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IN THE SUPREME COURT OF FLORIDA

ENOCH D. HALL,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

Case No. SC15-1662

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ON APPEAL FROM THE CIRCUIT COURT
OF THE SEVENTH JUDICIAL CIRCUIT,
IN AND FOR VOLUSIA COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

This is an appeal of the circuit court's denial of Enoch Hall's motion for postconviction relief pursuant to *Fla. R. Crim. P*. 3.851. Citations to the direct appeal record will be DAR, V_, R_ . Citations to the postconviction record will be R_.[1] This brief will refer to Appellant as such, Defendant, or by proper name, e.g., "Hall."

Unless the contrary is indicated, bold-typeface emphasis is supplied; cases cited in the text of this brief and not within quotations are italicized; other emphases are contained within the original quotations.

RESPONSE TO REQUEST FOR ORAL ARGUMENT

The State defers to this Court's judgment as to whether or not oral argument is necessary in this case.

RESPONSE TO JURISDICTIONAL STATEMENT

The State does not dispute the jurisdictional statement found on page 1 of the *Initial Brief*.

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[1] See, *In re: Amendments to Rule of Appellate Procedure* 9.200, 177 So. 3d 1254, 1255-56 (Fla. 2015) ("Because electronic records will not be separated into volumes and any supplements will continue the pagination of the original record, citations should be to the relevant page of the record on appeal or trial transcript without reference to a volume.")

STATEMENT OF THE CASE AND FACTS

As authorized by *Fla.R.App.P*. 9.210(c), the State submits its rendition of the case and facts. In its direct appeal decision affirming Hall's convictions and death sentence, the Florida Supreme Court summarized the facts of the case in the following way:

> Enoch D. Hall was convicted of the first-degree murder of Officer Donna Fitzgerald. Fitzgerald's body was found in the paint room at Tomoka Correctional Institute (TCI). She had been stabbed, strangled by ligature, and suffered blunt force trauma to her head. Hall, an inmate at TCI, was apprehended by TCI personnel. Hall continued to repeat "I freaked out. I snapped. I killed her." Hall was indicted by a grand jury for the murder. A jury returned a verdict of guilty of first-degree murder and recommended that Hall be sentenced to death by a unanimous vote.
>
> **FACTS AND PROCEDURAL HISTORY**
>
> On July 10, 2008, Enoch Hall was indicted by the grand jury for the murder of Florida Department of Corrections Officer Donna Fitzgerald. Hall was an inmate at TCI, who worked as a welder in the Prison Rehabilitative Industries and Diversified Enterprises, Inc. (PRIDE) compound, [FN1] where inmates work refurbishing vehicles. Sergeant Suzanne Webster was working as the TCI control room supervisor, where she was responsible for getting a count from all areas of the prison as to the number of inmates in each area. When Webster had not heard from Fitzgerald, who was working in the PRIDE compound that night, Webster radioed Officer Chad Weber, who went to the PRIDE facility with Sergeant Bruce MacNeil to search for Fitzgerald. Weber saw Hall run through an open door on the other end of one of the PRIDE buildings and Weber and MacNeil pursued Hall. Weber caught up to Hall, who repeatedly stated "I freaked out. I snapped. I killed her." Hall responded to Weber's commands and placed his hands on the wall and was handcuffed. Weber took possession of the PRIDE keys that Hall had in his hands. Officer Chad Birch shouted from inside the building, "Officer down!" and Hall remained outside with other officers while Captain Shannon Wiggins and Officers Weber and MacNeil entered the building and

located Fitzgerald's body. Fitzgerald's body was found lying face down on top of a cart in the paint room. The upper part of her body was wrapped in gray wool blankets, and the bottom half of her body came over the back of the cart, with her pants and underwear pulled down to her knees. Inside a bucket of water that was on the floor next to Fitzgerald's legs was Hall's bloody T-shirt. Hall was escorted to the medical facility (MTC) of the prison by Officers Brian Dickerson and Gary Schweit. Several officers took turns watching Hall while he sat in the MTC. Hall was later escorted to a conference room to talk with investigators from the Florida Department of Law Enforcement (FDLE) and then to a cell. Hall gave three statements to FDLE agents throughout the night regarding the events of the murder.

> [FN1] The PRIDE compound consists of numerous outbuildings and one main bay area.

Guilt Phase

A jury trial commenced on October 12, 2009. Daniel Radcliffe, a crime scene investigator for FDLE, testified that he found two packets of pills in a file cabinet in the paint room of PRIDE where the body was discovered. The pill packets had an inmate's name on them, Franklin Prince, and were labeled Ibuprofen 800 milligrams and Carbamazepine, a generic equivalent of Tegretol, 200 milligrams, an anti-seizure medication. Hall's white T-shirt was found in a bucket of water with other shirts in the paint room, and Hall's pants were found in a pile of clothes, also in the paint room. Months later, Hall's blue prison shirt was found lodged on top of a paint booth. Granules of Speedy Dry, an oil absorbent material, were found on the ground in front of the welding shed and in a coffee can next to the shed. The granules tested positive for blood and DNA testing confirmed that it was Fitzgerald's. A broom found nearby had Fitzgerald's blood on the broom head. Blood was found on the walls of the welding shed. Also found in the welding shed was a cap, which had Fitzgerald's blood on it. Hall's clothes, including his underwear, tested positive for Fitzgerald's blood. A sexual assault analysis was performed on Fitzgerald's body. Jillian White, a crime lab analyst with the FDLE, testified that there was no evidence of semen on the body. Wiggins testified that he was a commander of the TCI rapid response team and as part of his job would search prisons for weapons. Wiggins testified that shanks made in the PRIDE facility differed from the usual ones

made by inmates in that they had a machined edge made by a grinder. Wiggins testified that the shank recovered from the wall of the paint room which appeared to be the murder weapon had a meticulously sharpened point like those made from a tool grinder in the PRIDE facility.

The State played the three confessions Hall made on the night of the murder. In the first statement, given to FDLE agents and TCI personnel, Hall admitted to killing Fitzgerald and stated that he had taken four pills that Frank Prince, another inmate working in PRIDE, had given to him. Later that day, when his shift ended, Hall went looking for more pills, but was unable to find any and became angry. Officer Fitzgerald came in and laughed and called Hall by his nickname, "Possum, come on, get out of there." Hall told her to get out. Fitzgerald grabbed Hall's arm and he "freaked out" and began to stab her with a sharp piece of metal that he found on the floor of the room. Hall then took off his bloody shirt, put it in a bucket of water, and put on one of Prince's shirts. He picked up the PRIDE keys and continued to look for pills. Hall stated that he did not remember pulling Fitzgerald's pants down. Hall said that he did not want to have sex with Fitzgerald. Hall repeatedly stated that he just wanted to get high.

The second statement, given at about 1:30 a.m., was taken by Agent Stephen Miller of the FDLE upon Hall's request in the cell in which Hall had been placed. During this interview, Hall admitted that he killed Fitzgerald somewhere other than the room where she was found. Fitzgerald found Hall searching for pills in the office. He ran out past her, she chased him to the welding shed, and he stabbed her there. Hall carried her to the office and placed her on the cart. Hall said he threw some dirt on the blood outside the welding shed. Hall told Miller that he hid the knife in a cinderblock wall near the welding shed. Hall also told Miller he did not think he was "going to make it to tomorrow." Miller told Hall that he would transport him to the branch jail in a little while.

The third statement was given at about 3:30 a.m. and was made only to the FDLE agents. In this third statement, Hall agreed that in his first statement he said he killed Fitzgerald inside the PRIDE building, but in his second statement he admitted to killing her in the welding area

outside the PRIDE building. Hall admitted that he stayed behind in the PRIDE compound to look for drugs. While looking for drugs, Hall found the shank by the sink in Prince's office and took it with him. When he realized Fitzgerald was looking for him, Hall hid inside the welding shed. Fitzgerald opened the shed door and came in and tried to grab him. He tried to run past her, but she would not let go, so he stabbed her. Hall did not recall how many times he stabbed her, but said he stabbed her enough times "just to get by." Fitzgerald fell to the ground inside the shed; he did not know whether or not she was alive. He hid the shank in the wall and spread some Speedy Dry on the ground in the welding area to soak up the blood. Hall wrapped her up in a towel and blankets and carried her back to the paint room/office. Hall placed her on a cart. He then continued to look for pills, but was not able to find any. Hall went back to the room where Fitzgerald was and pulled down her pants. He did not sexually assault her. Hall said he put his shirt in a bucket of water, put on Prince's shirt, but kept on his own pants. Corrections officers entered the PRIDE facility and he attempted to run from them.

Dr. Predrag Bulic, the Volusia County associate medical examiner, testified for the State about the injuries Fitzgerald sustained based on her autopsy results. He testified that Fitzgerald's body bore evidence of blunt force injuries, mostly on her face, consistent with those caused by punches from a hand. Fitzgerald's hands and arms had sustained defensive wounds caused by a sharp instrument consistent with a knife. Fifteen additional stab wounds were inflicted upon Fitzgerald, including on her stomach, back, and chest. Dr. Bulic also testified that a gold chain necklace on Fitzgerald's body had been pulled tightly around her mouth and neck from behind in a manner so as to exert sufficient force to leave a postmortem mark consistent with ligation. On October 23, 2009, Hall was convicted of first-degree murder.

Penalty Phase

The penalty phase commenced on October 27, 2009. The defense renewed its previously argued motion to preclude the State from offering evidence of the length of Hall's sentences he was serving when he killed Fitzgerald. The trial court denied the motion and the State offered evidence that Hall was serving two consecutive life sentences when he murdered Fitzgerald.

The State also offered evidence that Hall had committed prior violent felonies, introducing testimony from two women whom Hall had raped. The defense objected to the testimony of the two women as highly prejudicial and irrelevant. The trial court overruled the objection and allowed the testimonies.

Victim impact statements were published for the jury. Donald and Dana Shure, Officer Fitzgerald's younger brother and sister, prepared written statements and read them to the jury. Joanne Dunn, Fitzgerald's mother, also read a statement to the jury.

The defense presented several witnesses during the penalty phase to support mitigation. James Hall, Hall's father, testified that Hall was a good son and got along well with his two younger brothers. He also testified that Hall had been raped in jail at age 19, when his girlfriend's mother's boyfriend, a law enforcement officer, arranged to have him put in jail after a dispute. After his release, Hall became afraid and mostly stayed home, and he eventually started living in a shelter in the woods. James Hall had not seen his son since 1995. Hall's mother, Betty Hall, also testified regarding her son's love for sports growing up. Dr. Reid Hines, a dentist, testified telephonically that he and Hall had played sports together in high school and that Hall was an excellent athlete. Bruce Hall, the former plant manager for PRIDE, testified that Hall started at PRIDE as an apprentice welder and eventually worked his way up to lead welder. Rodney Callahan, an inmate who used to work with Hall, described him as a very good worker, conscientious, and responsible.

Dr. Daniel Buffington, a pharmacologist, testified for the defense that, among other possible side effects, both Ibuprofen and Tegretol have the capacity to alter someone's behavior. The State called Dr. Wade Myers on rebuttal, who testified that most people who take an overdose of Ibuprofen do not have any side effects and the remaining people typically complain of nausea, and that Tegretol has an anti-aggression component to it, and, in his opinion, it "would be very unlikely" to cause aggression—"You're going to get the opposite effect."

The jury returned a recommendation of death by a unanimous vote.

Spencer [FN2] Hearing

In support of the defense's contention that Hall should receive the emotionally and mentally disturbed statutory mitigator, Dr. Harry Krop testified for the defense that Hall had a cognitive disorder, not otherwise specified, coercive paraphilia disorder-multiple sexual offender, and an alcohol substance abuse disorder. Krop testified that Hall had a serious emotional disorder at the time of the offense and that Hall's ingestion of Tegretol could bring out his underlying psychological traits.

[FN2] *Spencer v. State*, 615 So. 2d 688 (Fla. 1993).

The State offered rebuttal testimony from Dr. William Riebsame, a forensic psychologist and professor of psychology, and Dr. Jeffery Danziger, a board certified forensic psychiatrist. Riebsame testified that the results of the tests administered to Hall by Krop were questionable, because Krop failed to test for malingering. Danziger testified that he administered two tests to determine whether Hall was mentally ill or was malingering. A score of more than 14 is highly correlated with malingering and Hall's score was 29. Danziger arrived at the opinion that Hall has a history of substance abuse, adult anti-social behavior, history of sexually-related charges, possible psychosexual disorder, and pseudo-seizure disorder by history. Danziger strongly disagreed with any attempt by Buffington to diagnose a psychological condition and disagreed with Buffington's opinion that Tegretol could unmask an underlying psychological illness. The trial court found that Hall did not establish the existence of mental or emotional disturbance as a statutory mitigating circumstance and gave it no weight.

In the trial court's Sentencing Order, the court found five aggravators: (1) previously convicted of a felony and under sentence of imprisonment—great weight; (2) previously convicted of another capital felony or of a felony involving the use or threat of violence to the person—great weight; (3) committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws—great weight; (4) especially heinous, atrocious or cruel—very great weight; (5) cold, calculated, and premeditated—very great weight; (6) the victim of the capital felony was a law enforcement

> officer engaged in the performance of his or her official duties—no weight—merged with aggravator number 3 as listed above. In mitigation, the sentencing court found no statutory mitigators and eight non-statutory mitigating circumstances: (1) Hall was a good son and brother—some weight; (2) Hall's family loves him—little weight; (3) Hall was a good athlete who won awards and medals—little weight; (4) Hall was a victim of sexual abuse—some weight; (5) Hall was productively employed while in prison—some weight; (6) Hall cooperated with law enforcement—some weight; (7) Hall showed remorse—little weight; and (8) Hall displayed appropriate courtroom behavior—little weight. The trial court concluded that the aggravating circumstances far outweighed the mitigation and gave great weight to the jury's unanimous recommendation of death. Thus, the trial court imposed the sentence of death. This direct appeal followed.

Hall v. State, 107 So. 3d 262, 267-271 (Fla. 2012).

ISSUES RAISED ON APPEAL

As framed by the Florida Supreme Court, Hall raised the following issues on direct appeal:

> (1) Whether the trial court properly denied Hall's motion to suppress his confessions;
>
> (2) Whether the trial court erred by admitting opinion testimony of the medical examiner regarding the sequence of wounds and the position of the victim;
>
> (3) Whether the trial court erred in admitting prior crime evidence during the penalty phase (and whether the State's argument in penalty phase closing about the prior crimes constituted fundamental error);
>
> (4) Whether the trial court erred in admitting evidence of non-statutory aggravating circumstances;
>
> (5) Whether the death sentence is proportionate (and specifically whether the trial court erred in finding the HAC and CCP aggravators); and

> (6) Whether Florida's death sentencing scheme is unconstitutional under *Ring*. [FN3]
>
>> [FN3] *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002).

Hall, 107 So. 3d at 271. The Florida Supreme Court rejected claims (1) through (4) and claim (6) in their entirety. *Id*. at 273-77, 280. The Court struck the CCP aggravator but found that its application to Hall's death sentence was harmless beyond a reasonable doubt. *Id*. at 278-79. The Court rejected the remained of Hall's arguments about aggravation, mitigation, and proportionality in claim (5). *Id*. at 275-77, 279. The Court affirmed Hall's conviction and death sentence. *Id*. at 281. Hall's *Petition for Writ of Certiorari* to the United States Supreme Court was denied on October 7, 2013. *Hall v. Florida*, 134 S.Ct. 203 (2013).

THE POSTCONVICTION PROCEEDINGS

Pursuant to *Fla. R. Crim. P*. 3.851, Hall filed a motion for postconviction relief on September 17, 2014, raising eleven (11) claims with subclaims:

> (1) Whether trial counsel was ineffective for failing to challenge a juror for cause during voir dire;
>
> (2) Whether trial counsel was ineffective at the guilt phase in the investigation and development of a defense and in challenging the State's case at Hall's trial;
>
> (3) Whether trial counsel was ineffective for not objecting to the testimony of Frederick Evins;
>
> (4) Whether trial counsel was ineffective in the investigation of Hall's family history;

(5) Whether trial counsel was ineffective in the presentation of Dr. Krop's testimony;

(6) Whether trial counsel was ineffective in his penalty phase argument regarding statutory mental health mitigation;

(7) Whether trial counsel was ineffective in the penalty phase regarding the case in mitigation presented;

(8) Whether cumulative error entitles Hall to relief;

(9) Whether the statutory instruction to the jury regarding its role in capital sentencing is facially vague and overbroad by unconstitutionally diluting the jury's sense of responsibility in the sentencing process and whether trial counsel was ineffective for failing to litigate the issue;

(10) Competency to be Executed; and

(11) Whether Florida's capital sentencing statute is unconstitutional on its face and as applied and whether trial counsel was ineffective in litigating this issue.

(R1188-1266). The State responded. (1391-1434). The circuit court held a case management conference on January 27, 2015. (R112-150). The court issued an order granting an evidentiary hearing on claims I through VIII, and ruled that claims IX through XI would be decided at the conclusion of the evidentiary hearing. (V2, R1507-1508).

An evidentiary hearing was held May 4-7, 2015. (R151-1052). Hall's motion for postconviction relief was denied on July 8, 2015, (R2254-2281) and his motion for rehearing was denied on August 7, 2015. (R2283-2286). A notice of appeal was filed on September 2, 2015. (R2292-2293). The *Initial Brief* was filed on February 4, 2016. This *Answer* follows.

Evidentiary Hearing Facts

Prison Events and Procedures

Lt. Stephan Farrow

Lt. Stephan Farrow, Department of Corrections, videotaped[2] Hall's transport from the Volusia County jail to Florida State Prison on June 26, 2008, subsequent to Fitzgerald's murder. (R176-78). The video consists of Hall walking from the Volusia County jail to the transport van, videotaping stops, and then continues after the van arrived at Florida State Prison and Hall was escorted inside. The actual transport while Hall is in the DOC van was not videotaped. (R177, 178). Farrow had Hall in his custody for about 2-3 hours. Hall would have received medical attention if he had any injuries. Although Hall had a black eye, Hall did not report having any other injuries that needed medical attention. (R180).

John Joiner

John Joiner was employed by the Florida Department of Corrections, Inspector General's Office in 2008. (R183). He reviewed prison policies and procedures, took a photograph of Hall's face,[3] and participated in the investigation report issued subsequent to Fitzgerald's death. (R185, 186, 195). The photo showed some contusion and swelling around Hall's left eye, and was taken within two hours of Joiner's arrival at the prison. (R195). Another photograph[4] of Hall's shirtless

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[2] Compact Disc, Def. Exh. 1.
[3] Photo-Def. Exh. 2
[4] Photo-Def. Exh. 3

shoulder/back area was taken by FDLE personnel. (R198-99). Joiner did not investigate any claim of excessive force. (R205).

Joiner said it is fairly common for drugs to get into prison; it is also possible inmates do not take their prescribed medications and distribute it to other inmates. (R201). Joiner was not present when FDLE interviewed Hall and was not aware of any admissions by Hall of drug use. (R200, 204). When Joiner met with Hall, he did not appear to be intoxicated—"… he seemed to be dazed" and impaired by a substance, such that drug testing would have been appropriate under DOC policy. However, due to the criminal investigation into Fitzgerald's murder, Hall was removed from Tomoka Correctional and Joiner had no further contact with him. Joiner did not request drug testing/urine screening and did not know if any medical attention was given to Hall. (R204, 206, 207). Hall's demeanor improved when he gave three separate interviews with an FDLE agent and was responsive to FDLE's questions. (R208, 210, 211).

Joiner said corrections officers who are certified to carry chemical agents or body alarms are required to do so due to policy and procedure. (R203). Fitzgerald was trained to carry chemical agents. (R205-06). However, when Joiner conducted a body alarm test in the area where Fitzgerald was killed, he was surprised to learn there was no active alert notification from that area. (R207).

Rodney Callahan

Rodney Callahan was an inmate for 22 years at Tomoka Correctional Institution, "TCI," and was house there in June 2008. (R424-25). TCI is a "psych

camp"—an institution where the majority of inmates are on psychotropic medications. (R425, 462).

Callahan worked in PRIDE for 22 years and knew Hall for 15 of those years. (R425). Callahan was the lead technician in charge of welding and fabrication for vehicle renovations for various municipalities. Hall was a lead technician for the welding shop. (R426). He and Hall took classes together, attended church services together, and played sports. Callahan never noticed any injuries that Hall might have sustained while playing sports. (R428). Hall was "a team player" and would "accomplish what needed to be done." (R429).

Callahan interacted with Hall on a daily basis. (R426). Occasionally Callahan helped Hall with jobs when there was a time deadline. Hall expressed stress concerns when his projects got behind. Hall "was receiving a lot of … flak" to get projects done in a timely manner. (R427). However, "I think that we all were under pressure at the time to complete projects that needed to be completed" because there were fines involved if the project were completed in an untimely manner. (R429-30). "Sometimes" if the jobs were late, the inmates were reprimanded or demoted. (R430). Inclement weather, shortage of staff, and security concerns were factors in project delays. (R433, 434). Hall "was very good at what he did … he was able to adapt and learn very quickly." (R432).

Generally there was one guard assigned to the PRIDE area during overtime shifts. (R434). Not all inmates got overtime shifts. There were 20-22 inmates working the night of Fitzgerald's murder. (R446). Callahan observed Hall became "more stressed" in the days leading up to Fitzgerald's murder. Hall "was butting

heads" with other PRIDE inmates and getting into arguments with his supervisor. (R436). Hall was usually easygoing and did not fight with other inmates. (R441). However, the weather was very hot, the equipments the inmates wore and some of the fumes caused people to become ill. (R439-40). Nonetheless, Hall was very protective of his position at PRIDE as those jobs were coveted by the inmates. (R443, 462).

The majority of inmates liked and respected Officer Fitzgerald. She was very professional. Fitzgerald "had the unique ability of being able to balance the affection she had for her profession as a corrections officer with the compassion that she had for the convicts that worked under her supervision." (R449). All the inmates, including Hall, got along with Fitzgerald. (R451).

Callahan was aware that Hall was running late with finishing his job on the night Fitzgerald was killed. Callahan asked Fitzgerald if he should go get Hall so all the inmates could leave but Fitzgerald said she would get Hall. (R451-52, 455). It was normal procedure that if one of the inmates was late for count, one of the other inmates was instructed to get the missing inmate. Or, the officer would call for the inmate on the intercom. (R454, 463).

Callahan would have noticed a difference in Hall's behavior if he took any medication because they talked throughout the day. (R457-58). However, he did not see Hall after lunchtime on the day Fitzgerald was killed. (R461).

Elizabeth Lasseter

Elizabeth Lasseter is Hall's half-sister. (R215-16, 220). Lasseter has a history of taking medication for "epilepsy" which included Tegretol. (R216, 218-19).

However, Tegretol caused blackouts, memory loss, and suicidal thoughts. It also caused heightened irritation. As a result, her doctor took her off that medication. (R219, 220). Stress, anxiety, and feeling overwhelmed caused Lasseter to have a blackout. (R221). Lasseter clarified that she had been diagnosed with a "seizure disorder." (R221).

Jesse Eugene Hall

Jesse "Gene" Hall,[5] Enoch Hall's uncle, testified that Hall was aware that his mother was unfaithful to his father many times. (R470). He would have testified at trial if he had been asked. (R485).

Enoch James Hall

Enoch James Hall, Hall's father, testified that he was part of the household "part-time." (R473, 474). His wife, Betty Hall, had a loving relationship with her children, but she was unfaithful to him. (R474, 475). When Enoch Sr. confronted his wife about her unfaithful behavior, "she said I'm never [going to] to catch her, [she] just started laughing." (R477). There were times that Hall "could [have] heard" Enoch Sr. and Betty arguing. "Sometime[s] it got pretty heated." (R475-76). At one point, Betty moved in with another man and took the children with her, but she eventually returned. (R477). Betty "keep stuff stirred up all the time" and caused conflict between others. (R477). Enoch Sr. and Betty Hall divorced in 1996. (R478, 480).

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[5] For clarity, first names for family members will be used.

Enoch Sr. recalled meeting with a defense investigator and they discussed the Hall's family dynamics. (R479). Betty kept a clean household, did the laundry, and cooked for the family. They occasionally attended church together. Enoch Sr. took the children to their sporting events with Betty attending some of the events. (R480-81). The children had horses, dirt bikes, dune buggy, and three-wheelers which "kept [them] from … messing with someone else's … stuff …" (R482-83). The children were also responsible for chores. (R483).

Walter Schell

Walter Schell was an inmate at TCI and worked in PRIDE in 2008. PRIDE "was normally a stressful place." (R651). Around the time of Fitzgerald's murder, the PRIDE inmates were assigned projects with short turnaround times. (R651-52). Schell observed that Hall was particularly stressed the day he killed Fitzgerald. Hall "was kind of intent … and frazzled." (R653). However, inmates did not receive a disciplinary report, "DR," or punishment if they did not meet a deadline in PRIDE. Although, re-assignment to another area was a possibility. (R654).

Schell saw inmate Prince with Tegretol. Prince took the drug for "back pain" and had asked Schell if he knew if Tegretol could affect his kidneys. Both Schell and Prince had kidney disease and various problems with their backs. (R655). Schell advised Prince not to take the medication "on the job" because he could "end up falling into a grinder" or get hurt. Schell suggested Prince take the medication prior to bedtime and he would "sleep like a baby." If someone "took four or five of them, you could kind of sail away …" (R656).

Dr. Michael Maher, M.D.

Dr. Michael Maher, psychiatrist, has been practicing for thirty-four years. (R228). His primary focus consists of outpatient psychiatry and psychological management of medical conditions. (R231). He also evaluates defendants for competency in criminal matters and gives mitigation testimony in "upwards of 90 percent" of trials as a defense witness.[6] (R233). Although his medical training did not include a neurology residency, "every time I see a patient in my clinical practice or in my forensic practice, I make a neurological assessment of their neurological functioning." (R235, 237). In Maher's opinion, "[T]he distinction between neurology and psychiatry is not one that is sharp at all." (R237). Nonetheless, Maher is board certified in general psychiatry and forensic psychiatry but not board certified in neurology. (R230, 239). The court qualified Maher in the field of medicine inclusive of opinions related to epileptic disorders, psychiatry and forensic psychiatry. (R245-46).

Maher reviewed Hall's jail and prison medical records, family interview records, the FDLE video (Def. Exh. 1), the FDLE taped interrogations, Dr. Krop's report, investigative reports, depositions, an MRI report, trial counsel's notes and references to epilepsy, and Hall's Escambia County Jail rape report. (R246-48, 253, 262).

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[6] Although Maher said about 5% of his work is performed for the State, he declined to respond to questioning as it related to his belief in the death penalty. Notably, he offered his services in Hall's case at a discounted lower rate. (R404-05).

After reviewing defense exhibit 1, (Hall's escort to the DOC van subsequent to Fitzgerald's murder), Maher observed that Hall appeared to be "somewhat weak on the right side. And he appears to be steadying himself by sort of bouncing off or bumping along the wall, using the wall to steady himself." (R255-56). Maher did not attribute Hall's altered gait to Hall's 2003 knee surgery. (R257-58). In reviewing defense exhibits 2 and 3, (the photographs of Hall's face and back, respectively), in Maher's opinion, the eye swelling was "typical of an acute physical trauma … very recently inflicted. Something more than an incidental push or shove. A punch, object … something like that." Maher noted that Hall's back contained a "discernible red mark, approximately the size … of a person's thumb …" Maher could not opine whether or not the mark was inflicted by physical force. The eye swelling would have occurred very quickly. (R259-60, 395).

Maher reviewed Hall's taped interrogations. In his opinion, Hall sounded "upset … emotionally distraught … somewhat confused about what had happened, what was going on." However, his demeanor from the first, second, and third interviews changed. Hall was not as logical and coherently responsive to questions in the first interview compared to the subsequent interviews. Hall was confused, dazed and repetitive. (R262-63, 264). By the third interview, Hall was "less confused, more focused … more alert …" (R271). In Maher's opinion, any altercation that Hall might have been in, whether it was Fitzgerald or guards, would have caused "some immediate time-limited acute effect on his mental functioning so that in the brief period of time after this physical altercation … he would be confused and - - less alert." (R271). Maher opined that if Hall had been

beaten by guards, it would have been a normal reaction for Hall to be anxious and unwilling to reveal information. But, Hall "had worked successfully at PRIDE in a trusted … position … so he knew the rules, and he had the ability to follow them." (R272-73).

In Maher's opinion, Hall was in "an agitated emotional state" when he stabbed Officer Fitzgerald 22 times. (R275, 398). Hall did not "reflect" during the stabbing, rather, his actions were consistent "with impulsive emotion-driven desperation, fear, anger, rage." (R276). In Maher's opinion, " … in almost any instance the death of a person at one's own hands is a - - an emotionally traumatic experience." (R276).

Maher said an epileptic diagnosis affects memory. (R278). In Maher's opinion, Hall's "state of mind" (as shown on the video during the first interview) was consistent with a "postictal condition." Maher could not make a diagnosis that Hall's experienced an epileptic seizure based on the information he had. (R278, 408). However, Maher was aware that Hall was instrumental in having epileptic restrictions removed from his medical records in order to work in PRIDE. (R283, 286). In addition, the seizures occurred infrequently. (R283).

Hall was "cooperative" with Maher during their two-hour meeting. (R281). He did not administer any neurological tests to Hall. (R397). Maher noted that Hall had no trouble standing or balancing. (R396). Hall provided both positive and negative information about himself, including his prior conviction for sexually

battery and kidnapping. And, to a very limited extent, Hall mentioned that he was raped during his 1988 incarceration in the Escambia County jail.[7] Hall avoided discussing suicidal attempts in his past. (R301, 307-08). Maher agreed with the State's trial witness, Dr. Riebsame's diagnosis, that Hall experiences posttraumatic stress disorder, "PTSD," as a result of the 1988 assault. (R302). PTSD tends to be a chronic disorder. Hall's records did not indicate he received any treatment for it. (R309). In addition, although Hall was traumatized by the reported rape, Maher said, " … one of the pathological reactions of people who are victimized [is] that they stand in the role of the victimizer and victimize other people." (R387).

Hall reported that his childhood was relatively normal. (R389). His father provided for the family but was "emotionally unavailable." (R313). Although Hall had a loving relationship with his mother, he harbored ill-will towards her because she was unfaithful to his father. (R313, 389). As a result, in Maher's opinion, Hall's relationships with women were "very dysfunctional and at times violent" due to Hall's perception of what he "learned … a woman is like …. what [] a wife [is] like" when he was growing up. (R315-16). Nonetheless, the family had horses and four-wheelers as well as an intact family that was supportive of his schooling and his sports. (R389).

Hall was proud of his work performance at PRIDE and the positive way it influenced his life. (R282-83, 300). Hall "appeared to be in a state of mind where

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[7] The Escambia County Sheriff's Office concluded Hall's allegations were unfounded. (R304).

he wanted to be understood and did not want to makes excuses for himself." (R300-01). Hall was fearful of losing his PRIDE job if he missed a deadline or did not perform as expected. (R291). In Maher's opinion, Hall is "a type-A personality … focused on getting the job done … focused on organizing things … focused on details … focused on a follow-through …" (R293). Hall experienced stress the week prior to the murder due to deadlines being moved up to earlier that he expected. (R407).

Hall admitted he "occasionally" tried to get drugs or medication to help him sleep or feel less agitated; he did not use the drugs "to get high or for entertainment." (R296-97, 383). Maher opined that Hall searched inmate Prince's office for pills in the PRIDE area "because he believed those pills were going to help him with stress at work, including the possibility that he might have a seizure." (R382). Hall, however, never indicated that he knew what the pills were for at the time he was looking for them. (R403). Maher said Hall would lie to get what he wanted. (R404).

Hall reported he started having seizures after sustaining a head injury at 20 years old. (R319). At some point Hall was referred to the DOC seizure clinic. His medical records indicate Hall suffered from "pseudoseizures" which Maher said "is a vague term … that there is a seizure-like phenomenon reported which cannot be clearly documented …" (R321). Although Hall's EEG report was normal, the report also indicated it did not mean that Hall does not have a seizure disorder. (R322). Results of an MRI report were consistent with a seizure disorder. (R323). Hall had been prescribed Dilantin, an anti-seizure medication, 10 to 15 years

before the murder, and Caramazepine. Hall refused to take Dilantin because it made him sleep and groggy; he never tried taking the Caramazepine. (R325, 394-95). Hall described having an aura associated with a sweet, heavy smell that occurred prior to a seizure. (R392).

In Maher's opinion, Hall was able to perform his welding job because "people with seizure disorders can do all kinds of things competently and well." (R328). Based upon all the information Maher received, even though Hall lied about not having a seizure disorder in 1999, in Maher's opinion, Hall suffers from a seizure disorder. Maher could not specify as to what type of seizure disorder he attributed to Hall. (R329, 330, 376-77). In Maher's opinion, Hall lied about not having the disorder in order to get the job in PRIDE. "People with seizure disorders do this very commonly." (R330). There was no evidence that Hall ever suffered a seizure in the PRIDE area. (R379). Maher opined that Hall knew he would have been removed from the PRIDE detail if he attempted to get medication through the prison for seizures. (R382).

Maher also diagnosed Hall with a cognitive disorder NOS, based upon Dr. Krop's testing administered to Hall, and based upon Maher's interview with Hall and a review of his history.[8] (R330, 340, 398). Krop did not administer any tests for malingering. (R335). Maher said Tegretol can be detected in the blood for several days after taking a dose. (R332). It can also be detected in urine—"the

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[8] Hall's IQ is in the average range. (R383-84).

metabolites can be detected for at least a couple of weeks, possibly longer than that." (R333).

Maher was aware that Hall was administered Sinequan in the 1990's due to a schizophrenic diagnosis. (R340). Hall also was administered Trilafon and Cogentin, antipsychotic medications, while he awaited trial in the Volusia County jail. Trilafon is also used in institutional settings for behavior control for individuals experiencing impulsivity and agitation. (R340-41). Maher, however, did not conclude that Hall was schizophrenic. (R341). In his opinion, a diagnosis of schizophrenia is "overappreciated" and a diagnosis of post traumatic stress disorder is "underappreciated." In Maher's opinion, "the proper diagnosis [for Hall] is post traumatic stress disorder." (R342). There is no clinical way to tell what will trigger a person's PTSD or jolt someone out of a PTSD episode. (R374). Based on Hall's behavior and relationships with others, in Maher's opinion, Hall does not have antisocial personality disorder. (R356, 357). Also, in Maher's opinion, Hall does not suffer from auditory hallucinations. (R390).

In Maher's opinion, Hall snapped when Hall murdered Officer Fitzgerald in a highly emotional, frenzied killing. (R359, 398). Hall's actions subsequent to the murder suggested that "he knew something terrible had happened, and he was trying to clean it up … or hide it or something like that." (R359). Although Hall was reacting to his surroundings, it was without "clear thinking." (R360). Maher opined that Hall pulled Officer Fitzgerald's pants down due to "his reaction of feeling humiliated" and not because he was motivated by some sort of lust or sexual feelings. (R360, 361). Further, Hall does not suffer from paraphilia. "There

is no[] evidence during his incarceration that he has been a (sic) uncontrolled sex offender or overly sexualized or impulsive in his sexual behavior." (R362, 373). Maher opined that Hall moved Fitzgerald's body into an unoccupied office because he was not thinking sensibly. (R362-63). Hall's claimed that Fitzgerald had "laugh[ed] at him" humiliated Hall. (R364, 365). In Maher's opinion, Hall was under the influence of extreme mental and emotional distress at the time of the murder. (R365).

James Valerino

James Valerino has been a criminal defense attorney for over forty years and has defended at least eleven death penalty cases. (R488). He and Matthew Phillips were Hall's trial counsel. They "worked hand in hand on the case" and made strategic decisions together. (R490, 492). Although Phillips made a decision not to call Dr. Krop as a witness after conversing with Krop about Hall, Valerino concurred in that decision. (R492). The defense team started preparing for Hall's case as soon as they were appointed. (R591). They worked on both the guilt and penalty phase in anticipation of the penalty phase starting within a day or two of a guilty verdict. (R592). Valerino had a good rapport with Hall who was cooperative with defense strategies. (R599).

Counsel moved for several continuances in Hall's case. Phillips had another first-degree murder case occurring at that time[9] and was concerned about the short

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[9] Karen Blosser case. (492).

time period in between the two cases. (R489, 493). Nonetheless, Valerino said they had enough time to adequately prepare for Hall's trial. (R496). The defense's strategy was to present evidence that Hall was not guilty of first degree murder; to the contrary, "the most that was proven was that Mr. Hall was guilty of second degree murder." The defense did not present evidence of any stress-related issues. (R497).

Valerino met with Hall just prior to Hall's first appearance. (501, 609). Valerino observed that Hall had a swollen, black eye but he did not notice a limp. Valerino could not think of a reason to ask the court to conduct an independent medical exam,[10] blood draw, or urine screening. (R503, 504, 507). He did not observe any signs of intoxication. (R594). In addition, Hall did not know what the "pills" were that he claimed to have ingested. If Valerino had requested a toxicological screening, he would have had to identify the substances that he was looking for. (R604, 605). The defense learned through the discovery process that the pills Hall claimed he had taken and was looking for in the PRIDE area were Tegretol. (R605, 606). Valerino leaned the following day that Hall had been transferred to Florida State Prison "FSP." (509).

Valerino next saw Hall at arraignment. (R510). Hall did not deny killing Officer Fitzgerald. (R511). Valerino moved to suppress Hall's statements made subsequent to the murder because Hall claimed "he was being beaten by correctional officers and he was afraid." Hall also indicated he wanted to go to the

[10] Hall did not request medical attention for his injuries, either. (R607-08, 634).

county jail because he believed he would not survive the night at TCI. (R511, 512). " … as a result of the beatings by corrections officers - - he made the statements." However, Hall did not make a false confession and never claimed his statements were inaccurate. (R513, 609). Although Valerino felt obligated to move to suppress the statements, in his professional opinion, the statements were important because they revealed Hall's defense to the charges without Hall having to take the stand. Each statement revealed more details as to what had occurred. (R514, 515, 592). Valerino did not believe it was necessary to hire a medical expert regarding his motion to suppress Hall's statements or to testify as to Hall's eye injury. (R516, 610). He did, however, submit a photograph of Hall with the black eye at the suppression hearing. (R517).

Valerino reviewed the video of Hall taken as he was transported from TCI to FSP. In observing Hall's gait, Valerino attributed Hall bouncing against the wall " … to the fact that he was belly-shackled, -- his ankles were chained together, he's trying to walk in shower-type shoes …" He did not observe Hall walking with a limp.[11] (R520).

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[11] On June 26, 2008, Hall was processed through intake at the Volusia County Brach Jail, subsequent to Fitzgerald's murder. Jail nurse John Gordon examined Hall and observed swelling over one of Hall's eyes and a limp. Gordon testified about his observations at the September 9, 2009, suppression hearing. (DAR, V3, R322-23). Prison personnel also testified at the suppression hearing. Officer Weber testified that he did not notice any injury to Hall immediately following Fitzgerald's murder. (DAR, V3, R268, 273). Captain Wiggins testified that upon arriving at the PRIDE scene subsequent to the murder, Hall was already handcuffed and speaking to Officers Weber and McNeil. (DAR, V3, R290). After

At the suppression hearing, Valerino tried to convince the trial court that Hall had been beaten by corrections officers and therefore, his statements were coerced. (R610). The State, however, presented testimony of every corrections officer that had contact with Hall subsequent to the murder, and they all denied every striking Hall. (R549, 597-98). Valerino concluded that he could not successfully disprove the State's argument that Hall sustained the injuries as a result of the confrontation with Fitzgerald. (R550, 597). The defense's position at the suppression hearing was that Hall's statements were not voluntarily given because he feared for his life. (R554, 555). However, the defense's position during the trial was that Hall freely and voluntarily gave the statements after the murder which showed this was not a first degree premeditated murder, but rather, a second-degree murder case. (R553, 594). Due to Hall's statements, it would have been inconsistent with the defense's overall theory to have argued that Hall was in a seizure state at the time he committed the murder. (R593).

Valerino initially planned a challenge for cause for Juror Rapone. (R612). However, after she had been successfully rehabilitated, Valerino believed his cause challenge would be denied so he used a peremptory challenge to strike Rapone. (R615). Juror Roddy indicated he had had read about Hall's case in the newspaper

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finding Fitzgerald's body and returning to the area where Hall was being detained, Wiggins noticed a small bump under Hall's eye. Wiggins also observed that Hall did not have any trouble walking. (DAR, V3, R290, 294-95, 297). After Hall was escorted to the Medical Treatment Center "MTC," Officer Dickerson testified that he observed an eye injury to Hall. He also observed that Hall had no trouble walking. (DAR, V3, 310, 311, 314).

and had also spoken to a corrections officer about the case. However, he also stated that he could fair and impartial. (R617). The defense challenged Juror Roddy for cause but the court denied it. (R557, 617). Valerino did not ask for an extra peremptory because the court had already granted three additional peremptory challenges. As a result, the cause challenge was not preserved when the defense accepted the jury panel. Valerino explained, "We just didn't think we would get any more [challenges]. I was actually surprised we got three additional challenges." (R557). Nonetheless, Hall was involved with jury selection and indicated at trial that he was satisfied with the jury panel. (R600, 616).

Valerino did not present any evidence that it was unusual for Officer Fitzgerald to go and find Hall by herself in the PRIDE area. He explained, " … that would almost be an argument that the jury would think that she deserved what she got by not complying with the rules of the Department of Corrections." By Hall's own statements, he knew Fitzgerald was in the PRIDE area looking for him. (R560, 612-13). Valerino chose not to present evidence of officers' requirement to wear chemical agents and body alarms because it was "not relevant." (R560-61). In addition, he did not want it to appear that Fitzgerald was comparatively negligent because she did not follow procedure. "I would not present that in front of a jury." (R610).

Valerino did not challenge Officer Frederick Evins testimony at trial when he discussed PRIDE procedures for closing the area. " … we did not feel that his testimony was objectionable." (R564, 565).

Valerino did not raise a stress-related issue for Hall during the guilt or penalty phase. The inmates he deposed that worked in PRIDE said that although they were stressed with their respective PRIDE jobs, they did not suffer any repercussions if they did not meet expected deadlines. (R566, 572). Valerino explained, " … because these people who also felt stress, they didn't go and kill Donna Fitzgerald." (R566-67). Hall's assistant on the day of the murder said Hall " … did his job normal that day. There was nothing unusual about him. He wasn't acting weird, nothing out of the ordinary." (R570, 619-20). Valerino did not recall Hall mentioning that he had been experiencing above-average stress at the time he murdered Fitzgerald. (R633, 634).

The defense's theory was that Hall had remained in the PRIDE area in order to find Tegretol pills, an anti-seizure medication, thereby challenging the State's theory of premeditation. (R581-82, 585, 618). However, Hall did not know what the "pills" were that he claimed to have ingested. (R604). Valerino did not consider a voluntary intoxication defense as viable because "if you're so intoxicated, you wouldn't remember what happened 'cause you were so drunk." Hall "remembered everything that happened." (R620-21).

Valerino, Investigator Ryan, and Dr. Krop interviewed Hall's parents and brother in Milton, Florida. Although Hall cooperated in providing additional names for mitigation purposes, he told the defense team not to contact certain people. (R585-86, 587-88, 635-38). Valerino could not recall specific names that Hall did not want contacted but Investigator Ryan took extensive notes regarding potential mitigation witnesses. (R601). The defense "interviewed all witnesses" but chose

not to call two of Hall's former high school coaches—Coach Gracie and Coach Manning. Gracie described Hall as a "ticking time bomb" and Manning said Hall "was trouble all through school." (R601-02, 603, 639, 640). Although he was subpoenaed, Hall's brother Adrian did not show up for the penalty phase and no one knew his whereabouts. (R641). Nonetheless, Hall's childhood "was better … than some others …" The house Hall grew up in was a "pretty nice-looking house." They had horse and rode four-wheelers. (R621-22). There was no mention of infidelity occurring between Hall's parents. (R623). In sum, Valerino, Investigator Ryan, or Dr. Krop went to Hall's hometown of Milton, Florida, and attempted to obtain jail records (including federal prison records), medical records, interviewed family, interviewed high school coaches, and interviewed Hall's former dentist, in an attempt to provide as much mitigation as possible. In addition, PRIDE inmates and PRIDE civilians were also interviewed. (R635-41).

Matthew Phillips

Matthew Phillips, co-counsel for Hall, has been an attorney for 25 years, with 21 of those years as a defense attorney. He has defended over 200 homicide cases. (R667, 678). In 5 of the 23 homicide cases that went to trial, the State was seeking the death penalty. (R679). Most of the homicide cases resulted in pleas, had a conflict of interest, or private counsel was retained. (R680). Phillips attends yearly "Life Over Death" and "Death is Different" seminars. (R750-51).

Phillips had worked on several cases with co-counsel Valerino since 2005. Phillips, Valerino, and Investigator Ryan worked together as a team and strategized

on all aspects for Hall's case. (R752). Hall never requested independent medical treatment as a result of sustaining the eye injury. (R762).

Phillips moved for several continuances close in time to Hall's trial because he was simultaneously working on another first-degree murder case. (R667). However, there was no problem with focusing on mitigation for Hall's case—"We got it all done." (R668, 670).

Since Hall had acknowledged killing Fitzgerald, the strategy was to present evidence that Hall was stressed and had ingested another inmate's medication which cause him to "snap[] or he freaked out." "We were trying to get it to a second-degree murder" and not a pre-meditated or a felony-murder conviction. (R671). As a result, Dr. Buffington was hired to present an opinion on the effects of Tegretol. (R672). A toxicology screening was not requested because counsel were confident that Hall had ingested Inmate Pierce's medication—Tegretol pill containers were found in the crime scene area. (R672). However, without a starting point of determining what drugs Hall might have ingested, the defense could not request a toxicology screening because they did not know what to ask the lab to test for. (R610-11).

The defense gave Dr. Krop, forensic psychologist, copies of Hall's three taped statements/interrogations. Krop was aware of Hall's prior criminal record, medical history, attempted suicide, and he also knew that Officer Fitzgerald was found with her pants pulled down. (R675-77). Krop also interviewed Hall's family in Milton. (R677). Because the family claimed the Halls did not have a dysfunctional family, which Phillips said was "out of the ordinary" for most of the clients he had

represented, the defense “kept looking” for any evidence of mitigation. (R678). Ultimately, Phillips made a strategic decision[12] not to call Krop as a witness during the penalty phase because Krop said “ … he had more bad things to say than good.” (R682). Krop found inconsistencies with Hall’s recollections and information he had provided to various examiners. (R683, 693-94). Phillips, however, was still uncomfortable with not presenting Krop because they were trying to establish some mental health mitigation. (R683). The State’s witness, Dr. Danziger, was going to testify that Hall was malingering during the testing Danziger administered. Since Krop had not administered any similar tests, the defense was concerned the State would be able to “devalue [Krop’s] testimony.”[13] The defense only called Krop as a witness during the *Spencer* hearing. (R695).

Phillips testified that it was Krop’s opinion that Hall suffered from a mild neurocognitive impairment, particularly in the area of memory and executive functions. However, Hall’s goal-directed behavior at the time of the murder made “it difficult to support the opinion that he has a significant cognitive disorder.” (R696). Although Krop found some signs of cognitive disorder which could have presented to a jury as mitigation, Krop also “had all these other negative things … that [Hall] suffered from a sexual disorder.” Putting Krop on the stand would have

[12] Phillips also sought the advice of Capital Appellate Attorney, Christopher Quarles on whether or not to present Krop as a witness at the penalty phase. (R682, 753).

[13] Krop testified at the *Spencer* hearing that he was confident that Hall was truthful with him and he did not see any signs of malingering or deception. (DAR, V5, R665).

required Krop "to elaborate on [Hall's] prior history of sexual violence." (R696). In addition, Krop would have had to reveal the different versions of information that Hall provided to Danziger that he had not revealed to Krop. (R697, 698-99). Krop believed Hall was truthful with him and therefore, he did not administer any malingering tests. (R702). Krop had received all of Hall's prison records, disciplinary reports, family information, and prior history before rendering a diagnosis. (R754). The defense team tried "really hard" to get historical medical records from Escambia County/Santa Rosa County to assist in mitigation. Everything received was given to Krop. (R755). Nonetheless, Phillip made a strategic decision not to call Dr. Krop as a witness in the penalty phase. (R697).

Phillips recalled Krop's testimony at the *Spencer* hearing included information that Hall had been sexually assaulted in the Escambia County jail as well as observations by Hall's family in that his behavior significantly changed and that he made several suicide attempts. (R704, 705). However, Phillips did not want Krop to testify about a disciplinary report "DR" that Hall had previously received in an attempt to support Krop's opinion. "Something like a prior fight in prison might not really be the best thing to bring out about a client." (R706-07). Counsel also made a strategic decision not to call Krop in the penalty phase because the State's witness, Dr. Danziger, "had a great deal of negative information" and counsel attempted to prevent that from happening. (R739-40).

Phillips retained Dr. Tanner, a neurologist, to administer a PET scan, MRI scan, or CT scan, based on Krop's recommendation. (R707-08). Although the results of the PET scan EEG were normal, the MRI indicated asymmetry where

Hall's right brain had more atrophy. Tanner indicated to Phillips that "cognitive deficits may result from such atrophy." (R709, 714). Tanner also indicated that atrophy can be associated with schizophrenia and epilepsy, and further, that 'there could be a biological reason for a lack of control." (R710, 714-15). In addition, the asymmetry could be consistent with schizophrenia, posttraumatic stress disorder, and head traumas. (R716). Phillips used Tanner's information as part of Krop's testimony to develop an overall opinion. (R717-18, 719).

Phillips and Hall discussed Hall's seizure history. Hall indicated he wanted a "pass" on having a medical condition because he wanted to work in PRIDE; therefore, he had not fully disclosed to medical staff or prison personnel that he suffered from seizures. (R723-24). Nonetheless, Hall also claimed he had a seizure a few weeks prior to the murder. (R727). Phillips also recalled Krop testified that Hall had an emotional disorder and the Tegretol medication could have exacerbated the disorder, which was the focus of the defense's mitigation presentation. (R721). Krop's opinions were based "a lot … on what Mr. Hall is telling him." (R727). The defense team called Dr. Buffington, pharmacologist, to testify about Tegretol but Buffington was not permitted to give an opinion whether or not the drug unmasked a psychological disorder. (R730, 733-34). However, the State called Dr. Wade Myer to rebut Buffington's testimony that related to side effects caused by Tegretol. (R731).

Phillips did not seek the "under extreme mental and emotional disturbance" mitigator because "we didn't have the expert testimony to support it" and therefore could not present it during the penalty phase. (R747, 748, 749). "We had made the

strategic decision that Dr. Krop had … more bad things to say than good." (R748, 753). Hall ultimately reported consuming more substances than he initially reported even though the defense team learned that Tegretol is not "an intoxicating substance." (R755, 756). Phillips said that in initially talking to Hall and other inmates, there was nothing said that indicated the work level at the time of the murder had increased to the point of being stressful or caused fear of repercussions for the PRIDE workers. "… it was just business as usual." (R766). Other inmates did not indicate that Hall was acting in an unusual manner up to and including the day of the murder. (R767).

Based on the facts of this case, Phillips was prepared to go to trial from the date of Hall's arrest. Although the defense hoped for a second-degree murder conviction, they "knew it was going to be a trial … We were preparing all along for trial and preparing all along that it would go to a penalty phase." (R768).

Phillips said Dr. Krop described Hall as having "mild cognitive deficits." Therefore, the value of Dr. Tanner's opinion that Hall's brain showed signs of atrophy was limited because Hall's IQ was average. (R769). In addition, Hall worked approximately 80 hours a week as a lead welder in the PRIDE area and supervised other inmates. (R769). Hall's family indicated there were no dysfunctional issues but they did discuss Hall's Escambia County jail-rape claim, and that Hall's behavior changed subsequent to that event. (R770). "The turning point in his life was getting raped there at the Escambia County jail." (R803). Although the defense received some documents from Escambia and Santa Rosa jail facilities, "we were always looking for more." (R771-720). Nonetheless, "in all of

our meetings with him or with his family, really nothing else was ever pointed to." (R770). Phillips could not recall why Hall did not want some of his uncles contacted. (R771, 799). In addition, no one told the defense team about any "big event" in Hall's life that would have led to a PTSD diagnosis. (R781). Hall was a star athlete and won many awards and accolades. (R782). His father was a hard-working many and the family had a "nice piece of land." Hall's mother told "touching stories" about riding horses on their property, and having a dirt bike track. (R782). None of the medical professionals could render a PTSD diagnosis for Hall. (R783).

Phillips spoke at length with Hall about why he killed Officer Fitzgerald. However, "he was even somewhat puzzled why it happened on that particular day, how it happened." (R778). The only thing Hall would say was " … taking those pills [made him] freak out" even though he did not claim he had a seizure and he remembered the events of what happened. (R779, 780).

Counsel met with Hall and told him that Krop had more bad things to say than good. Their strategy was to present Dr. Krop at the *Spencer* hearing rather than the penalty phase. At that point, Hall was leaving decisions like that up to his attorneys. (R815-16). Hall understood the defense's position regarding Krop and did not voice any objection. (R817).

State Witnesses

Agent Steven Miller

Steven Miller, currently an investigator with the State Attorney's Office, was a Special Agent with FDLE for 22 years. (R827). He assisted in the

investigation of Fitzgerald's murder and interview Hall three times. (R828, 829).

Miller noticed Hall had a swollen eye, a bruise on his face, and scratches on his neck. (R830, 847). In between interviews when Hall was escorted through a hallway, Miller twice asked Hall how he had sustained the injuries but Hall "refused to answer." (R831, 845). Miller noted that Hall's legs were shackled so Hall walked with a shuffle. He did not limp or appear to be in any pain. (R831-32, 837). Miller recalled that Hall indicated he was in fear and that he would not make it through the night. (R840). Miller asked Hall why he thought that but Hall refused to go into any detail. Miller reassured Hall that he was in FDLE's custody and would be transported to the county jail. (R841).

Miller testified that Hall claimed he had ingested four valium pills at lunchtime in addition to smoking marijuana at some point during the day. However, Hall did not appear to be intoxicated during the interviews. (R833, 834, 838). Although Miller could have requested toxicology testing, he was not the lead case agent and he also had a supervisor on the scene. In addition, "I wasn't sure what to believe." (R835).

Miller was not aware that Tegretol pills were found in Inmate Prince's work office in the PRIDE area. However, he was assisting in the investigation and reiterated that he was not the case agent in charge. (R839, 843-44). There was nothing that Miller was aware of that indicated Tegretol had anything to do with Fitzgerald's murder. (R843).

Investigator Robert Ryan

Robert Ryan is a board certified criminal defense investigator and

currently works as an investigator for the Seventh Circuit public defender's office. (R849, 851). About 9 of his 11 years of experience with the public defender's office have been in the high crimes division. (R851). He investigated Hall's case and provided Hall's attorneys with whatever they needed. (R849).

Ryan had adequate resources and time to investigate and prepare for Hall's case. (R852). Although Hall was initially reluctant to provide any names for mitigation purposes, he was convinced of the need to do so. Ryan was eventually able to investigate Hall's family background. Hall did not want his half-siblings contacted or some of his uncles. Hall also did not have contact information for his half-siblings. (R854, 864-65, 868, 869, 871). Ryan, along with Mr. Valerino and Dr. Krop, interviewed family members in Milton and Pensacola. (R855-56). The family members they spoke to were very cooperative. (R857). Ryan also tried to get historical documents, jail records, medical records, prior attorney notes, and any records pertaining to the rape Hall claimed occurred in the Escambia County jail. (R858). Ryan, however, was not able to obtain too many records due to elapsed time and records being destroyed. (R859). Ryan did not do any less investigation for Hall's case than a mitigation specialist would have done. (R860-61).

Ryan wanted to maintain a rapport with Hall because after his first interview with Hall, Hall "was not going to open up about mitigation." (R874). If Ryan had done something Hall had specifically requested he not do (i.e., contact uncles), then he would not have learned about Hall's rape and things "that went bad in his childhood." Hall "was very difficult to get things out of that might help him for

mitigation purposes." (R875-76, 877).

During their first meeting, Hall indicated to Ryan and his attorneys that he wanted to plead guilty "and he did not want to through this." (R879). Ryan and the attorneys explained "that's not the way it's going to go. We have an obligation to do all this." (R880).

Dr. Jeffrey Danziger, M.D.

Dr. Jeffrey Danziger, M.D., has been a psychiatrist for almost 30 years. (R886-87). He maintains an active clinical practice, conducts research studies, and also works as a forensic psychologist. He conducts competency and/or sanity evaluations, prepares mitigation reports, and testifies for either the defense or the State in various state and federal courts throughout Florida. (R887-88, 892).

Danziger was hired by the prosecutor to conduct an evaluation on Hall subsequent to the guilt phase. (R892-93). He met with Hall on October 29, 2009. In preparation for his testimony, he reviewed voluminous documents[14] that included criminal records, school records, documents regarding this case, brain imaging studies, witness statements and inmate statements. Ultimately he testified at the *Spencer* hearing. (R892, 893-94, 895).

Danziger reviewed a recent report issued by Dr. Maher. (R896-97). In

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[14] Danziger was aware that an initial IQ test administered by the prison indicated Hall has an IQ of 88-"the dull-average range." Dr. Krop also administered testing which yielded a performance IQ of 95, a verbal IQ of 78, which also is in the dull-average range. (R909-10).

Danziger's opinion, Maher "spent quite a bit of time talking about a seizure disorder." (R897). However, Danziger reviewed three 1994 prison medical reports for Hall that indicated Hall had a negative EEG (brainwave test),[15] was not having seizures, was not taking any medication, and contained a determination that Hall was suffering from pseudoseizures, which are "false seizures, malinger seizures." (R897, 918-19). A normal EEG does not rule out a seizure disorder. (R918).

Hall was not taking seizure medication for the 14 years prior to the murder. (R897-98). In addition, Hall worked as a welder for over a decade. "If you truly have seizures, holding a welding torch is a bad idea." (R897, 919).

In Danziger's opinion, Maher's report also contained information about challenges people meet during different stages of life, "but it had very little to do with [Hall's] mental state at the time of the offense." (R899). Although Maher's report opined that Hall must have been in a disorganized state, was emotionally overwrought, and in an unaware state of mind, "this contradicts - - the depositions of multiple inmates who essentially reported that Mr. Hall's behavior was entirely normal that day, that he was not acting strange or peculiar… it was a completely unremarkable day." (R899, 946). Further, in Danziger's opinion, Hall's behavior subsequent to the murder as follows: hiding the murder weapon, changing clothes, moving the victim's body, cleaning the crime scene area, and pulling the victim's pant down, were inconsistent with Maher's opinion that Hall was out of control or

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[15] The imaging studies were conducted in 2009 at Shands Hospital at the defense's request. (R898).

in a frenzy. (R899-900, 911). Hall's actions were "purposeful and goal-directed." (R943). Hall also told Danziger that he pulled Fitzgerald's pants down as a potential escape plan as opposed to a sexual motive. (R899). However, Hall was serving two life sentences for a sexual battery that occurred in Escambia County, 40 years on a federal charge for a sexual battery that occurred in Alabama, and 12 years on a Santa Rosa County sexual battery charge. In Danziger's opinion, "when I see someone with that life history who pulls pants down, I'm thinking is this a sexual motive. [Hall] said no. He thought about taking the pants down to escape." In Danziger's opinion, either reason was purposeful behavior. (R945).

Danziger said a psychotic disorder builds up over a period of time. "It's not that you are in a sudden frenzy for a minute or two … You don't have a completely normal day, act psychotic for a few minutes when you stab someone 22 times, and then you're back to normal. That is not mental illness." (R900). In addition, in Danziger's opinion, Hall's actions were inconsistent with Hall being in a dissociative state or postictal state because "memory would be impaired" or Hall would have "confused" or "delirious." (R912-13).

Danziger testified that Hall did not tell him that Officer Fitzgerald "laughing at him" caused some kind of frenzy. (R900-01). Further, in Danziger's medical opinion, "being laughed at" would not meet the statutory threshold of extreme emotional distress. (R901, 952-53). Additionally, in Danziger's medical opinion, Hall's mother's unfaithfulness to his father, events that occurred 20 years prior to the murder, did not qualify as a statutory mitigator. (R902). Hall made no mention of a difficult childhood. (R903).

Danziger was aware of Hall's claim that he was raped in jail at age 19. However, there were no documented references to psychiatric treatment between 1994 and 2008; no references to extreme anxiety; no references that Hall was ever in protective custody; and no references to active symptoms of mental illness. (R903). Although Hall was diagnosed with PTSD when he was younger man, the lack of any mention of anxiety, panic attacks, terrible nightmares, or intrusion symptoms in his prison records did not currently associate him with suffering from PTSD. Hall also did not report extreme PTSD symptoms. (R935-36). Nonetheless, PTSD "is not necessarily a lifelong illness." (R939).

Danziger administered the M-Fast test and SIMS test to Hall, testing "tools," to determine whether or not Hall was malingering. (R926, 962). Results indicated Hall "was likely exaggerating and amplifying symptoms, which would raise any self-reported symptoms … into question." (R904, 928, 932-33). There were no prison medical records that indicated Hall ever suffered a seizure in the PRIDE area or was ever found unconscious. (R904).

Hall had four disciplinary reports "DRs" during his 14 years at TCI. If he had an intermittent explosive disorder, in Danziger's opinion, he "would expect to see much more frequent outbursts, agitation" especially in a prison setting. (R905-06). In addition, Hall did not tell Danziger that he was in the midst of a seizure or a blackout during the time of the offense. (909).

Danziger's did not see any signs of cognitive impairment in Hall during his evaluation. (R915). In addition, in Danziger's opinion, very little information could be gleaned from the videos taken of Hall after the murder. Hall appears "quiet. Has

downcast eyes. He's not aggressive, agitated. He's not … incoherent. He's rather quiet, withdrawn, maybe a bit restless…you can't say he's in a dissociative state…psychotic …[or] disorganized." (R916). In Danziger's opinion, Hall's behavior did not meet the requirements of the statutory mental mitigators. (R917, 947, 955). Danziger would expect someone that just killed another to be "a little bit upset … not acting perfectly cheerful at that time." (R947).

In reviewing Dr. Krop's reports, Danziger said Krop did a "reasonable job" on Hall's case. There was nothing to indicate he did an inadequate or poor job. (R943).

Danziger did not see any signs or collaborative signs of schizophrenia in Hall. Hall does not suffer from bipolar disorder, either. (R963). In addition, in Danziger's opinion, there was no evidence in the videos of Hall taken subsequent to the murder indicated a medication side effect. (R964).

SUMMARY OF ARGUMENT

Argument I: The postconviction court was correct in denying relief on this claim because there is no evidence on the record that seated Juror Roddy was actually biased. Hall actively participated during voir dire and accepted the jury panel as seated. Venireperson Rapone could not have been challenged for cause because she had been rehabilitated. Trial counsel made a reasonable decision not to request additional preemptory challenges because they had already been granted three additional preemptory challenges and they would not be granted more.

Argument II: The postconviction court was correct in denying relief on this claim, trial counsel was effective in investigating Hall's case, rebutting the State's theory,

and presenting a defense. Trial counsel made reasonable, strategic decisions.

Argument III: The postconviction court was correct in denying relief on this claim because trial counsel performed effectively in declining to object to CO Frederick Evins's testimony even though he was not listed on the State's witness list because trial counsel was aware of the witness and had previously deposed him. His testimony was relevant because he was a Tomoka Corrections Officer who testified to the procedures of locking down the PRIDE facility.

Argument IV: The postconviction court was correct in denying relief on this claim because trial counsel mounted a reasonable investigation into Hall's background and family history. Hall specifically asked that his uncles and half-siblings not be contacted. Hall's father and mother both discussed their divorce with trial counsel, and Dr. Krop, and testified in the penalty phase and infidelity was never mentioned. The mitigating value of Hall's uncle and father testifying that Hall's deceased mother had cheated on him which led to Hall's resentment toward women is tenuous at best and would not have changed the outcome.

Argument V: The postconviction court was correct in denying relief on this claim because trial counsel made a reasonable, strategic decision not to present Dr. Krop's testimony until the *Spencer* hearing when Dr. Krop had admitted he would have more negative than positive to say.

Argument VI: The postconviction court was correct in denying relief on this claim because trial counsel considered asking for the statutory instruction for extreme emotional or mental disturbance based on Hall's admitted use of an unknown drug, but declined to do so because he had no evidence to support it and

it would have been negated by Hall's actions before and after the murder.

Argument VII: The postconviction court was correct in denying Hall's claim of ineffectiveness in investigating mental health mitigation and preparing Hall's mental health expert. Hall failed to prove this claim because he failed to call Dr. Krop to testify as to what information he had in making in diagnosis and how the information claimed in post-conviction would have changed his opinion, if at all. Moreover, the evidence adduced in post-conviction is clear that Dr. Krop in fact had the evidence Appellant now claims he should have had.

Argument VIII: The postconviction court was correct to summarily deny Hall's claim of cumulative error. Where individual claims are without merit, there is no error to cumulate.

Argument IX: Hall's claim that he may be incompetent for execution presented for preservation is not yet ripe and must be denied.

ARGUMENT

STANDARDS ON CLAIMS OF INEFFECTIVE ASSISTANCE OF COUNSEL

Ineffective assistance of counsel claims are governed by the well-settled *Strickland v. Washington*, 466 U.S. 668 (1984), standard. This Court has described that standard in the following way:

> Claims of ineffective assistance of counsel are reviewed under the two-pronged standard established in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). First, the burden falls on the defendant to identify specific acts or omissions that demonstrate counsel's performance was unreasonable under prevailing professional norms. *Duest v. State*, 12 So. 3d 734, 742 (Fla. 2009). Counsel's errors must be "so serious that counsel was not functioning

> as the 'counsel' guaranteed the Appellant by the Sixth Amendment." *Strickland,* 466 U.S. at 687, 104 S.Ct. 2052. Second, the defendant must prove that the deficient performance resulted in prejudice. *Id*. Thus, the defendant must demonstrate that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id*. at 694, 104 S.Ct. 2052. "Because both prongs of the *Strickland* test present mixed questions of law and fact, this Court employs a mixed standard of review, deferring to the circuit court's factual findings that are supported by competent, substantial evidence, but reviewing the circuit court's legal conclusions *de novo*." *Anderson v. State*, 18 So. 3d 501, 509 (Fla. 2009). In reviewing a claim that counsel's representation was ineffective based on a failure to investigate or present mitigating evidence, the Court requires the defendant to demonstrate that the deficient performance deprived the Appellant of a reliable penalty phase proceeding. *Henry v. State*, 937 So. 2d 563, 569 (Fla. 2006); *see Gaskin v. State*, 737 So. 2d 509, 516 n. 14 (Fla. 1999) ("Prejudice, in the context of penalty phase errors, is shown where, absent the errors, there is a reasonable probability that the balance of aggravating and mitigating circumstances would have been different or the deficiencies substantially impair confidence in the outcome of the proceedings."), *receded from in part on other grounds by Nelson v. State*, 875 So. 2d 579, 582–83 (Fla. 2004).

Hoskins v. State, 75 So. 3d 250 (Fla. 2011).

The *Strickland* Court acknowledged that it is appropriate for a court considering an ineffectiveness claim to dispose of that claim on the prong that is the easiest to decide, and commented that the Court expected that the prejudice inquiry would frequently fall into that category. *Strickland v. Washington*, 466 U.S. at 696. A court considering a claim of ineffective assistance of counsel need not determine whether counsel's performance was deficient when it is clear that any alleged deficiency is not prejudicial. *See Van Poyck v. State*, 694 So. 2d 686 (1997). Appellate courts do not "reweigh the evidence or second-guess the circuit

court's findings as to the credibility of witnesses." *Nixon v. State*, 2 So. 3d 137, 141 (Fla. 2009) (quoting *Brown v. State*, 959 So. 2d 146, 149 (Fla. 2007)).

Appellant bears the burden of establishing both prongs of the *Strickland* test before a criminal conviction will be vacated. *Schofield v. State*, 681 So. 2d 736, 737 (Fla. 1996). First, there is a strong presumption that counsel's performance was not ineffective. *Strickland*, 104 S.Ct. 2052 ("Judicial scrutiny of counsel's performance must be highly deferential."). Second, "[a] fair assessment of attorney performance 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." *Id*. Third, the Appellant must "overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" *Id*. (quoting *Michel v. Louisiana*, 76 S.Ct. 158 (1955)). Specifically, "strategic decisions do not constitute ineffective assistance of counsel if alternative courses have been considered and rejected and counsel's decision was reasonable under the norms of professional conduct." *Occhicone v. State*, 768 So. 2d 1037, 1048 (Fla. 2000).

ARGUMENT ISSUE I: TRIAL COUNSEL RENDERED EFFECTIVE RESPRESENTATION DURING VOIR DIRE BECAUSE VENIREPERSON RAPONE COULD NOT HAVE BEEN CHALLANGED FOR CAUSE. (IB 14-16, RESTATED)

In his first claim, Appellant asserts that he is entitled to a new trial because trial counsel was deficient in his decision to remove venireperson Rapone from the jury panel using a preemptory strike as opposed to a challenge for cause. Appellant argues that had venireperson Rapone been challenged for cause, the defense's last

preemptory strike could have been used against Juror Roddy. The second part of Appellant's claim is that counsel was ineffective for failing to request an additional peremptory challenge. Appellant asserts, "[t]rial counsel was ineffective for failing to challenge juror, Rapone, [sic] for cause, wasting a much need [sic] peremptory challenge that would have been used against Roddy. Furthermore, counsel was ineffective for failing to request an additional peremptory to be used against Roddy." (*IB* at 15).

Primarily, Hall did not make the argument below that counsel was deficient for failing to request more preemptory challenges. (*See* R1198-1201). Therefore, that argument is procedurally barred here. Appellant cannot present an argument for the first time to this appellate Court. *Trushin v. State*, 425 So. 2d 1126, 1130 (Fla. 1982).

In denying the claim properly raised below, the postconviction court found as follows:

> *Carratelli* sets out the standard that courts should apply in deciding whether a trial counsel's failure to preserve a challenge to a potential juror constitutes ineffective assistance of counsel. In order to demonstrate prejudice "[f]rom a practical standpoint, a jury selection error justifying postconviction relief is so fundamental and glaring that it should have alerted a trial judge to intervene, even in the absence of a proper objection, to prevent an actually biased juror from serving on the jury, thereby irrevocably tainting the trial. Where reasonable people could disagree about a juror's fitness to serve, the showing of prejudice required for postconviction relief is lacking". *Carratelli v. State,* 961 So. 2d 312, 323-324 (Fla. 2007) citing the District Court ruling.
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> Like many of the prospective jurors Ms. Rapone had some media exposure to the case. She initially said she had already formed an

opinion that Mr. Hall was guilty. During the voir dire, after questions posed by the attorneys, the court questioned Ms. Rapone. Ms. Rapone stated she had made no opinion as to a possible penalty and that she would be able to set aside her opinion as to Mr. Hall's guilt, and keep an open mind for the purpose of this case. Further, that she would listen to the evidence and the law the court provides, to discuss the case with fellow jurors in deliberation, and after hearing the argument of counsel return a fair verdict. Trial Transcript (TT), Vol. IV, page 503. Due to the prospective juror's response to the questions set forth by the judge there is no showing a cause challenge would have been appropriate. At the evidentiary hearing Mr. Valerino acknowledged Ms. Rapone had been rehabilitated; she said she could put aside any prior knowledge of the incident. EH, Vol. IV, page 465.

At the end of the day the court inquired of Mr. Hall: "Have you had a full opportunity to speak with your attorneys, Mr. Phillips and Mr. Valerino, about the case, and have they answered all your questions as we progressed today?" Mr. Hall advised that he had, and that he was satisfied with their representation that day. TT, Vol. IV, page 653. At the evidentiary hearing Mr. Valerino testified that Mr. Phillips, Mr. Hall and he were all involved in the selection of the panel. EH, Vol. IV, 465-466.[1] No showing of deficiency or prejudice has been made.

> [FN 1] Ms. Rapone was later struck from the jury via preemptory challenge.

Prospective Juror Roddy testified he had some media exposure and had a couple of conversations with a correctional officer who works full-time at TCI. TT, Vol. VII, page 1042. The Correctional Officer was a part-time instructor at Daytona State College where Mr. Roddy was a professor, and supervised the Officer. Mr. Roddy described the conversation with the correctional officer as follows: "He didn't tell me anything other than what I had already saw in the newspaper at that time". TT, Vol. VIII, 1328 – 1332. When questioned by State Attorney Larizza Mr. Roddy said he could put aside personal opinions and follow the law. TT, Vol. VIII, pages 1178-1180. He stated there would be no conflict -that he wouldn't feel like he had to reach a guilty verdict or a death recommendation because he knew

> and worked with a correctional officer. And that he had formed no opinion until he heard the evidence. TT, Vol. VIII, pages 1332 – 1336. When questioned by Trial Counsel Phillips Mr. Roddy made clear his willingness "to weigh all the facts, both pro and con, for and against, and render a decision based on that", as well as to consider all mitigating circumstances presented. TT, Vol. VIII, pages 1264-1265.
>
> Trial counsel made a cause challenge to remove Mr. Roddy. After argument the court denied the challenge for cause stating "I saw Mr. Roddy. He did affirm that he could be fair and disregard any relationship. I didn't detect in Mr. Roddy any possible bias." TT, Vol. XII, pages 1941-1945. As stated by the Florida Supreme Court, "the trial court is in the best position to observe the attitude and demeanor of the juror and to gauge the quality of the juror's responses". *Dufour v. State,* 905 So.2d 42, 54 (Fla. 2005); *lbarrondo v. State,* 1 So. 3d 226, 230 (Fla. 2008).
>
> Counsel had exhausted their preemptory challenges and did not seek an additional one for Mr. Roddy. This was the sixth day of voir dire, counsel had already sought and received three additional challenges, one of which the state objected to and the court denied, but later granted. TT, Vol. XII, pages 1927 – 1938. At the evidentiary hearing counsel testified he felt tactically it was not to their advantage to seek another challenge. EH, Vol. IV, page 407. The court ruled against the cause challenge stating Mr. Roddy "was a very forthright individual" and that no bias had been detected. TT, Vol. XII, pages 1944-1945. "Where reasonable people could disagree about a juror's fitness to serve, the showing of prejudice required for postconviction relief is lacking." *Carratelli* at 324. Claim I is without merit.

(R2259-62).

The postconviction court was correct to deny this claim. [When a defendant] alleges [in post-conviction] that trial counsel was ineffective for failing to raise or preserve a cause challenge, the defendant must demonstrate that a juror was *actually* biased. *Carratelli v. State*, 961 So. 2d 312, 324 (Fla. 2007). When applying *Strickland* to this issue through *Carratelli*, this Court need not even

determine whether counsel was deficient. For this issue, the Court can go straight to the prejudice analysis. No matter the justification for challenging Juror Rapone for cause, no matter whether counsel's performance was deficient, if Hall cannot demonstrate that Juror Roddy had actual bias against Hall, the claim fails.

The question is not whether Juror Roddy might have been biased, but whether Juror Roddy was in fact a juror with actual bias and that actual bias is patent on the record from voir dire. *Carratelli*, 961 So. 2d at 324. "Under the actual bias standard, the defendant must demonstrate that the juror in question was not impartial…that the juror was biased against the defendant, and the evidence of bias must be plain on the face of the record. *Id.*

Here, the record is devoid of any evidence of actual bias against Hall on the part of Juror Roddy. In fact, in denying the challenge for cause, the trial court reasoned, "I didn't detect in Mr. Roddy any possible bias." (V12, R1941-1945). The trial court is in the "best position to observe the attitude and demeanor of the juror and to gauge the quality of the juror's responses". *Dufour v. State*, 905 So. 2d 42, 54 (Fla. 2005). During trial, Hall was actively engaged in selecting and excluding jurors, and trial counsel allowed Hall the ultimate say in which jurors he wanted to serve. (R616). In addition, the trial court asked Hall if he was satisfied with the jury panel as selected and Hall accepted the panel. (DAR, V23, R1951-52; R599-600).

Trial counsel moved to strike Roddy for cause, the Court denied the challenge, and Roddy sat as a juror. About a year prior to the trial, Roddy had seen a newspaper article that was specifically about the victim in this case—Roddy

initially stated her name was Kennedy, then corrected himself—but there was no indication that the article mentioned Hall or any substantive facts about the murder at all. The extent—or aggregate, as it was described—of Roddy's memory about the article was that:

> [I]t was at Tomoka and at the end of the workday the work detail was gathering to leave the work area to go back to the main section -- I'm not sure what the names are -- the corrections officer took a head count, saw that someone was missing that should have been there, went looking for the individual and -- I don't really recall how it ended up that either she did not return or how -- what transpired after that. I don't really remember the exact content or the specifics. That -- I would think that it had stated they had arrested an inmate. That's my best recollection.

Roddy explained that there was an instructor who works part-time at Daytona State and full-time as a correctional officer ("CO") at TCI. The instructor/CO provided no other information than what Roddy had read in the article about the victim. The instructor/CO Roddy knew was not on the witness list and did not testify at Hall's trial. Roddy affirmed that he felt no conflict with knowing a CO from TCI; he felt no obligation to find one way or the other. Roddy affirmed that he had not formed an opinion either way about Hall's guilt or innocence, nor what penalty Hall should receive. He also affirmed that anything he had heard in the media—to the extent that he could remember anything—would have no effect on his determination and that he would make a decision based on the evidence and the court's instructions. (DAR, V19, R1328-36). The defense moved to strike Juror Roddy for cause, stating, "I don't know quite how to call it [the relationship between Roddy and the instructor/CO from TCI]….It just could

create and unfair situation….I'm not quite sure how you would describe it….it just seems awful close." (DAR, V23, R1941-42). After hearing a response from the State, the trial court denied the challenge for cause and Juror Roddy sat on Hall's jury. (DAR, V23, R1944-45).

Roddy's voir dire reads like the facts in *Carratelli* itself. The juror in question in *Carratelli* had been exposed to some limited media coverage about the crime[16] on the television news, overheard a discussion about the case at a barbershop, and read an article in the newspaper recent to showing up for the trial. 961 So. 2d at 326. The news coverage and the conversation he overheard at the barbershop had even mentioned facts about a possible defense that Carratelli had suffered a medical ailment as a result of his diabetes and was actually unconscious at the time he went through the red light. *Id*. at 325-26. The juror in *Carratelli* stated that he did not have an opinion about Carattelli's guilt, that he did not know anything about diabetes, but stated that he thought, "there should have been some kind of forewarning [of the reaction]," "because of when you get sick you have some kind of forewarning." 961 So. 2d at 326. Carratelli's defense attorney asked, "But it would certainly be more difficult for Mr. Carratelli to convince you of his innocence now than if you had not read the article had not been involved in that discussion," to which the juror responded, "I believe that's a fair statement." *Id*.

[16] Carratelli was charged with a vehicular homicide for speeding through a red light and crashing into another car killing six passengers. *Carratelli*, 961 So. 2d at 325.

The trial court in *Carratelli* then asked, "Would you be able to set aside any input you had, bias or prejudice, and sit here and assure us all that you can be a fair and impartial juror?" the juror responded, "If I come in here as a juror, I will sit down with an open slate and listen to what is said and make up my mind from there." *Id*. at 326-27. After evaluating those facts in *Carratelli*, this Court found that the juror in question did not have actual bias and the claim failed.

Similarly, Juror Roddy had read some articles that were about the victim in this case but could not remember any facts or details and knew nothing but vague generalities about the case. Based on the record, the articles barely mentioned Hall. Juror Roddy worked as a professor at a state college and knew a CO from TCI who was a part-time instructor at the college. Roddy had a generic conversation with the instructor/CO but learned nothing substantive about the case and did not form an opinion about Hall's guilt or the appropriate punishment. The record does not show whether or not the instructor/CO communicated anything about the victim or Hall to Roddy. In fact, the record does not show whether the instructor/CO even knew the victim or Hall. There was no evidence that the instructor/CO worked at PRIDE or knew anything about the facility such that he could have communicated with Roddy about it. The record shows at best that the instructor/CO (nameless throughout the transcript) was an acquaintance with whom Roddy would have an occasional conversation or exchange pleasantries in the work-place.

Hall draws a comparison between Juror Roddy and venireperson Henderson. Henderson was removed for-cause on the State's motion due to his familiarity with the case and the parties involved. Hall implies that Roddy should have been

removed under the same basis as Henderson. In contrast, venireperson Lawrence Henderson, was a self-described "passionate" capital defense attorney with twenty-seven years of experience who had previously represented capital murder defendants in the same circuit as Hall's trial. In fact, Henderson had represented a capital defendant in the exact same courtroom in which Hall's trial took place with one of Hall's current defense attorneys as his co-counsel. At the time of the trial, Henderson was working in the neighboring circuit exclusively representing capital defendants. Henderson personally knew the lead prosecutor and had tried cases against her many times. Henderson was married to a mitigation specialist from the Public Defender's office of the neighboring circuit where he worked. Henderson knew several witnesses who were going to testify for the state and the defense, including three mental health experts that Henderson had used in his cases in the past. Henderson had familiarity with the PRIDE facility and had even heard that Hall should not have been working there. Henderson knew that Hall was serving a life sentence for rape at the time of the murder. Henderson's personal familiarity with the attorneys in this case, the witnesses in this case, and the subject matter of this case in the very courtroom in which it was being tried all rendered him unqualified to be a juror in this case. In sum, if Henderson is the barometer Hall uses to measure whether a juror exhibits actual bias, then Roddy does not come close. Hall cannot meet the *Carratelli* standard and demonstrate Juror Roddy is actually biased on the face of the record. This claim was properly denied.

To establish prejudice, Appellant must demonstrate that because of counsel's deficient performance, he was deprived of a fair trial with a reliable result. *Bradley*

v. State/McNeil, 33 So. 3d at 672 (citing *Strickland*, 466 U.S. at 689). Mere speculation that counsel's error affected the outcome of the proceeding is insufficient. *Id*. at 693. Appellant asserts that prejudice is proven because Hall was convicted of First-Degree Murder rather than Second-Degree Murder. To prove the prejudice prong of *Strickland*, Hall must demonstrate that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland* at 694. There is absolutely no reasonable probability to believe that had unbiased Juror Roddy not been a member of the deliberating jury that Hall would have been acquitted, convicted of a lesser offense, or been sentenced to life.

To the extent it is relevant in light of the *Carratelli* standard, venireperson Rapone could not have been challenged for cause. When she was questioned, she indicated that she was exposed to news media coverage about the murders in this case. Specifically, Rapone knew that Hall was a prisoner serving a life sentence for rape and that he was alleged to have murdered a female guard. Rapone stated that she had discussed the case with other people and formed an opinion about Hall's guilt. She stated in voir dire that she believed that Hall was guilty. She had not, however, formed an opinion as to whether Hall should receive the death penalty. During rehabilitative questions, Rapone agreed that she could listen to and consider all of the evidence and follow the court's instructions on the law. (DAR, V15, R499-504). Trial counsel Valerino testified that based on the trial court's questioning, Rapone "had been rehabilitated for a cause challenge." (R615). Later,

the defense used a peremptory strike on Rapone. (DAR, V23, R1911; V1, R615). Any attempt to challenge venireperson Rapone for cause would have been unsuccessful and Juror Roddy would have still been on the jury. Any further requests for additional preemptory challenges would have been denied after already having received three additional preemptory challenges. (R407). The postconviction court correctly denied this claim.

ARGUMENT ISSUE II: TRIAL COUNSEL WAS EFFECTIVE IN THE GUILT PHASE IN INVESTIGATING HALL'S CASE AND ADEQUATELY CHALLENGED THE STATE'S CASE. TRIAL COUNSEL MADE REASONABLE, STRATEGIC DECISIONS IN DEFENDING HALL. (*IB* 17-56, RESTATED)

Appellant divides his second argument issue into several subparts. Each sub-claim will be discussed in turn below. The postconviction court was correct to deny this claim.

A. Overtime and Stress at Work.

In denying this sub-claim, the postconviction court found as follows:

> Trial Counsel had four inmates who worked at PRIDE with Mr. Hall transported to testify at trial on Mr. Hall's behalf: Jeffrey Jones, Rodney Callahan, Charles Washington and Calvin Thomas. TT, Vol. XXI, page 3218. Mr. Jones, Mr. Callahan and Mr. Washington testified at the penalty phase, primarily as to Mr. Hall's work skill and sport activities. Mr. Thomas refused to testify. EH, Vol. IV, pages 494-495. On cross-examination of Mr. Jones, who was also Mr. Hall's roommate, Jones acknowledged that Mr. Hall never expressed to him that he was stressed out or overworked at PRIDE. TT, Vol. XXIII, pages 3360 -3361.
>
> At the postconviction evidentiary hearing Rodney Callahan, an inmate who worked with Mr. Hall, testified that they were always under stress: projects behind; being pushed by supervisors and other

inmates; friction between departments, etc. EH, Vol. III, pages 277, 279 -282. Walter Schell also worked at PRIDE and also testified it was normally a stressful place and at the time of the murder it was a particularly stressful time because Miami wanted to move a deadline up from the end to the beginning of July. EH, Vol. IV, pages 501-502.

Mr. Callahan also testified they valued their jobs very highly and took a lot of pride in their work. EH, Vol. III, page 309. Sports and chapel were all Mr. Hall had besides work. EH, Vol. III, page 310. Part of Mr. Callahan's daily contact with Mr. Hall involved work load and if Mr. Hall needed assistance. Mr. Callahan testified that if Hall informed him that he needed extra help Callahan would weld or fabricate to kind of "speed the process along". EH, Vol. III, pages 276-277. There was no testimony that Mr. Hall sought assistance from additional workers around the time of the murder.

Clearly PRIDE workers were usually under stress, but they loved their jobs and stayed with PRIDE for many years. Mr. Callahan worked for PRIDE for 22 years; Mr. Hall for 15 years. Overall, it seems Mr. Hall, and the other workers at PRIDE, felt fortunate to have their jobs. They had the best pay, best perks and high status within the institution.

Trial Counsel Valerino testified at the evidentiary hearing that a decision was made not to bring up stress. Stress was not part of their defense. EH, Vol. III, pages 346 - 347. Attorney Valerino also noted that Mr. Hall spoke highly of the PRIDE program; the focus was not on stress. All the PRIDE workers deposed said they were all under stress. Counsel chose not to bring stress up because it would give the state the opportunity to say if all the PRIDE workers were under stress then it would be no excuse for Mr. Hall's behavior. EH, Vol. IV, pages 416 - 419, 423. Attorney Valerino also noted that the PRIDE workers said Mr. Hall was acting normally all day, the day of the murder. EH, Vol. IV, pages 419 -420; see also EH, Vol. VI, 749.

The attorneys and/or their investigator did talk to inmates and supervisors at PRIDE. One inmate[2] who worked at PRIDE, was under subpoena and transported. On October 28, 2009, in a holding cell at the courthouse, Calvin Thomas said he would not testify; he was upset

about the case. He did not want to help Hall; Thomas felt bad about CO Fitzgerald. Mr. Thomas wanted to talk to the state. EH, Vol. IV, pages 494 -495.

[FN2] Three other inmates did testify. (R2262-64).

The postconviction court was correct. This Court has consistently held that a trial counsel's decision to not call certain witnesses to testify at trial can be reasonable trial strategy. *Everett v. State*, 54 So. 3d 464, 474 (Fla. 2010), *as revised on denial of reh'g* (Feb. 10, 2011) (citing *Bowles v. State,* 979 So. 2d 182, 188 (Fla. 2008) (holding that counsel's failure to call clinical psychologist to provide emotional disturbance mitigation was reasonable trial strategy); *Arbelaez v. State,* 898 So. 2d 25, 39 (Fla. 2005) (holding that trial counsel's failure to call defendant's family members as witnesses during penalty phase was reasonable trial strategy and not ineffective assistance of counsel)).

Here, trial counsels were well-aware of the other PRIDE workers, had deposed and transported four of them to testify. Rodney Callahan, an inmate who worked with Hall, testified in the trial and also in postconviction. At the evidentiary hearing he testified that PRIDE workers were always under stress. (R279-80). Callahan also testified that PRIDE was a highly coveted job and one that inmates could quit at any time. (R462). Callahan testified that he was available to assist Hall if Hall needed extra help. (R427). However, there was no evidence that Hall asked anyone for assistance around the time of the murder. In the penalty phase, inmate Jones acknowledged that Hall never expressed to him that he was stressed out or overworked at PRIDE. (DAR, V23, R3360-61).

Trial counsel’s made a reasonable strategic decision not to bring up stress as

a defense because all the PRIDE workers were under stress, and yet they loved their jobs and no one indicated Hall was acting differently or particularly stressed the day he murdered CO Fitzgerald. (R569; 899). Trial counsel Valerino also testified that it was not a good idea to call inmate witnesses to testify because their theory was that the pills had unmasked a psychological condition and it would not have been helpful to have witnesses testify that Hall was acting normally directly before he murdered CO Fitzgerald. (R570). Trial counsel Valerino testified at the evidentiary hearing that stress was not a part of the defense. (R496-97). Trial counsels chose not to bring stress up because all of the inmates felt stress, but they had not murdered CO Fitzgerald. Trial counsel Valerino was concerned that arguing stress would give the state the opportunity to say if all the PRIDE workers were under stress then it would be no excuse for Hall's behavior. (R566-67). Moreover, there were no repercussions and no one was taken off PRIDE if a deadline was missed. (R567).

Hall failed to establish that he was particularly overworked or stressed at his PRIDE job, and even if he had been, trial counsel made a reasonable, strategic decision not to put on a "stress" defense. There was nothing new or particularly mitigating testified to in postconviction and this subclaim should be denied.

B. PRIDE procedures

In denying this sub-claim, the postconviction court found as follows:

> Attorney Valerino testified that they made a strategic decision not to get into these procedures; it would look like they were blaming the victim for her own murder. He did not think that would sit well with the jury. EH, Vol. IV, page 410. The attorneys thought a better

> strategy was to remain consistent with Mr. Hall's own statements: he was looking for drugs and she surprised him, and he just snapped. Attorney Valerino stated "[t]he theory of defense was that Mr. Hall had taken some white pills, that he freaked out, that he, as a result of that, killed Donna Fitzgerald". EH, Vol. III, page 346. Mr. Hall had consistently said he stayed behind looking for drugs and that he had snapped. (R2264).

The postconviction court was correct to deny this subclaim. Strategic decisions do not constitute ineffective assistance of counsel if alternative courses have been considered and rejected and counsel's decision was reasonable under the norms of professional conduct. *Occhicone v. State*, 768 So. 2d 1037, 1048 (Fla. 2000) (citing *Rutherford*, 727 So.2d at 223; *State v. Bolender*, 503 So.2d 1247, 1250 (Fla.1987). Here, trial counsel Valerino did not want to present an argument to the jury that because CO Fitzgerald did not follow proper procedures she "deserved what she got" which is certainly reasonable given the facts of this case. (R410).

C. Access to Scrap Metal and Grinders

In denying this sub-claim, the postconviction court found as follows:

> At the trial Captain Shannon Wiggins testified as to the numerous amounts of sheet metal located at the PRIDE facility along with machines for cutting and sharpening located in the welding shed. TT, Vol. XIII, pages 2094 - 2095, 2098. Captain Wiggins also testified that there is a difference in the kind of weapons in a prison that has a PRIDE facility, versus one that does not. He explained "We have, to coin a term, we have PRIDE-made shanks ... they have the tools in the metal shop to sharpen them, to have the knives brazed, mechanically-sharpened edge." TT, Vol. XIII, pages 2129 -2130. There were 50 to 70 workers at the PRIDE facility, and sometimes numerous welders were in the welding area. TT, Vol. XIII, pages 2142 -2143. The issue of who had access to scrap metal and grinders was covered at trial. There is no prejudicial effect on the outcome of the trial. This sub-

> claim is summarily denied.
>
> Sub-claims A through C involve an alleged failure to present evidence and/or witnesses that Mr. Hall claims would have explained his state of mind - over worked and stressed; PRIDE procedures at closing time which would refute the state's theory that he had a sexual motivation; and that any number of persons could have made the shank. Arguably the issues raised in sub- claims A - C would have demonstrated the state's theory of the case was wrong. That the murder had been was unplanned and occurred in a frenzy. Clearly that information was presented to the jury, whether by the state or defense; the jury did not find it compelling.
>
> There was no evidence presented that counsel was deficient. What was shown was that trial counsel went forward with a theory of the case consistent with Mr. Hall's statements; that he was looking for drugs, snapped when discovered by the victim, and killed her. As described above, counsel made decisions based on that trial strategy. "Counsel cannot be deemed ineffective merely because current counsel disagrees with trial counsel's strategic decisions." *Occhicone v. State* , 768 So. 2d I 037, 1048 (Fla. 2000) referencing *Strickland*, 466 U.S. at 689. (R2264-65).

The postconviction court was correct to deny this subclaim. Again, strategic decisions do not constitute ineffective assistance of counsel if alternative courses have been considered and rejected and counsel's decision was reasonable under the norms of professional conduct. *Occhicone v. State*, 768 So. 2d at 1048 (citing *Rutherford*, 727 So. 2d at 223; *State v. Bolender*, 503 So. 2d at 1250. Here, not only was the availability of prison-made shanks to various inmates covered in trial, trial counsel Phillips was well-aware of this fact, having had a prior 1995 "shanking" case from PRIDE. (R618-19). Given the fact Hall had never denied the fact he was the murderer, it is certainly reasonable that trial counsel would not have pursued this line of defense. Moreover, Appellant's argument that it would

have negated a theory of planning was already well-covered at trial, as defense's theory was not that he planned to murder CO Fitzgerald, but that he snapped.

D. Toxicology

The postconviction court properly denied this subclaim as follows:

> Mr. Hall argues this is relevant because his statements all mentioned that he had taken drugs earlier in the day, and was late because he was attempting to find more. The presence of drugs in his system would support Mr. Hall's explanation for staying behind. Attorney Valerino testified he didn't order a toxicology screen because he did not know what drug to test for. All Mr. Hall told him was he took little white pills. EH, Vol. IV, pages 453-455. This is consistent with Attorney Matt Phillip's testimony that they had no starting point, they wouldn't know what to ask lab to test for. EH, Vol. V, page 521- 522. Special Agent Steven Miller, at that time a Florida Department of Law Enforcement (FDLE) Investigator,[3] was also involved in the investigation of Officer Fitzgerald's murder; he arrived at TCI several hours after the crime occurred. At the evidentiary hearing he testified that: he was present for the three interviews of Mr. Hall; he had the authority or probable cause to order Mr. Hall submit to a urinalysis for drugs; and he did not do so because he did not feel it was necessary. EH, Vol. VI, page 685. During discovery trial counsel found out another PRIDE inmate had a prescription for Tegretol; that is when they hired Dr. Buffington, a pharmacologist. EH, Vol. V, page 523. Counsel cannot be considered deficient for failing to do something they could not do. As soon as they received information on the drug that might possibly been ingested by Mr. Hall they took steps to find out the possible ramifications of consuming that drug.
>
> > [FN3] Steven Miller is currently employed as an investigator with the state attorney's office, assigned to the homicide unit. (R2265-66).

The postconviction court properly denied this claim. Trial counsel was not deficient for failing to order a toxicological screen for substances in Hall's blood because Hall had no idea what he had taken, and trial counsel would have had to

know what to ask the independent lab to search for. (R604-05; 610-11). Hall had no idea what he had taken, just that it was a round, white pill. It was not until discovery was provided some time later that showed a blister pack of Tegretol in Prince's office that the theory was developed that Hall had taken Tegretol. (R611). By that time, toxicological screens would have been of minimal to no value. FDLE Agent Miller saw Hall directly after the murder and he observed no signs of impairment. (R833, 834, 838).

To the extent Hall adds a sub-subclaim to his argument in failing to "challenge the DOC's motive for also failing to [order a blood and urine sample]" that claim was not argued below and cannot be presented for the first time here.[17]

E. Dr. Buffington

In this subclaim, Appellant argues, "Defense counsel was ineffective, because they made the wrong argument for why Dr. Buffington's testimony was relevant," and "[i]t was incompetent to offer Dr. Buffington's testimony to argue a diminished capacity defense, which defense counsel admits knowing was not legally permissible, because they could not establish insanity." (*IB* at 38). These claims were not argued below and cannot be presented for the first time here.[18]

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[17] Appellant framed their argument below as, "Counsel did not request the court to order the Department of Corrections to draw blood and obtain a urine sample from Mr. Hall, so that the Defense could perform drug tests, nor did the Defense argue that the Department of Corrections failed to test Mr. Hall's urine, as well."

[18] Appellant framed their argument below as, "During proffer of neuropharmacologist, Daniel Buffington, defense counsel failed to offer the doctor

What was preserved below is the argument that trial counsel was deficient for failing to have Dr. Buffington describe the side effects and withdrawal symptoms of Tegretol. Moreover, the underlying claim goes to the admissibility of Buffington's testimony. Claims that could have been raised on direct appeal cannot be relitigated under the guise of ineffective assistance of counsel. *Freeman*, 761 So. 2d at 1067.

In any event, the postconviction court properly denied this claim as follows:

> Dr. Buffington's testimony was initially proffered outside the presence of the jury. TT, Vol. XXI, pages 3136 - 3159. Trial counsel submitted that the evidence was relevant to the issue of premeditation, but not mental health. This was to avoid the possibility of the state bringing in mental health experts in rebuttal. TT, Vol. XXI, pages 3143 - 3145, 3149. Trial counsel proffered the doctor would only be addressing what Tegretol is, the potential dose and potential side effects, but not about any type of mental health diagnosis, and the same information as to ibuprofen. Dr. Buffington testified that he was asked by counsel to review ibuprofen and Tegretol with regard to their potential to impact an individual's behavior or appearance. He had information from multiple sources that Mr. Hall had taken between four and seven tablets. He opined that Tegretol has the capacity to alter an individual's behavior. TT, Vol. XXI, page 3138. Dr. Buffington then testified before the jury as to those medications and possible side effects. TT, Vol. XXI, pages 3198 - 3213.
>
> Trial counsel made a strategic decision to limit their questioning of Dr. Buffington to avoid the admission of damaging testimony on rebuttal. Counsel's attempt to prevent rebuttal evidence was

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to explain the side effects of Tegretol and the withdrawal symptoms of Tegretol to enable the jury to understand Mr. Hall's motivation for searching for more of these pills after work."

> reasonable in light of Mr. Hall's history of sexually violent acts and resultant diagnoses of paraphilia, inter alia. "Reasonable strategic decisions of trial counsel should not be second-guessed by a reviewing court." Jones v. State, 845 So. 2d 55, 65 (Fla. 2003) referencing Strickland, 466 U.S. at 689-91. (R2266-67).

The postconviction court was correct to deny this subclaim. Again, strategic decisions do not constitute ineffective assistance of counsel if alternative courses have been considered and rejected and counsel's decision was reasonable under the norms of professional conduct. *Occhicone v. State*, 768 So. 2d at 1048 (citing *Rutherford*, 727 So. 2d at 223; *State v. Bolender*, 503 So. 2d at 1250. Here, trial counsel did exactly what postconviction counsel alleges should have been done.

Trial counsel proffered the testimony of a pharmacist (Dr. Buffington) in order to discuss the side effects of Tegretol and Ibuprofen. The trial court excluded the proffered testimony from the jury. The record patently demonstrates that trial counsel tried to present expert testimony about the effects of Tegretol which is exactly what Appellant now claims trial counsel was deficient for failing to do. (R741-42).

F. Medical Exam

> The postconviction court denied this subclaim in the following way:
>
> All of the credible evidence presented at the evidentiary hearing refutes any need for an independent medical exam of Mr. Hall following his arrest almost immediately after the murder. Nor was there anything apparent from the pictures and videos[4] made contemporaneous with the arrest, interviews and transport of Mr. Hall which would suggest Mr. Hall needed medical attention. It was clear

that he sustained a black eye and several marks or scratches. He did not ask for medical attention and he refused any offers for medical treatment.

> [FN 4] Exhibits from evidentiary hearing: Defendant's Ex. 1, 2 and 3.

Lieutenant Farrow testified at the evidentiary hearing stating the only injury he noted was a black eye. If Hall needed medical attention he would have requested it; he made no request for medical attention. EH, Vol. I, pages 30. Florida Department of Law Enforcement Special Agent Stephen Miller arrived at TCI approximately two hours after the murder. He conducted the three interviews of Mr. Hall. He noticed Mr. Hall's swollen eye, a scratch on his neck and a bump on his head. He also noted that Mr. Hall was shuffling from the shackles but he observed no limp or apparent pain. Agent Miller asked Mr. Hall if someone had hit him. He waited until he was alone with Mr. Hall and again inquired several times. Mr. Hall did not respond. EH, Vol. VI, pages 678 - 682. John Joiner, an investigator for the Office of the Inspector General testified that he observed an injury to Mr. Hall's eye and asked him if he was okay; Hall indicated he was. EH, Vol. I, pages 57 - 58.

Attorney Valerino testified that he did not feel a medical expert was needed to explain a black eye. EH, Vol. IV, page 458. Attorney Valerino testified that Mr. Hall never asked for medical attention. He also testified that the DOC records and Volusia County jail records indicated Mr. Hall never asked for medical attention; when asked if he had any other problems besides the black eye Mr. Hall said he did not. EH, Vol. IV, page 457. Attorney Valerino was present with Mr. Hall for first appearance; he did not appear to be limping. EH, Vol. III, page 357. He also stated he did not use the picture of Mr. Hall's back (Defendant's Exhibit 3) because it did not show any injury. EH, Vol. III, page 368. The attorneys were sensitive to Hall's needs. When Mr. Hall mentioned he was having trouble reading they arranged for him to see an optometrist to get glasses. EH, Vol. IV, page 458.

The issue of whether or not Mr. Hall suffered physical harm from the TCI correctional officers was thoroughly pursued at a suppression hearing on September 9, 2009. Mr. Hall testified he was repeatedly

punched in the face, knocked to the ground, and repetitively kicked in the face and ribs for ten minutes. Mr. Hall testified the blows to his head continued on the way to the Multi-Treatment Center (MTC) building and in the lobby part of that building. Transcript of Suppression Hearing, Defendant's Testimony, pages 4-7, 9, 25. He was then sitting in the hallway on a wooden bench which was videotaped. In the order denying the motion to suppress the court found "...a constant videotape recording was made of the defendant that reveals no obvious sign of abuse or injury". The court further found "[d]efendant' s version of the facts conflicts with every one of the state's witnesses that were in a position to have observed how the defendant was treated after his apprehension within the PRIDE building and custodial treatment thereafter. The court finds the state's witnesses more credible under all circumstances presented at hearing."

Mr. Hall also contends despite the denial of the motion to suppress the jury still should have been aware "that there was a high likelihood that [he] had been beaten by the guards after his arrest". Motion at page 37. Attorney Valerino testified that they made a strategic decision to pursue second degree murder. They wanted the statements to come in so Mr. Hall could tell his version of what occurred without putting him on the stand. They were not concerned with inconsistencies in the statements; Mr. Hall was attempting to clarify what had happened. EH, Vol. III, page 366. Mr. Hall never denied he committed the murder. EH, Vol. III, page 361. From the moment Hall was discovered at PRIDE, before the body had been found, or he was questioned, Hall repeatedly stated that he snapped, he killed her, he freaked out.

The court finds that under the totality of the circumstances trial counsel did not act unreasonably in not seeking an independent medical exam after Mr. Hall's arrest or consulting a medical expert to review photographs and video of Hall after his arrest. Further, trial counsel were pursuing a legitimate, reasonable trial strategy. (R2267-70).

The postconviction court was correct to deny this subclaim. Again, strategic decisions do not constitute ineffective assistance of counsel if alternative courses have been considered and rejected and counsel's decision was reasonable under the

norms of professional conduct. *Occhicone v. State*, 768 So. 2d at 1048 (citing *Rutherford*, 727 So. 2d at 223; *State v. Bolender*, 503 So. 2d at 1250. Here, trial counsel Valerino testified that he did not see any reason to order a medical exam for a black eye. (R507-08). Hall did not indicate he needed medical attention until he advised he wanted to go to the optometrist to be fitted with glasses. (R762). Trial counsels attempted to establish that Hall had been beaten by corrections officers in the suppression hearing, but the challenge was "everybody got up there and categorically denied they had hit Mr. Hall." (R549). Ultimately the trial court found Hall's version of events incredible and denied the motion. It was a reasonable trial strategy, once this motion was denied, to have Hall's statements to come in so Hall could tell his version of what occurred without putting him on the stand.

G. Expert testimony about the effects of head trauma, epilepsy, cognitive disorders and post-traumatic stress on memory

The postconviction court denied this subclaim in the following way:

> Trial counsel hired Dr. Harry Krop, a psychologist, to evaluate Mr. Hall and to assist in developing mitigation. On September 22, 2009 Attorney Phillips filed a notice of intent to present Dr. Krop's expert testimony of mental mitigation and list of mental mitigating circumstances. A part of that list was for the expert to establish extreme mental or emotional disturbance and impaired judgment and reasoning. Additionally, counsel engaged Dr. Buffington, a pharmacologist, to establish what Tegretol is, the potential dose and possible side effects with regard to their potential to impact an individual's behavior or appearance. EH, Vol. V, page 523.
>
> Ultimately Dr. Krop was not called in either phase of the trial, but did testify at the *Spencer* hearing. Dr. Krop actually brought up the issue of not appearing before the jurors, believing his testimony would be

> more harmful then helpful to the defense. EH, Vol. V, pages 531-533. See also EH, State Ex. 1, Memo to File from Dr. Krop, October 28, 2009 - CONFIDENTIAL. The trial court declined to permit Dr. Buffington to testify during the guilt phase.
>
> Counsel was not ineffective. There are many capital cases where counsel conducted an investigation but was found to have made a reasonable strategic decision to not present a mental health expert, i.e. an expert's designation of a defendant as having an antisocial or sociopathic disorder would be held against him by the jury, or would be inconsistent with the defense being presented. *Looney v. State*, 941 So. 2d 1017, 1028-1029 (Fla. 2006); *Nelson v. State* , 43 So. 3d 20, 31-32 (Fla. 2010). Postconviction counsel's ability to find a favorable witness for an evidentiary hearing has no bearing on trial counsel's not having done so. *Stephens v. State*, 975 So. 2d 405, 413-414 (Fla. 2007). (R2270-71).

The postconviction court correctly denied this claim. "This Court has repeatedly held that counsel's entire investigation and presentation will not be rendered deficient simply because a defendant has now found a more favorable expert." *Card v. State*, 992 So. 2d 810, 818 (Fla. 2008); *see Peede v. State*, 955 So. 2d 480, 494 (Fla. 2007) ("The fact that Peede produced more favorable expert testimony at his evidentiary hearing is not reason enough to deem trial counsel ineffective."); *Gaskin v. State*, 822 So. 2d 1243, 1250 (Fla. 2002) ("[C]ounsel's reasonable mental health investigation is not rendered incompetent 'merely because the defendant has now secured the testimony of a more favorable mental health expert.'" (quoting *Asay v. State*, 769 So. 2d 974, 986 (Fla. 2000)). Trial counsels conducted a reasonable mental health mitigation investigation with a well-qualified expert and the fact that in postconviction Appellant has retained a more favorable expert does not make trial counsel ineffective.

H. Cumulative Effect

> The findings above establish no error and therefore this cumulative error claim fails as well. Where the alleged errors urged for consideration in a cumulative error analysis are either meritless, procedurally barred, or do not meet the *Strickland* standard for ineffective assistance of counsel, the contention of cumulative error is similarly without merit. *Bradley v. State*, 33 So. 3d 664, 684 (Fla. 2010). (R2271).

The postconviction court correctly denied this claim because each individual claim is without merit, so there can be no error to cumulate.

ARGUMENT CLAIM III: TRIAL COUNSEL WAS EFFECTIVE IN THE GUILT PHASE BECAUSE THERE WAS NO BASIS TO OBJECT TO EVINS'S TESTIMONY. (*IB* 56-59, RESTATED)

Appellant's third issue is that the postconviction court erred in its order denying postconviction relief under the theory that trial counsel was ineffective for failing to object to the testimony of Corrections Officer Frederick Evins because he had not been listed on the State's witness list and because his testimony regarding the steps to lock down the PRIDE facility was irrelevant.

In denying this claim, the postconviction court found as follows:

> Correctional Officer Frederick Evins was allowed to testify as to the procedure he followed for closing down PRIDE even though he was not on the witness list. Attorney Valerino testified that he did not object to the testimony of Frederick Irvins (sic) as he had already taken his deposition and did not have a problem with his testimony. EH, Vol. IV, page 415. Under the totality of the circumstances and considering the entire record, counsel's failure to object to Mr. Evins very brief testimony was not prejudicial. *Capehart v. State*, 583 So. 2d 1009, 1014 (Fla. 1991), citations omitted.

(R2271).

The postconviction court was correct to deny this claim. In order to find trial

counsel deficient, Hall would need to show that no reasonable attorney would agree with trial counsel's decision not to not to object to Evins's testimony, and that trial counsel made errors so egregious in not objecting that he was not functioning as counsel. Further, Hall must then prove that he was prejudiced.

Reasonable strategic decisions of trial counsel should not be second-guessed by a reviewing court. *Jones v. State*, 845 So. 2d 55, 65 (Fla. 2003). As stated succinctly by this Court in *Peterson v. State*, 154 So. 3d 275 (Fla. 2014), *reh'g denied* (Dec. 2, 2014):

> "[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." *Burns v. State,* 944 So. 2d 234, 239 (Fla. 2006). "The defendant bears the burden to overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." *McCoy,* 113 So. 3d at 707 (quoting *Strickland,* 466 U.S. at 689, 104 S.Ct. 2052). However, there is a strong presumption that counsel's performance was not deficient, and great deference is given to counsel's performance. *Johnston v. State,* 63 So. 3d 730, 737 (Fla. 2011). Moreover, counsel cannot be deemed ineffective for failing to make a meritless argument. *See Lukehart v. State,* 70 So. 3d 503, 513 (Fla. 2011).

Peterson v. State, 154 So. 3d at 280.

Here, trial counsel Valerino testified that he did not object to Evins's testimony because "we did not feel that his testimony was objectionable." (V1, R565). Based on the fact that the defense team was aware of CO Evins, and had taken his deposition, any objection as to failure to provide notice of the witness on the state's witness list would likely be overruled. (*See* R415). Moreover, because Evins testified to procedures he personally followed as a corrections officer having

worked in the PRIDE facility – the location CO Fitzgerald was murdered – it is certainly reasonable that trial counsel felt there was no basis to object to his testimony. Under these facts, like in *Brown v. State*, 846 So. 2d 1114, 1123 (Fla. 2003), "[t]rial counsel's decision not to object was a strategic decision that should not be second-guessed."

Appellee asserts that Appellant has made no showing of deficient performance and is therefore not entitled to relief on this claim. However, assuming *arguendo* that this Court finds that counsel was deficient for failing to object to Evins's testimony, Hall would still only be entitled to relief if both prongs of *Strickland* are met and the alleged deficiency prejudiced Hall such that a reasonable probability exists that the outcome of the trial would have been different. This deficiency must ultimately deprive the defendant of a fair trial with a reliable result. *Peterson v. State*, 154 So. 3d 275, 280 (Fla. 2014), *reh'g denied* (Dec. 2, 2014) (citing *McCoy v. State*, 113 So. 3d 701, 708 (Fla. 2013)).

The jury heard and considered substantial evidence that proved Hall's guilt in the murder of CO Fitzgerald. As recognized by trial counsel, there was nothing objectionable in Evins's testimony, so any objection would have been overruled. There is no reasonable probability that had trial counsel objected to the brief testimony of CO Evins as to the procedures he followed in locking down the PRIDE facility, that the jury would have acquitted Hall, convicted him of a lesser charge, or voted for life instead of death. Even if the objection had been sustained and they jury had not heard the procedures for locking down the PRIDE facility, it would not have changed the prosecutor's closing argument or theory of the case.

Evins's testimony did not lay the foundation for the state's theory that Hall was lying in wait for CO Fitzgerald. The evidence was clear that CO Fitzgerald had to return to escort Hall out of the facility at the end of the shift. It is a reasonable inference from the evidence introduced that Hall was lying in wait to attack CO Fitzgerald, regardless of Evins's testimony. The postconviction court properly denied this claim. *See Johnston v. State*, 63 So. 3d 730, 740 (Fla. 2011).

ARGUMENT CLAIM IV: TRIAL COUNSEL CONDUCTED A REASONABLE FAMILY HISTORY MITIGATION INVESTIGATION IN PREPARATION OF THE PENALTY PHASE. (*IB* 59-69, RESTATED)

Appellant's fourth argument issue is that the postconviction court erred in its order denying postconviction relief under the theory that trial counsel was ineffective for failing to conduct a reasonable family background investigation, specifically to present testimony that his mother was unfaithful to his father.

In denying this claim, the postconviction court found as follows:

> At the evidentiary hearing the State presented Mr. Hall's Uncle Jesse Eugene Hall, who testified Betty Hall was unfaithful to her husband, and Hall was present when other men were with his mother. EH, Vol. III, pages 320 - 321. Defendant Hall's father, Enoch James Hall, also testified that his wife was unfaithful; she moved in with another man and took the boys with her. EH, Vol. III, pages 325-327. Dr. Maher testified as to the effect of Mrs. Hall's infidelity on the defendant's view of women. EH, Vol. II, pages 160-166. Mr. Hall claims the jury's recommendation of death is unreliable due to trial counsel's failure to present this crucial evidence to undermine the "idyllic family dynamic" that was presented during the penalty phase.
>
> The evidence established that in many ways Mr. Hall did have a good childhood; his parents remained married for decades, they lived on a farm with horses and four wheel drive vehicles. The family enjoyed these outdoor items together. They also had weekly barbeques to

which Mr. Hall's sport teammates were invited. EH, Vol. III, pages 331-333; Vol. IV, page 471. Both attorneys have found this family and environment to be surprisingly different from those of other clients. Attorney Phillips testified he was surprised with the report from the family that there was really no kind of issues there. He stated they continued to keep looking; they questioned Mr. Hall further. It was out of the ordinary; they expected a more dysfunctional family history, as they had seen with other clients. EH, Vol. V, page 528; Vol. VI, pages 471- 472.

Public Defender Investigator Robert Ryan worked as a team with Attorneys Valerino and Phillips in the investigation for both the guilt and penalty phases of Mr. Hall's trial. Investigator Ryan testified that at an early meeting with Mr. Hall it was difficult to get much information. Mr. Hall was reluctant to provide information about his childhood and contact information about his family. He gave some names. He also directed Investigator Ryan to not contact his half-siblings or his uncles, but he could contact Mr. Hall's brother Adrian. EH, Vol. VI, pages 704- 705. He made his first trip to Milton, Florida where Mr. Hall grew up and where many family members remain. He spoke with the family members Hall agreed to. Investigator Ryan testified that he followed Mr. Hall's request to limit whom he spoke to in order to build rapport with Mr. Hall. EH, Vol. VI, pages 723-725. On a second trip to Milton Investigator Ryan was accompanied by Attorney Valerino and Dr. Krop. They first went to Pensacola, where Hall's mother resides. The three met with Mr. Hall's mother, Betty; father, Enoch; and brother. They spent the entire morning at Betty Hall's house. Dr. Krop also spent some time alone interviewing each of them. EH, Vol. VI, pages 705-707; Vol. IV, pages 437, 487.

Investigator Ryan did conduct a very thorough investigation. He testified he traveled the Florida Panhandle extensively looking for documents relating to the rape and county jail records. He checked the courthouse and looked for the hospital but it was no longer there. Investigator Ryan didn't find a lot of evidence; after seven to ten years many records had been purged. It took him multiple attempts and some time but he was eventually able to retrieve records of the jail rape. EH, Vol. VI, pages 708-709. He spoke to Mr. Hall's coaches from school because Mr. Hall was an accomplished athlete. Mr. Manning, Hall's football coach, told the investigator that Hall was

> trouble all through high school; his attitude was so bad he couldn't be turned around. EH, Vol. VI, page 489. Mr. Gracie, Hall's track coach said Hall was a ticking time bomb. EH, Vol. VI, page 489. The investigation of Mr. Hall's family was comprehensive and the failure to discover his mother's infidelity cannot be considered prejudicial under *Strickland*.

(R2271-73).

The postconviction court was correct to deny this claim. An attorney has a duty to conduct a reasonable investigation, including an investigation of the defendant's background, for possible mitigating evidence, but not necessarily to run down every possible lead. *Sochor v. State*, 883 So. 2d 766, 772 (Fla. 2004).

Based on the testimony of trial counsels Valerino, Phillips, and Investigator Ryan there is competent, substantial evidence to support the trial court's finding that the background investigation done for Hall was "very thorough." Both Phillips and Valerino testified as to the incredibly high level of preparation and the depth of the investigation that goes into a capital case and the depth of the search for mitigation. Attorneys, Investigator, and Dr. Krop traveled to Hall's home town of Milton, Florida on more than one occasion to meet with members of the family and several people from Hall's adolescence. The defense team spoke with Hall's brother, mother, and father – and none of these family members ever mentioned Hall's mother's alleged infidelity as a possible watershed moment or mitigating circumstance in Hall's life. (R623, 770). In fact, the postconviction proceeding was the first time this information came to light.

Appellant's assertion that trial counsel was ineffective for failing to "look deeper" and "delve further" into the reasons leading to Hall's parents' divorce is

misguided. Valerino and Phillips were aware of Hall's parents' divorce. As found by the postconviction court, Hall's mother and father discussed their divorce during interviews with the defense team, but infidelity was never mentioned. (R2277). They spoke at length to his mother and father. This Court has previously concluded that trial counsel is not ineffective for failing to discover mitigation that the defendant and his family are not forthcoming about. *Asay v. State*, 769 So. 2d 974, 987-988 Fla. 2000) (finding no ineffectiveness for failing to discover that the defendant was sexually abused when the defendant and his family were not forthcoming with the information, even though trial counsel was aware of the defendant's rough childhood); *Diaz v. State*, 132 So. 3d 93, 114 (Fla. 2013) (finding no ineffectiveness for failing to discover information regarding sexual abuse that Diaz and his family did not disclose).

"*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." *Taylor v. State*, 3 So. 3d 986, 998 (Fla. 2009) (quoting *Wiggins v. Smith*, 539 U.S. 510, 533 (2003)). Trial counsels Valerino and Phillips both expressed surprise at Hall's idyllic childhood not because they had failed to uncover some hidden mitigating secret, but rather, because Hall was accorded so many opportunities for success unlike many death penalty litigants, and yet, still chose to pursue a life of violence and crime. They actively attempted to find background mitigation and uncovered very little. This is not a "red flag" that trial counsel is missing something as asserted by Appellant, but rather, indicative of the true fact that Hall had very little to mitigate his actions.

To the extent Hall is claiming ineffectiveness for failing to call his uncle, Jesse Eugene Hall, in the penalty phase, Hall specifically asked the defense team not to contact his uncles, and the argument that any other uncle or family member should have been called is waived, as those witnesses did not testify at the evidentiary hearing. (R854-55). *See Ferrell v. State*, 29 So. 3d 959, 970 (Fla. 2010) (holding that there is no ineffectiveness where the defendant consents to not calling certain witnesses). Even assuming Gene Hall should have been called during to penalty phase, he could not have provided information on Hall's mother's infidelity that Hall's father could not have. Trial counsel is not ineffective for failing to present cumulative evidence. *See Darling v. State*, 966 So. 2d 366, 377 (Fla. 2007) (citing *Gudinas v. State*, 816 So. 2d 1095, 1106 (Fla. 2002); *Sweet v. State*, 810 So. 2d 854, 863-64 (Fla.2002)). Hall's father testified in the penalty phase and made no mention of infidelity.[19] Trial counsel cannot be deemed deficient for failing to present mitigation not supported by the record. *Darling v. State*, 966 So. 2d 366, 378 (Fla. 2007). The testimony presented at the evidentiary hearing was that this was well-known to Hall's father at the time, and well-before the penalty phase. (R474-77).

To the extent that Hall now argues Dr. Maher could have used the information of his mother's infidelity to explain Hall's anger toward women as a

[19] It is notable that Hall's mother, Betty Hall, is now deceased. She testified in the penalty phase as well and made no mention of infidelity as a mitigating factor. *See Hall v. State*, 107 So. 3d 262, 270 (Fla. 2012).

mitigating circumstance, this information was never presented to Dr. Krop by Hall or his mother, father, or brother. This Court concluded in *Diaz v. State*, 132 So. 3d 93 (Fla. 2013), that:

> [T]rial counsel is not ineffective for relying on evaluations conducted by qualified mental health experts. *See Stewart v. State*, 37 So. 3d 243, 251 (Fla. 2010). Trial counsel is not deficient because the defendant is able to find postconviction mental health experts that reach different and more favorable conclusions than the mental health experts consulted by trial counsel. *Asay v. State*, 769 So. 2d 974, 986 Fla. 2000). Diaz has not demonstrated that the mental health experts retained for trial were not qualified experts. Thus, counsel acted reasonably in relying on the experts.

Diaz v. State, 132 So. 3d at 113. Likewise here, Hall has not argued that Dr. Krop was not a qualified expert.

Appellant's reliance on *Sears v. Upton*, 130 S. Ct. 3259, 3264 (2010) (per curium); and *Ferrell v. Hall*, 640 F.3d 1199 (11th Cir. 2011) is not persuasive. In *Sears*, the Supreme Court acknowledged that potentially helpful evidence was not uniformly favorable to the Appellant, but counsel’s failure to investigate and develop that evidence fell below the standards expected of a reasonable capital defense attorney. In *Ferrell*, a Georgia case viewed through the lens of AEDPA, the court held that “trial counsel conducted a profoundly incomplete investigation, and its judgment to so sharply limit its inquiry fell far outside the wide range of professional competence.” *Ferrell,* at 1227. By contrast, in this case, trial counsel mounted a thorough investigation, and thoughtfully considered how to best present mitigation for Hall. The trial court made a factual finding that the mitigation investigation went “above and beyond” what is merely reasonable. This is

distinguished from Appellant's reliance on cases where trial counsel was found deficient for failing to investigate and develop exculpatory or mitigating evidence. Here, no new information would have been uncovered had Hall's uncle been interviewed, albeit against Hall's explicit request. As recognized by the postconviction court, Hall's mother and father actually discussed their divorce during these meetings and there was never any mention of infidelity. (R857). All of the information the defense team received from the family pointed to an idyllic childhood where Hall was accorded a stable home and family life with opportunities to participate in sports and recreational activities but was still a "ticking time bomb." (R678; *See* R603-04).

Appellee asserts that Appellant has made no showing of deficient performance; and is therefore not entitled to relief on this claim. However, assuming *arguendo* that this Court finds that counsel was deficient for failing to present evidence of Betty Hall's infidelity, Hall would still only be entitled to relief if both prongs of *Strickland* are met and the alleged deficiency prejudiced Hall such that a reasonable probability exists that the outcome of the trial would have been different. This deficiency must ultimately deprive the defendant of a fair trial with a reliable result. *Peterson v. State*, 154 So. 3d 275, 280 (Fla. 2014), *reh'g denied* (Dec. 2, 2014) (citing *McCoy v. State*, 113 So. 3d 701, 708 (Fla. 2013)).

The jury heard and considered substantial evidence that proved Hall's guilt in the murder of CO Fitzgerald. The defense team mounted a comprehensive and through background mitigation investigation. After meeting with Hall's mother, father, brother, childhood friends, and coaches, trial counsel was surprised what a

pleasant childhood Hall actually had. There is no reasonable probability that had trial counsel presented evidence of Hall's mother's affair and his resultant anger toward women, that the jury would have acquitted Hall, convicted him of a lesser charge, or voted for life instead of death. This evidence as presented is not compelling and could not possibly shift the balance of aggravating and mitigating factors such that confidence in the conviction is undermined. The postconviction court properly denied this claim. *See Johnston v. State*, 63 So. 3d 730, 740 (Fla. 2011).

ARGUMENT CLAIM V: TRIAL COUNSEL MADE A REASONABLE STRATEGIC DECISION IN DECLINING TO CALL DR. KROP IN THE PENALTY PHASE WHEN DR. KROP'S TESTIMONY WOULD HAVE BEEN MORE HARMFUL THAN HELPFUL TO HALL. (*IB* 69-87, RESTATED)

In his fifth claim, Hall asserts that trial counsel was deficient for declining to call Dr. Krop to testify in the penalty phase. Dr. Krop testified in the *Spencer* hearing after the jury had been dismissed.

In denying this claim, the postconviction court held:

> Mr. Hall alleges counsel was deficient for failing to call Dr. Krop to testify during the penalty phase claiming: (1) Dr. Krop would have been able to explain some of Hall's inconsistent statements; (2) his testimony could have lended credibility to Hall's claim that he had been raped in jail when he was around nineteen and attempted suicide shortly thereafter. The doctor then could have explained this was a turning point resulting in Hall's manifestation of anger by sexually acting out his rage. Mr. Hall further claims Dr. Krop could have testified about him having a cognitive disorder effecting how he functioned under stressful situations, i.e. being caught by the CO while attempting to find pills resulting in his "snapping".
>
> Attorney Phillips clearly explained it was a strategic decision to hold

Dr. Krop's testimony until the *Spencer* hearing so it would not be heard by the jury. Dr. Krop had actually brought the issue to the attorney's attention out of concern that his testimony would be more harmful than beneficial. EH, Vol. V, pages 532-533, 543-549. In a Memo to the File Dr. Krop wrote: "[t]he following is a summary of a 'strategy' meeting involving Mr. Hall's attorneys, Dr. Buffington, and myself held on October 27th, 2009. Based on extensive discussion, it was decided that testimony from this expert would most likely be detrimental to Mr. Hall in that the negatives would far outweigh any possible assistance". Memo to File, October 28, 2009, CONFIDENTIAL.[5] Following the guilt phase Dr. Krop watched a videotaped psychiatric evaluation conducted by Dr. Danziger; the information Mr. Hall provided to Dr. Krop varied greatly from that information Hall provided to Dr. Danziger. On October 27, 2009, a day prior to the aforementioned strategy meeting, Dr. Krop met with Mr. Hall for the sixth time to clarify the discrepancies. Mr. Hall acknowledged he had lied to Dr. Krop about such crucial matters as why he pulled down the victims pants and what/how many drugs he had used at the time in question. *Id.*

> [FN 5] State's Ex. 1 from the evidentiary hearing; under seal of court.

The Florida Supreme Court has established that "strategic decisions do not constitute ineffective assistance of counsel if alternative courses have been considered and rejected and counsel's decision was reasonable under the norms of professional conduct." *Howell v. State,* 877 So. 2d 697, 703 (Fla. 2004) (quoting *Occhicone v. State*, 768 So. 2d 1037, 1048 (Fla. 2000)). In *Looney* the court found trial counsel was not ineffective in relying on his mental health expert's assessment of the defendant and in choosing not to present a mental health expert at the penalty phase in light of that assessment. *Looney v. State* , 941 So. 2d 1017, 1030 (Fla. 2006). The facts *sub Judice* are similar. Dr. Krop would have testified that Mr. Hall had a mild cognitive disorder and a sexual disorder, paraphilia, NOS. Jurors most probably would not view paraphilia as mitigation. Rebuttal testimony then would have come in, i.e. discrepancies with information provided to Dr. Danziger. Counsel's decision not to put Dr. Krop before the jury was a well-reasoned strategic decision.

(R2273-75).

Competent, substantial evidence supports the postconviction court's conclusion that trial counsel’s decision was reasonable and strategic. Dr. Krop was a witness whose testimony had to be evaluated as a double-edged sword. He would have testified that Hall had mild cognitive deficits, but that he had the sexual disorder of paraphilia, not otherwise specified and he was inconsistent in his version of events in the various examinations. (R683). After six forensic interviews with Hall, Dr. Krop brought to trial counsel Phillips’s attention that “he had more bad things to say than good.” (R682).

This Court has established that “strategic decisions do not constitute ineffective assistance of counsel if alternative courses have been considered and rejected and counsel's decision was reasonable under the norms of professional conduct.” *Looney v. State*, 941 So. 2d 1017, 1030 (Fla. 2006) (quoting *Howell v. State*, 877 So. 2d 697, 703 (Fla. 2004); *Occhicone v. State,* 768 So. 2d 1037, 1048 (Fla. 2000)). In those cases where counsel has conducted a reasonable investigation of mental health mitigation prior to trial and then made a strategic decision not to present this information, this Court has affirmed the trial court's findings that counsel's performance was not deficient. *Dufour v. State*, 905 So. 2d 42, 56 (Fla. 2005). Trial counsel will not be held to be deficient when he makes a reasonable strategic decision not to present mental mitigation testimony during the penalty phase because it could open the door to other damaging testimony. *See Ferguson v. State*, 593 So. 2d 508, 510 (Fla. 1992) (holding that counsel's decision not to put on mental health experts was a “reasonable strategy in light of the negative aspects of

the expert testimony"). In *Bowles v. State*, 979 So. 2d 182 (Fla. 2008), this Court reasoned, "[Dr. McMahon] was a well-qualified clinical psychologist who concluded that Bowles did not suffer from anything beyond mild impairments. She further concluded that he was impulsive and dangerous." *Id*. at 188-89. In that case, it was not unreasonable for trial counsel to withhold her testimony from the jury and trial counsel were not ineffective under *Strickland.* Likewise, in *Gaskin,* this Court held, "[t]rial counsel will not be held to be deficient when she makes a reasonable strategic decision to not present mental mitigation testimony during the penalty phase because it could open the door to other damaging testimony." *Gaskin v. State*, 822 So. 2d at 1248.

This is not a case where counsel never attempted to meaningfully investigate mitigation. Trial counsel hired Dr. Krop who met with Hall six different times. Dr. Krop performed a battery of tests, flew to Hall's hometown to interview his family and friends, reviewed voluminous documents, reports, and records, and referred Hall to a neurologist, Dr. Tanner, who performed a PET scan and MRI.[20] (R708). Trial counsel Phillips conferred with trial counsel Valerino and met with Dr. Krop along with appellate attorney Quarles and the decision was made that Dr. Krop did, in fact, have more "bad things to say than good." (R683). Some of those reasons were proffered during the penalty phase and additional reasons were detailed in Dr. Krop's memo prepared for trial counsel's file. (R693-94). Some of the negative

[20] The EEG and PET scan results were normal, but reflected asymmetry. (R708).

aspects of Dr. Krop's testimony included his prior sexual violence, what and how many pills he took, whether or not he remembered pulling CO Fitzgerald's uniform pants down and for what purpose, whether he was going to attempt to escape using CO Fitzgerald's uniform, and that he "considered raping the victim" postmortem. (R693-96).

The helpful aspects of Dr. Krop's testimony in the penalty phase would have been that Hall never denied culpability, felt ashamed, had been raped in the Escambia County Jail, and suffered from "a mild neurocognitive impairment … particularly in the area of memory and executive functions." (R699; 697-98; 704; 696). However, Dr. Krop's testimony would have also been attacked under Dr. Danziger's theory that Hall was malingering and the "goal-directed" behavior around the time of the murder. (R696). Moreover, the testimony of the PRIDE inmates, and the investigation of the defense team established that Hall was not under any particular stress or behaving in an unusual manner just before the murder. (R767). Calling Dr. Krop in the penalty phase would have also likely led to a discussion of the changes and exaggerations in Hall's various versions of events. (R696).

These were all factors trial counsel Phillips considered in whether or not to call Dr. Krop in the penalty phase and made a well-reasoned, strategic decision to save Dr. Krop's testimony for the *Spencer* hearing. (R753-55). Dr. Krop was able to testify to the mitigation the defense team was aiming for, and he was cross-examined without a jury present. (*See* R719).

To prevail on this claim, Hall must demonstrate that but for counsel's errors,

he probably would have received a life sentence. *Gaskin v. State*, 822 So. 2d 1243, 1247 (Fla. 2002) (citing *Hildwin v. Dugger*, 654 So. 2d 107, 109 (Fla. 1995)). Here, counsel consulted with an expert and received an unfavorable report. Based on this double-edged information, trial counsels weighed the favorable and negative testimony and ultimately chose not to have the expert, Dr. Krop, testify in front of the jury. (R753-755). *See Douglas v. State*, 141 So. 3d 107, 123 (Fla. 2012) *as revised on denial of reh'g* (Sept. 13, 2012) (quoting *Reed v. State*, 875 So. 2d 415, 437 (Fla. 2004) ("An ineffective assistance claim does not arise from the failure to present mitigation evidence where that evidence presents a double-edged sword.")). Dr. Krop did, however, testify to the helpful aspects of his testimony in the *Spencer* hearing. Since the trial court already considered the helpful aspects of Dr. Krop's testimony, it cannot reasonably be said that had Dr. Krop testified in the penalty phase the balance of aggravating and mitigating factors would have changed.

To the extent Dr. Michael Maher testified in postconviction, this Court has held that counsel's reasonable mental health investigation is not rendered incompetent "merely because the defendant has now secured the testimony of a more favorable mental health expert." *Asay v. State*, 769 So.2d 974, 986 (Fla.2000). In this case, Dr. Maher's testimony represents not only a recent and more favorable defense expert opinion, but a cumulative opinion to one that was already presented to the trial court by Dr. Krop in the *Spencer* hearing. The information, had Dr. Krop or Dr. Maher testified in the penalty phase, would have painted an even more negative and prejudicial picture of Hall. If anything, had the

jury heard about Hall's intent to rape the victim post-mortem, his changing and exaggerated version of events, and the history of sexual violence, the jury would have been less inclined to consider his minimal mitigation. The statutory aggravators that were found in this case would have still overwhelmed any mitigating testimony that Dr. Krop could have provided. *See Gaskin v. State*, 822 at 1249 (citing *Breedlove v. State*, 692 So. 2d 874, 877 (Fla.1997)). This claim must be denied.

ARGUMENT CLAIM VI: TRIAL COUNSEL WAS EFFECTIVE IN DECLINING TO REQUEST THE STATUTORY MITIGATING INSTRUCTION FOR EXTREME EMOTIONAL DISTURBANCE WHEN THERE WAS NO TESTIMONY OR EVIDENCE TO SUPPORT IT. (*IB* 87-88, RESTATED)

In his sixth claim, Hall asserts that he is entitled to a new penalty phase trial because the postconviction court erred in finding that trial counsel was not deficient in the penalty phase for declining to ask for the statutory mitigating instruction for extreme mental and emotional disturbance. Appellant argues that even without any evidence to support that particular mitigating circumstance, trial counsel was deficient for failing to ask for the instruction because Hall admitted he had taken unidentified white pills.[21]

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[21] It is also notable that the "white pill" Hall may have taken was from a blister pack of Tegretol discovered in the crime scene photos of Prince's office. Tegretol is "not like an intoxicating substance." It does not cause euphoria, hallucinations, does not have pain-reducing qualities, and is not a medication one takes to "get high." (R756).

In denying this claim, the postconviction court found as follows:

> Mr. Hall alleges he was entitled to have the jury instructed as to the extreme mental and emotional disturbance mitigator because the record demonstrated he was under the influence of drugs at the time of the homicide. Trial counsel did establish, in the quilt phase, that Mr. Hall had taken drugs and that he was being influenced by them. EH, Vol. V, pages 597 - 598. Attorney Phillips testified that they were working on the theory that the Tegretol would have exacerbated Mr. Hall's cognitive disorder. EH, Vol. V, page 571. During the penalty phase trial counsel had called Dr. Buffington to elicit that the Tegretol unmasked a psychological disorder. Ultimately, "after a battle", Dr. Buffington's testimony was limited to discussing the side effects of the medication. Attorney Phillips explained he did not have the evidence to support the extreme mental and emotional disturbance, so he did not request it. EH, Vol. V, pages 580 - 586, 590. As discussed in Claim V, testimony by the defense's expert, Dr. Krop, became impracticable after new contradictory statements were made by Mr. Hall. Counsel made a strategic decision to opt for the "catch all" instruction under the circumstances. *Nelson v. State*, 43 So. 3d 20, 32-33 (Fla. 2010). Mr. Hall has failed to establish either prong of *Strickland*.

(R2275-76).

Appellant suggests that trial counsel Phillips was deficient for failing to request the instruction out of ignorance of the prevailing law. (*IB* at 88). Primarily, Hall failed to establish that trial counsel Phillips was ignorant of the law regarding statutory instructions. *See Nelson v. State*, 43 So. 3d 20, 33 (Fla. 2010) ("Because Nelson has not demonstrated that this decision was based on ignorance of the law as alleged, he is not entitled to relief."). Here, during questioning at the evidentiary hearing, trial counsel Phillips advised that counsel did not request the statutory mitigating instruction for extreme emotional or mental disturbance because "[w]e didn't have the expert testimony to support it." (R747). Trial counsel correctly

stated that "[j]ust drug use alone doesn't necessarily rise to the level of extreme mental or emotional --" (R748). When questioned why he could not request the instruction based on the defense theme of "drug use that led someone to snap," he reiterated that "we just didn't have the testimony to support it." (R749).

This Court has previously held:

> [T]he "Defendant is entitled to have the jury instructed on the rules of law applicable to this theory of the defense *if there is any evidence* to support such instructions." *Hooper v. State,* 476 So. 2d 1253, 1256 (Fla. 1985), *cert. denied,* 475 U.S. 1098, 106 S.Ct. 1501, 89 L.Ed.2d 901 (1986) (emphasis added); *Smith v. State,* 492 So. 2d 1063 (Fla. 1986). Regarding mitigating factors dealing with extreme mental or emotional disturbance, we have stated that where a defendant has produced any evidence to support giving instructions on such mitigating factors, [Fn. 6] the trial judge should read the applicable instructions to the jury. *Toole v. State,* 479 So. 2d 731 (Fla. 1985).
>
>> [Fn. 6] For example, the instant case involves section 921.141(6)(b), Florida Statutes (1989) (capital felony committed while defendant under influence of extreme mental or emotional disturbance), and section 921.141(6)(f), Florida Statutes (1989) (defendant's capacity to appreciate criminality of his conduct or to conform his conduct to requirements of law was substantially impaired).

Bryant v. State, 601 So. 2d 529, 533 (Fla. 1992), *opinion corrected on denial of reconsideration* (July 23, 1992) (emphasis in original).

Even if counsel was incorrect, and the court would have granted the instruction, that does not establish ineffectiveness. Here, it is clear that trial counsel made a well-reasoned strategic decision not to ask for the instruction based on the lack of evidence to support it. This Court has established that "strategic decisions do not constitute ineffective assistance of counsel if alternative courses have been

considered and rejected and counsel's decision was reasonable under the norms of professional conduct." *Looney v. State*, 941 So. 2d 1017, 1030 (Fla. 2006); *Howell v. State*, 877 So. 2d 697, 703 (Fla. 2004) (quoting *Occhicone v. State*, 768 So. 2d 1037, 1048 (Fla. 2000)).

In order to find trial counsel deficient, Hall would need to show that no reasonable attorney would agree with trial counsels' decision not to ask for the instruction, and that trial counsels made errors so egregious in not requesting it that they were not functioning as counsel. Further, Hall must then prove that he was prejudiced. Trial counsel's testimony at the evidentiary hearing does not sustain Appellant's assertion that trial counsel Phillips was ignorant of the law, and in fact, trial counsel states the correct standard; that there must be some evidence to support the instruction. Drug use of a non-intoxicating substance alone does nothing to support extreme emotional or mental disturbance, especially where here, there was biological evidence to support what, if anything, Hall had actually taken and in what amount. Moreover, the defense's theme is not evidence and would not support an instruction without more.

Appellee asserts that Appellant has made no showing of deficient performance; and is therefore not entitled to relief on this claim. However, assuming *arguendo* that this Court finds that counsel was deficient for failing to request the instruction for extreme emotional or mental disturbance, Hall would still only be entitled to relief if both prongs of *Strickland* are met and the alleged deficiency prejudiced Hall such that a reasonable probability exists that the outcome of the trial would have been different. This deficiency must ultimately

deprive the defendant of a fair trial with a reliable result. *Peterson v. State*, 154 So. 3d 275, 280 (Fla. 2014), *reh'g denied* (Dec. 2, 2014) (citing *McCoy v. State*, 113 So. 3d 701, 708 (Fla. 2013)).

Even if the statutory mitigating instruction had been requested, it would not have necessarily been given since there was no evidence to support it, by trial counsel's own estimation. Even assuming the instruction had been given, the record reflects that there was competent, substantial evidence to refute the allegation that Hall was under any extreme mental or emotional disturbance. Thus, any argument that Hall was under extreme emotion or mental disturbance when he finished a normal shift welding at PRIDE, and instead of returning for count, ran and hid from CO Fitzgerald with a metal shank, would not have been compelling and could not possibly shift the balance of aggravating and mitigating factors. *See Johnston v. State*, 63 So. 3d 730, 740 (Fla. 2011). There is no reasonable probability that the jury would have voted for life had they been instructed on the extreme mental or emotional disturbance mitigating circumstance. This is not compelling and there is no prejudice. This claim should be denied.

ARGUMENT VII: TRIAL COUNSEL WAS EFFECTIVE IN INVESTIGATING HALL'S MEDICAL HISTORY (*IB* 88-94, RESTATED)

In his seventh claim, Hall argues that the postconviction court erred in denying his penalty phase ineffectiveness claim regarding the mental mitigation investigation and presentation. Hall distinguishes his claim for failing to *provide his expert with information to establish mitigation* versus *failing to provide an expert establish mitigation.* Hall argues this claim as a failure to investigate and

present mental mitigation claim, thus, the analysis does not change. He asserts, "[d]efense counsel failed to investigate and present important mental health evidence that would support the statutory mitigator that Mr. Hall committed the murder while under an extreme mental or emotional disturbance." (*IB* at 94). Hall argues evidence should have been presented that he could have been having a seizure at the time he murdered CO Fitzgerald and that he had Post Traumatic Stress Disorder (PTSD) and/or psychosis.

In denying this claim, the postconviction court held as follows:

> Mr. Hall presented testimony from Dr. Michael Maher, a physician and psychiatrist, at the evidentiary hearing. Dr. Maher had reviewed the (sic) Mr. Hall's records and met with him for two hours. EH, Vol. II, page 131. He opined, after reviewing video of Mr. Hall's statements, that "[w]hat I would say is that his state of mind as I observed it in the first interrogation in particular and to some extent as improved somewhat, is that his state of mind is consistent with an individual who's suffering some impairment in his ability to think, understand, react, process information, both from a psychological trauma, and a physiological point of view, have suffered a psychological trauma, and from a physiological point of view, having suffered some physical trauma consistent with a concussion". EH, Vol. II, page 127. The doctor also found these characteristics to be consistent with a postictal period following an epileptic episode. EH, Vol II, pages 128 - 129. **The court finds that these opinions do not refute that Mr. Hall never denied culpability from the moment officers appeared at the PRIDE facility or during interrogations**.
>
> **As to Dr. Maher's opinions concerning mitigation this court finds them to be irrelevant as to whether or not trial counsel conducted a thorough investigation and presentation. "More" or "better" mitigation evidence presented at evidentiary hearing does not necessarily render trial counsel's presentation ineffective. *Pace v. State*, 854 So. 2d 167 (Fla. 2003). In the case at bar Attorneys**

Valerino and Phillips, along with their investigator, Robert Ryan, went above and beyond reasonable expectations in the investigation in an attempt to establish statutory and non-statutory mitigators. Mr. Ryan is a Certified Criminal Defense Investigator who assisted Attorneys Valerino and Phillips on approximately 30 cases. He worked on the guilt and penalty phases of Mr. Hall's case. As part of his investigative work he was tasked with investigating Mr. Hall's family background for purposes of potential mitigation. Investigator Ryan testified Mr. Hall was originally reluctant for them to contact anyone; after convincing Mr. Hall of the necessity of this information they were provided some names. Mr. Hall did not want Investigator Ryan to contact his half-sisters and brothers or his uncles. Mr. Hall did agree to him contacting his mom, dad, and brother, Adrian. Investigator Ryan traveled to Milton and surrounding area on two different occasions. He located and interviewed the family members that Mr. Hall agreed to. He did not pursue contact with the uncles because he was attempting to maintain rapport with Mr. Hall, to keep him talking to him because after the first initial interview, he was not going to open up about mitigation. **Although Mr. and Mrs. Hall discussed their divorce there was no mention of infidelity.** During the second trip Investigator Ryan was accompanied by Attorney Valerino; Dr. Krop flew in to interview the family the second day they were there. Investigator Ryan also spoke to a girlfriend, Tasha Melvin, and Bruce Hall with PRIDE.

Investigator Ryan also traveled to various locations in the Panhandle to try to find documents requested by either of the attorneys. He was looking for historical records, conviction records, attorney records, attorney notes, prior record from a possible rape in a county jail, and county jail records. He was able to find court house records and prior conviction records. He had some difficulty finding records: the hospital was no longer there; records had been destroyed due to institutions routinely purging records after a seven to ten year period. He could not find any record of the rape at that time, but did continue to pursue it and eventually received a report pertaining to Mr. Hall's rape. As Investigator Ryan put it, "it was so important that I wasn't going to stop just because somebody said no". EH, Vol. VI, pages 704 - 711, 715, 724 - 725.

Trial counsel made a strategic decision not to call Dr. Krop until the

> *Spencer* hearing. In those cases where counsel has conducted a reasonable investigation of mental health mitigation prior to trial and then made a strategic decision not to present this information, this Court has affirmed the trial court's findings that counsel's performance was not deficient. *Dufour v. State*, 905 So. 2d 42, 55-56 (Fla. 2005).

(R2276-78) (bold emphasis added).

The postconviction court relied on competent, substantial testimonial evidence to find that "Attorneys Valerino and Phillips, along with their investigator, Robert Ryan, went "above and beyond reasonable expectations in the investigation in an attempt to establish statutory and non-statutory mitigators." Trial counsel engaged in a thorough and comprehensive investigation and presented a reasonable penalty phase mitigation case.

Primarily, this claim must fail for lack of proof. Hall failed to call Dr. Krop as a witness at the evidentiary hearing. Therefore, Hall failed to establish what Dr. Krop actually relied on in forming his opinions, and failed to establish how, if at all, Dr. Krop's opinion would have changed had he known the information here alleged; specifically that Hall had reported a seizure to a DOC dentist in 2002 and that Hall's half-sister, Elizabeth Lasseter has seizures. In fact, the only evidence adduced at the evidentiary hearing directly refutes this claim. Contrary to Appellant's assertion, trial counsel Phillips was aware of the report of a seizure in 2002, and he discussed it with Dr. Krop. (*IB* at 90). Trial counsel Phillips testified that the defense team, including Dr. Krop, was aware of Hall's history of seizures including Hall's report of an episode occurring shortly before the murder. (R727). Trial counsel discussed the seizures with Dr. Krop in "trying to develop a diagnosis." (R721-23).

On the merits, in reviewing a claim that counsel's representation was ineffective based on a failure to investigate or present mitigating evidence, this Court requires the defendant to demonstrate that the deficient performance deprived the defendant of a reliable penalty phase proceeding." *Hoskins v. State*, 75 So. 3d 250, 254 (Fla. 2011). An attorney has a duty to conduct a reasonable investigation, including an investigation of the defendant's background, for possible mitigating evidence, but not necessarily to run down every possible lead. *Sochor v. State*, 883 So. 2d 766, 772 (Fla. 2004). As the Supreme Court noted in *Strickland*, "the reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions." *Cherry v. State*, 781 So. 2d 1040, 1050 (Fla. 2000) (quoting *Strickland v. Washington*, 466 U.S. at 691).

In this case, Hall was a cooperative client, but nonetheless sought to limit the background investigation and falsified reports to Department of Corrections (DOC). (R723-24). He asked that his uncles and half-siblings not be contacted, and Investigator Ryan acquiesced to his wishes. (R771, 799, 854, 864-65, 868, 869, 871). He did not report seizures to DOC because he "didn't want to lose his Pride job." (R727, 764-65).

A. Epilepsy

Even still, the investigation was thorough and trial counsel was still trying to uncover anything of significance in Hall's history that could have been used for mitigation. (R771). "Everything [trial counsel] found [he] turned over to Dr. Krop." (R755). Dr. Krop had the information that postconviction counsel now

argues he should have been provided with. (R765). Dr. Krop was provided "DOC records, disciplinary records, family information, prior history, things of that nature before making his" diagnosis in this case. (R754). Dr. Krop had the information regarding a possible seizure disorder, and Hall's request that the epileptic hold be lifted so he could work at PRIDE. (R765-66). Dr. Krop flew into Milton to personally meet with Hall's family. In all the meetings with Hall and his family, the only information that came out as especially mitigating was the event where Hall was sexually assaulted in jail and not a family history of epilepsy. (R770). Lack of proof aside, it is not reasonable to believe that Dr. Krop's opinion would have changed had he known (if he did not, already) that Hall's half-sister was epileptic and had experienced side effects with Tegretol – given the voluminous materials he reviewed and the interviews with Hall and his family.

B. Psychosis

Again, the defense team and Dr. Krop were fully aware of the information Appellant now claims they were deficient for failing to discover, specifically that Hall had been diagnosed with schizophrenia, PTSD and been prescribed anti-psychotic medications. (DAR, V5, R650-51; EH, R772; 776-78). Appellant's argument that Dr. Krop and Dr. Buffington should have testified to the fact Hall was placed on psychotropic medications *after* the murder is not compelling, especially considering the fact that the murder of CO Fitzgerald in and of itself could have caused symptoms of PTSD. Moreover, trial counsel Phillips testified that the defense team had to work within the confines of Hall's version of events, since the defense theory was that he had freely given his confession to the

investigators. (V779). Hall never stated that he "was in a seizure or that he blacked out or he didn't remember what happened, just that he snapped." (R779-80). Hall could describe the facts of the murder, and was oriented to time and space and knew he murdered a guard. (R780-81). He had an average IQ, only exhibited "mild cognitive deficits," was able to work his way up to a position as a lead welder where he worked sometimes 80 hours per week, and never had a reported incident during his time at PRIDE. (R769). All of these facts go against any mitigation theory of psychosis in the murder of CO Fitzgerald, and directly contradict the defense theory that he just "snapped."

Appellant merely incorporates his arguments for Claims II, IV, and V to argue this claim, with the addition of the argument that an attorney cannot make a strategic decision based upon ignorance of the facts or an incomplete investigation, citing *Williams v. Taylor*, 529 U.S. 362 (2000). *Williams* is not instructive here because that case dealt with counsel who:

> [F]ailed to introduce available evidence that Williams was "borderline mentally retarded" and did not advance beyond sixth grade in school. They failed to seek prison records recording Williams' commendations for helping to crack a prison drug ring and for returning a guard's missing wallet, or the testimony of prison officials who described Williams as among the inmates "least likely to act in a violent, dangerous or provocative way." Counsel failed even to return the phone call of a certified public accountant who had offered to testify that he had visited Williams frequently when Williams was incarcerated as part of a prison ministry program, that Williams "seemed to thrive in a more regimented and structured environment," and that Williams was proud of the carpentry degree he earned while in prison.

Williams v. Taylor, 529 U.S. at 396 (internal citations omitted).

Here, trial counsel's investigation was reasonable as argued *supra*, and the epilepsy and PTSD theories were considered and rejected. Contrary to *Williams*, this is not a case where new and mitigating information was discovered in postconviction, but a highly aggravated case with minimal mitigation and an expert witness that had more aggravating information than mitigating.

Appellee asserts that Appellant has made no showing of deficient performance and is therefore not entitled to relief on this claim. However, assuming *arguendo* that this Court finds that counsel was deficient for failing to provide Dr. Krop with the facts that Hall had recently reported a seizure and that his half-sister was epileptic, Hall would still only be entitled to relief if both prongs of *Strickland* are met and the alleged deficiency prejudiced Hall such that a reasonable probability exists that the outcome of the trial would have been different. This deficiency must ultimately deprive the defendant of a fair trial with a reliable result. *Peterson v. State*, 154 So. 3d 275, 280 (Fla. 2014), *reh'g denied* (Dec. 2, 2014) (citing *McCoy v. State*, 113 So. 3d 701, 708 (Fla. 2013)).

Hall has failed to prove how Dr. Krop's opinion would have changed had this information been provided to him, assuming of course that it had not been. This information is tenuous at best, and could not possibly shift the balance of aggravating and mitigating factors in this highly aggravated case. *See Johnston v. State*, 63 So. 3d 730, 740 (Fla. 2011). This claim should be denied.

ARGUMENT CLAIM VIII: THERE IS NO CUMULATIVE ERROR (*IB* 95, RESTATED).

Hall claims the "sheer number and types of errors involved in his trial at both the guilt and penalty phases" and the cumulative effect of same deprived Hall

of a fair trial. (*IB* at 95). The merits of this claim are contingent on his succeeding on several of his claims of error. In denying Hall's motion for a new trial on this claim, the postconviction court found as follows:

> Because of the aforementioned analysis Mr. Hall's claim of cumulative error is without merit. ". . . [W]here allegations of individual error are without merit, a cumulative error argument based thereupon must also fail." *Barwick v. State,* 88 So.3d 85, I 05 (Fla. 2011).

(R2278).

The State asserts that Hall has failed to prove ineffective assistance of counsel on each of his asserted claims. Because there is no error on the individual claims, there can be no error to cumulate, and this claim should, likewise, be denied. This Court has held:

> As we have determined, however, none of Butler's individual claims of ineffectiveness of counsel warrant relief. "Where, as here, the alleged errors urged for consideration in a cumulative error analysis 'are either meritless, procedurally barred, or do not meet the *Strickland* standard for ineffective assistance of counsel[,]...the contention of cumulative error is similarly without merit.'"*Bradley v. State,* 33 So. 3d 664, 684 (Fla. 2010) (alteration in original) (quoting *Israel v. State,* 985 So. 2d 510, 520 (Fla. 2008)).

Butler v. State/Tucker, 100 So. 3d 638, 668 (Fla. 2012). *See also Simmons v. State*, 934 So. 2d 1100, 1111 n.12 (Fla. 2006). The postconviction court's denial of this claim was correct and this Court should affirm that denial.

ARGUMENT CLAIM IX: INCOMPETENT FOR EXECUTION (*IB* 96, RESTATED).

Hall next contends in his final claim that he may be incompetent to be executed in the future. This claim is not yet ripe, and no relief may be contemplated at this time. In denying Hall's motion for a new trial on this claim, the postconviction court found as follows:

> Defendant Hall and the State agree this issue is not ripe until a death warrant has been issued.

(R2279).

This claim must be denied because it is not ripe as Hall has had no warrant for execution yet signed. *Nelson v. State*, 43 So. 3d 20, 34 (Fla. 2010).

CONCLUSION

Based on the foregoing authority and arguments herein, the State respectfully requests that this Honorable Court affirm the order of the postconviction court and deny all relief.

CERTIFICATE OF SERVICE

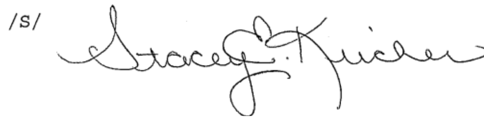
I certify that a copy hereof has been furnished by E-Portal filing to Anne Marie Mirialakis (mirialakis@ccmr.state.fl.us, support@ccmr.state.fl.us) and Richard Kiley (kiley@ccmr.state.fl.us, support@ccmr.state.fl.us), Assistants CCRC-Middle Region, 12973 N. Telecom Parkway, Temple Terrance, Florida 33637 on this 16th day of May, 2016.

CERTIFICATE OF COMPLIANCE

I certify that this brief was computer generated using Times New Roman 14 point font.

Respectfully submitted and certified,

PAMELA JO BONDI
ATTORNEY GENERAL



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