculpatory evidence. See Breedlove v. State, 580 So. 2d 605, 609 (Fla. 1991) (distinguishing cases where the prosecution witnesses' conduct was related to the charges against the defendants and cases where the conduct was unrelated, finding the later not to be relevant).

As to the second requirement, whether the information was suppressed, Brant has not shown that the Hillsborough County prosecution team had actual knowledge of Garett's activity as a CI in another jurisdiction or that such information can be imputed to the prosecutors. See Parker v. Allen, 565 F.3d 1258, 1277 (11th Cir. 2009) ("The prosecution does not ... have an obligation to seek evidence of which it has no knowledge or which is not in its possession."). Even if, under some unknown standard, the Hillsborough County prosecutors should be charged with constructive knowledge that Brant's brother was a CI in another jurisdiction, *a proposition which the State emphatically*

[4] The State did attempt to use a statement of Garett's as rebuttal, but it backfired because the trial court found that it only supported Brant's mitigation evidence. (V18/3459)

disputes, this information is not Brady material, i.e., it was not related to guilt or punishment, it was not exculpatory or impeaching, and Brant has not shown it would have been material or favorable. See Evans v. State, 995 So. 2d 933, 951 (Fla. 2008) (denying Brady claim where information was neither exculpatory nor impeaching); Downs v. Dept. of Corr., 738 F.3d 240, 260 (11th Cir. 2013) (rejecting defense claim that mere existence or identity of a person constitutes Brady information).

Notably, although Garett's testimony lacked credibility, he did testify that Brant was the only person he ever told about his work as a CI. (V46/933) If this is true, Brant had knowledge, before the prosecutors, that his brother was a CI. Brant cannot claim a Brady violation if he already had knowledge of the information or had equal access to obtaining it. See Overton v. State, 2013 WL 4052396, *2 (Fla. 2013) (citing Rhodes v. State, 986 So. 2d 501, 507 (Fla. 2008)). See also Parker, 565 F.3d at 1277 (stating that there is no suppression of evidence under Brady "if the defendant knew of the information or had equal access to obtaining it"); United States v. Cravero, 545 F.2d 406, 420 (5th Cir. 1977) ("The purpose of Brady is to assure that the accused will not be denied access to exculpatory evidence known to the government but unknown to him.").

Finally, Brant has failed to show that the evidence of his brother acting as a CI has any materiality. "[E]vidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." United States v. Bagley, 473 U.S. 667, 682 (1985). "The mere possibility that an item of undisclosed information might have helped the defense, or might have affected the outcome of the trial, does not establish 'materiality' in the constitutional sense." United States v. Agurs, 427 U.S. 97, 109-10 (1976). Brant has failed to establish that the prosecution possessed and suppressed favorable impeachment or exculpatory evidence that was material under Brady, and this claim should be denied.

CLAIM V

THE CUMULATIVE ERROR CLAIM

Brant raises a claim of cumulative error, but some of the issues involved in his cumulative error claim are procedurally barred. As such, any claim of cumulative trial error is procedurally barred. See Occhicone v. State, 768 So. 2d 1037, 1040 n.3 (Fla. 2000) (finding claim that the cumulative impact of judicial error at trial was an issue which must be raised on direct appeal and is procedurally barred in postconviction litigation). All of the errors raised by Brant were either procedurally barred or meritless. Thus, where the individual errors alleged are either procedurally barred, or without merit, the claim of cumulative error also fails. Downs v. State, 740 So. 2d 506, 509 n.5 (Fla. 1999). The postconviction court denied this claim, and this Court should affirm that ruling. (V18/3494)

CLAIM VI

THE COMPETENCY-TO-BE-EXECUTED CLAIM

As Brant stipulates, this claim is not ripe for review under Florida Supreme Court precedent. See Butler v. State, 100 So. 3d 638, 672 (Fla. 2012); Gonzalez v. State, 990 So. 2d 1017, 1035 (Fla. 2008); Green v. State, 975 So. 2d 1090, 1115-16 (Fla. 2008); Morris v. State, 931 So. 2d 821, 837 n.15 (Fla. 2006); Phillips v. State, 894 So. 2d 28, 36 (Fla. 2004); Davis v. State, 875 So. 2d 359, 374 n.9 (Fla. 2003); Griffin, 866 So. 2d at 21-22. The postconviction court also found that this claim is not ripe for review and denied the claim. (V18/3495)

CONCLUSION

In conclusion, Appellee respectfully requests that this Honorable Court affirm Appellant's judgment and conviction.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on this 3rd day of February, 2015, I electronically filed the foregoing with the Clerk of the Court by using the Florida Courts E-Portal system which will send a notice of electronic filing to the following: Marie-Louise Samuels Parmer, Esquire, P.O. Box 18988, Tampa, Florida 33679-8988 [marie@samuelsparmerlaw.com].

CERTIFICATE OF FONT COMPLIANCE

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

Respectfully submitted,

PAMELA JO BONDI
ATTORNEY GENERAL

/s/ Sara Elizabeth Macks
SARA MACKS
Assistant Attorney General
Florida Bar No. 19122
Concourse Center 4
3507 E. Frontage Rd, Ste 200
Tampa, Florida 33607-7013
Telephone: (813)287-7900
Facsimile: (813)281-5500
capapp@myfloridalegal.com
sara.macks@myfloridalegal.com

COUNSEL FOR APPELLEE