IN THE SUPREME COURT OF FLORIDA

MATTHEW L. CAYLOR,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

Case No. SC15-1823

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ON APPEAL FROM THE CIRCUIT COURT
OF THE FOURTEENTH JUDICIAL CIRCUIT,
IN AND FOR BAY COUNTY, FLORIDA

# ANSWER BRIEF OF APPELLEE

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## PRELIMINARY STATEMENT

Appellant, MATTHEW L. CAYLOR, the defendant in the trial court, will be referred to as appellant or by his proper name. Appellee, the State of Florida, will be referred to as the State. Pursuant to Rule 9.210(b), Fla. R. App. P. (2014), this brief will refer to a volume according to its respective designation within the Index to the Record of Appeal. A citation to a volume will be followed by any appropriate page number within the volume. The symbol "IB" will refer to appellant's initial brief and will be followed by any appropriate page number. The direct appeal record will be referred to as "DAR" and the post-conviction record will be referred to as "PCR."

## STANDARD OF REVIEW

In reviewing claims of ineffective assistance of counsel, an appellate court defers to the post-conviction court's factual findings as long as they are supported by competent, substantial evidence but reviews de novo the circuit court's legal conclusions. *Foster v. State*, 132 So. 3d 40, 54; *citing Johnson v. State*, 104 So. 3d 1010, 1022 (Fla. 2012). An appellate court applies "a mixed standard of review because both the performance and the prejudice prongs of the Strickland test present mixed questions of law and fact." *Id*.

## STATEMENT OF THE CASE AND FACTS

In July of 2008, appellant, 33, raped and murdered Melinda Hinson, a 13-year-old girl, in his Panama City hotel room. [PCR/I 4–5]. Appellant was convicted in the Circuit Court in Bay County, Florida of first-degree murder, sexual battery involving great physical force, and aggravated child abuse. *Id.* At the end of the penalty phase of Appellant's trial, the jury recommended the death penalty for the murder by a vote of eight to four, and the trial court followed this recommendation at sentencing. *Id.* The trial court also sentenced the Appellant to life in prison for the sexual battery involving great physical force, and thirty years in prison for the aggravated child abuse. *Id*.

Appellant filed a direct appeal in this Court. On October 27, 2011, this Court denied all six of appellant's claims and affirmed his death sentence. The appellant had argued in his direct appeal that (1) the trial court erred in denying his motion for judgment of acquittal on the charge of aggravated child abuse; (2) the trial court erred in denying his motion for judgment of acquittal on the charge of sexual battery involving great force; (3) the trial court erred in finding that appellant committing the murder while on felony probation amounted to an aggravating circumstance; (4) the trial court erred in assigning "little weight" to the "dysfunctional family" and "remorse" mitigating circumstances alleged by appellant; (5) appellant's death sentence is a disproportionate punishment; and (6)

Florida's death penalty is unconstitutional under the holding of *Ring v. Arizona*, 536 U.S. 584, 122 S. Ct. 2428 (2002). *Caylor v. State*, 78 So. 3d 482 (Fla. 2011) reh.'g denied (2012), cert. denied, ___ U.S. ___, 132 S. Ct. 2405 (2012).

Appellant turned back to the trial court to collaterally attack his judgment and sentence. On May 2, 2013, appellant filed his initial motion to vacate his judgement and sentence under Fla. R. Crim. P. 3.851 in the Circuit Court in Bay County, Florida, alleging that (1) his trial counsel was ineffective during voir dire for failing to challenge jurors, properly inquire of them, and to move to strike the entire panel for violations of his constitutional rights; (2) trial counsel was ineffective for not properly investigating and presenting mitigation evidence during the penalty phase; (3) appellant's rights under *Ake v. Oklahoma*, 105 S. Ct. 1087 (1985) were violated when his counsel failed to obtain an adequate mental health evaluation, and failed to provide the necessary background information about appellant to Dr. Jill Rowan, who trial counsel hired to examine appellant; and (4) trial counsel was ineffective in pursuing his postconviction remedies because of Rule of Professional Conduct which prohibited trial counsel from interviewing jurors to see if an error took place; (5) lethal injection violates the Eight Amendment prohibition against cruel and unusual punishment; and (6) errors in appellant's trial, when viewed as a whole, amounted to cumulative error. [r. 595–627]. The trial court conducted a *Huff* hearing on August 7, 2013, and granted

an evidentiary hearing for appellant to explore his claims regarding (1) juror Marianne Moore, (2) trial counsel's failure to investigate and present available mitigation evidence at the penalty phase, and (3) trial counsel's ineffectiveness at the penalty phase in providing information to the mental health consultant for mitigation. [PCR 630–31]. After an evidentiary hearing, the trial court denied all of Appellant's 3.851 claims. [PCR 595–627]. The Appellant timely appealed to this Court.

The relevant facts concerning the July 8, 2008, murder of Melinda Hinson are recited in this Court's opinion on direct appeal:

> In July 2008, Melinda Hinson was living with her mother, her mother's boyfriend, her fifteen-year-old brother, and Daryl Lawton, a family friend, in a single room at the Valu-Lodge Motel in Panama City. . . . The room was crowded and the children did not have school during the summer, so Melinda would spend most of her time by the motel's pool. Melinda would also walk two dogs belonging to Scott Heinze and Tyler Nichols, who also lived at the motel, while Heinze and Nichols were at work.
>
> According to the motel's records, Matthew Caylor checked into the motel on June 25, 2008. At trial, Lawton testified that prior to the date of Melinda's disappearance, he had only spoken with Caylor a few times and that he had never seen Melinda or her brother speak with Caylor. However, at around noon on July 8, Caylor came to Lawton and asked to borrow some duct tape, which Lawton took to Caylor's room. Later in the day, Caylor called Lawton and asked if he could also borrow a steak knife. Again, Lawton went to Caylor's room to take him the item. Lawton recalled that Melinda and her brother accompanied him on one of these occasions, but said that they did not speak to Caylor.

Melinda was last seen alive shortly after 5 p.m. on July 8, when she returned Heinze and Nichols' dogs to their room after taking the dogs for a walk.

. . .

Melinda's body was discovered on the morning of July 10, hidden under a bed in a room two doors down from Heinze and Nichols' room. The body was found naked and lying face-down. The discovery was made by a housekeeper who was following the motel's requirement of checking under the beds for trash. Although the room had been cleaned the previous day, the first housekeeper to clean the room testified that she did not look under the bed that day because her back was hurting. A review of the motel's records revealed that Matthew Caylor had been renting the room on the day of Melinda's disappearance. Officers of the Panama City Police Department subsequently learned that Caylor had been arrested in connection with a different criminal matter and that he was already in the custody of the Bay County Sheriff's Department.

Detective Mark Smith of the Panama City Police Department testified at trial that he interviewed Caylor after the body was discovered. He was accompanied by Investigator Mike Wesley of the Bay County Sheriff's Department, who had interrogated Caylor following the initial arrest. When Smith and Wesley went to see Caylor, Caylor said that he was glad to see the officers because he wanted to talk to them. The Officers read Caylor his *Miranda* rights, which he waived. In the interrogation that followed, Caylor confessed to the murder of Melinda Hinson and described the circumstances leading up to the crime.

. . .

In statements made initially to the police officers and later to the trial court, Caylor gave the following account of the murder and the events leading up to it. In the summer of 2008, Caylor was on felony probation in the State of Georgia based on an incident that had occurred several years before in which he was accused of molesting the fourteen-year-old daughter of a neighbor. Caylor asserted that he was falsely accused, but said that on his attorney's advice he pled guilty to avoid a possible prison sentence. He was later required to

register as a sex offender after violating the terms of his probation by being convicted of possession of cocaine. Caylor stated that after several years he became frustrated with the restrictions placed on him as a sex offender, and said that he told his probation officer that he would rather serve time in jail and be done with the sentence. Caylor said that he then went to Panama City to relax because he thought he would have to spend approximately a year and a half in jail. Caylor admitted that he had not been given permission by his probation officer to leave Georgia, even though he knew he was required to receive such permission by Georgia law.

Caylor decided to rent a room at the Valu-Lodge Motel because it was close to the beach. While in Panama City, Caylor began selling cocaine and methamphetamine. He said that he also became friends with "two Russian girls," and that he became romantically involved with one of the girls, Marina. He said that he discovered on July 8 that the women had stolen some of his drugs. Caylor said that he borrowed a knife and duct tape with the intent of using it to threaten them to get his drugs back. He subsequently went to the women's apartment, taking the knife and duct tape with him. Caylor said that he became violent during that encounter and decided to go back to his room at the motel. He was later arrested for the incident at the apartment.

During his interrogation, Caylor told Smith and Wesley that he returned to his motel room immediately after the incident at the women's apartment. He said that he had been back in his room for only a few minutes when Melinda Hinson knocked on his door and asked him for a cigarette. He told officers that at the time Melinda came to his room, he felt that he had "been through all of this because of something I didn't do," and told the officers that he decided he was "going to make it worth it." When asked during the *Spencer* hearing what he meant by these statements, Caylor responded that he meant he was angry about his prior conviction for child molestation. He told the trial court he felt that "[i]f I'm going to be in trouble for having sex with this girl being in my room, I might as well have sex with this girl.

After Melinda entered the room, Caylor said that she sat down on the bed and that they began smoking. He asked her what she had been

doing. Melinda replied that she had just finished walking a dog that belonged to the men in the next room. Caylor asked how old she was and she told him that she was thirteen. He said that he asked why she hung out with the guys next door. Melinda responded that "they think they're hot stuff" but said that she "[did]n't really like them." According to Caylor, Melinda then told him that she thought he was "hot," moved close to him on the bed and put her arm around him. Caylor said that they started kissing, that he took her clothes off, and that they started having sex.

Caylor said that at some point he "just started choking her." He claimed that they had stopped having sex just before he began to strangle her. He said that he "wasn't into it" and that the intercourse lasted for only thirty to forty-five seconds. However, he said that they were still naked when he began to strangle her and that he was still on top of her. Caylor said that when he began to choke Melinda, "she was flipping out and I just wanted her to go away." He said that she began fighting him and saying, "[L]et me ask you a question, let me ask you a question," and that during the struggle they fell from the bed to the floor. Caylor told the officers that he then unplugged the phone cord from the wall and wrapped it around her neck. The officers asked whether Melinda was moving when he began to strangle her with the cord, and Caylor responded: "Well, yeah, it was like no, no," [sic] When he thought Melinda was dead, he released her and plugged the phone cord back into the wall. He then lifted up the mattress and placed Melinda and her clothes under the bed. He said that he gathered his things and left the room.

Detective Smith asked Caylor why he decided to kill Melinda:

> [Detective Smith:] Well, is your thoughts that now I've had sex with her she's going to tell? Is that what led to that she has to die?
>
> [Caylor:] No, it wasn't like that, no, it wasn't like that, it was just like, it was like, more or less like you're the fucking reason why I'm in this situation I'm in now because I did the right thing. I think it was more of a hate, like a hate, like I was really angry, I think it what it was. [sic]

> [Detective Smith:] A hate for her or a hate for the fact [sic] that she's 13 years old.
>
> [Caylor:] That she as 13 coming on to me.

Caylor said that when Melinda came into his room, he was "all pissed off about everything that has happened, not to mention the fact of what just happened at Marina's house." He said that Melinda "just kind of walked up at the wrong, with, you know, with that same bull shit, man, at the wrong time."

At trial, the State called several witnesses to describe physical evidence recovered from the crime scene. Brenda Pelfrey, a crime scene investigator, identified photographs of the motel room where the body was discovered. She stated that the victim's clothes, which were found underneath the body, were not ripped or torn and that there was no blood on the victim's underwear. Pelfrey was also present during the autopsy, where she collected a sexual assault kit. Trevor Seifert, a crime lab analyst, testified that he found Melinda's DNA on portions of the phone cord removed from the motel room, and that Caylor was a possible contributor to scrapings taken from under Melinda's Fingernails. Seifert also stated that vaginal swabs from the victim tested positive for blood and semen, and that Caylor's DNA profile matched these samples.

The jury also heard testimony from Dr. Michael Hunter, the medical examiner who conducted the autopsy. Dr. Hunter stated that during the examination he observed considerable injuries to the victim's neck. He found that some of these injuries were consistent with strangulation by hand, while other straight-line markings showed strangulation by ligature. He agreed that the latter markings could have been inflicted through the use of a telephone cord. Dr. Hunter noted that there were multiple straight-line abrasions, which indicated application and reapplication of the ligature. He determined that these markings were most likely inflicted while the victim was still alive. He also observed bleeding in the victim's eyes, which provided further evidence of strangulation. Dr. Hunter ultimately concluded that the cause of death was strangulation. He said that the victim would have been in pain while she was conscious, and noted that there was no evidence of any head trauma that might have impaired her

ability to feel pain or made her unaware of what was happening around her.

In addition to evidence of strangulation, Dr. Hunter observed other injuries on the body, including a bruise on the victim's arm, a small abrasion on her left ankle, and another large bruise that extended over the length of the left side of her clavicle. He said that there was considerable bleeding underneath the clavicle bruise. Additionally, Dr. Hunter observed discoloration in the victim's public area, although he said that this injury could have occurred during consensual sex. He noted that the victim was menstruating at the time of death, but found no indication as to whether she was sexually active. He said that the victim's blood tested positive for nicotine but negative for drugs or alcohol.

After the jury convicted Caylor of all three charged offenses, a penalty proceeding was held. The State's only witness at this proceeding was Thomas Shakitra, who testified that he was employed as a probation officer with the State of Georgia. Shakitra stated that in 2008, he was supervising Caylor, who was on felony probation. Following this testimony, the defense stipulated that Caylor had a prior felony conviction in Georgia.

The defense called four witnesses during the penalty phase. The appellant's parents, Kimberly and Kerry Caylor, testified that they were both addicted to amphetamines while the appellant was a child and that for a time the family had no money and lived in a trailer with no power. Both parents testified that the appellant had an abusive relationship with his father, began abusing drugs at a young age, and suffered from emotional problems. A third defense witness testified that he worked with the appellant as a mechanic in Jasper, Georgia, and described the appellant's drug problems. The final defense witness was a veterinarian who testified that Matthew Caylor had worked in the kennel area of his office for several months. He stated that Caylor was a good employee and treated the animals well. At the end of the proceeding, the jury recommended the death penalty by a vote of eight to four.

The trial court held a *Spencer* hearing on November 18, 2009. Caylor testified in his own defense and descried the events proceeding the

> murder. He said that contrary to his initial statement to police, he had used a large amount of drugs on the day of the homicide. He stated that he decided to have sex with Melinda because he was angry because he found himself in a similar situation with a thirteen-year-old girl. He said that he did not rape Melinda and that he was remorseful for killing her.
>
> In its written sentencing order, the trial court found and assigned weight to the following aggravating circumstances: (1) the capital felony was committed by a person previously convicted of a felony and under a sentence of imprisonment or placed on community control or on felony probation (great weight); (2) the capital felony was committed while the defendant was engaged in the commission of sexual battery and aggravated child abuse (great weight); and (3) the capital felony was especially heinous, atrocious, or cruel ("HAC") (great weight). The court found the following mitigating circumstances: (1) dysfunctional family (little weight); (2) under the influence of an extreme mental or emotional disturbance (some weight); (3) compassionate to animals and good employee (little weight); (4) learning difficulties (very little weight); and (5) remorse (little weight).
>
> The trial court concluded that the nature and quality of the mitigating factors "pale[d] in comparison" to the enormity of the aggravating circumstances. Furthermore, the court determined that the aggravating circumstances clearly and convincingly outweighed the mitigating factors. Based on these determinations the trial court imposed a sentence of death.

*Caylor v. State*, 78 So. 3d 482, 486–91 (Fla. 2011).

***Facts from the Post-Conviction Evidentiary Hearing***

Deputy Public Defender Walter Smith, appellant's trial counsel (trial counsel) testified at the evidentiary hearing. [PCR/XXIV 1510–12]. At the time of appellant's trial in 2009, trial counsel was a Deputy Public Defender. *Id.* Trial

counsel was admitted to the Florida Bar in 1980, was a Board Certified Criminal Trial Attorney, and has been trying capital punishment cases since 1982. *Id.* Trial counsel has tried between 250 and 300 cases, of which approximately 100 were homicide cases and 26 of those homicides were death penalty trials. *Id.* Trial counsel regularly attends the required seminars on defending capital punishment cases, and was a qualified capital punishment attorney at the time of appellant's trial. [PCR/XXIV 151214, 1537].

Trial counsel testified that his strategy at the guilt phase was to try to convince the jury that the appellant committed the murder with a depraved mind, with the hope that appellant would receive a second-degree murder conviction and avoid the death penalty. [PCR/XXIV 1512]. After the appellant was convicted of first degree murder, trial counsel's penalty phase strategy was to show this murder was not "one of the most grievous forms of homicide…[but] one done in extreme rage, resentment." *Id.* This strategy was in line with the motivation for the murder that appellant explained to law enforcement officers in his videotaped confession. [PCR/XXIV 1513]. Trial counsel's penalty phase strategy included arguing that the defendant confessed and took responsibility for the crime after he committed the crime out of extreme rage, and therefore appellant did not deserve the ultimate punishment. *Id.*

Trial counsel testified at the evidentiary hearing that he was very selective in what evidence he presented to the jury at the penalty phase because (1) he did not want the jury to know the appellant was on probation for molesting a 13-year-old girl in Georgia; (2) he did not want the jury to hear about appellant's extensive drug abuse; (3) he did not want the jury to hear about appellant's anti-social diagnosis and the accompanying negative information entangled with his mental health history; and, (4) he did not want the jury to hear about appellant's unsavory family relationships because it would negatively impact his strategy to present appellant as a man who fessed up and took responsibility for a crime he committed rashly out of anger. [PCR/XXIV 1524–1530].

At the evidentiary hearing, appellant first called Daniel Ashton, the investigator hired by his post-conviction counsel. [PCR/XXII 1186]. Ashton testified that his role was to gather "any and all" information related to appellant's life history that could help with mitigation. [PCR/XXII 1188]. Ashton testified that he interviewed approximately 20 people. *Id.* Ashton also testified that he obtained records from Dr. Jill Rowan (the psychologist hired by trial counsel to evaluate appellant) that were provided to her by trial counsel, and these were admitted into evidence. [PCR/XXII 1192] [ Def. Ex. 1]. Ashton testified that he obtained appellant's school records. [PCR/XXII 1194] [Def. Ex. 2]. Ashton further testified that he obtained records from the Georgia Department of

Corrections that were provided to trial counsel by the State Attorney's Office before trial, in addition to records Ashton obtained from the Georgia Department of Corrections on 2/21/2013. [PCR/XXII 1195] [Def. Ex. 3].

Ashton testified that he obtained records of a mental health evaluation of appellant, conducted while appellant was incarcerated in Georgia, and which was included in the records of Northwest Georgia Regional Hospital that arrived during the trial, in addition to multiple jail and hospital records collected after the trial. [PCR/XXII 1196] [Def. Ex. 4]. Ashton also testified that he obtained medical records from the Rockdale Medical Center. [PCR/XXII 1199] [Def. Ex. 5]. All of these exhibits were admitted into evidence. However, Ashton conceded on cross-examination that he discovered a good deal of information in his investigation that would be unfavorable to appellant. [PCR/XXII 1210].

The only mental health expert the appellant called to testify on his behalf at the evidentiary hearing was Dr. Barry Crown, Ph.D. [PCR/XXII 1222]. Dr. Crown reviewed all the mental health records Ashton collected, and attempted to explain them at the evidentiary hearing. [PCR/XXII 1222]. Dr. Crown is a licensed psychologist who has testified regarding mental health mitigation in court over 200 times on behalf of criminal defendants. [PCR/XXII 1222, 1224]. Dr. Crown testified that he conducted a neuropsychological and psychological assessment of the appellant. [PCR/XXII 1224].

Dr. Crown testified that he ultimately diagnosed appellant with a cognitive disorder, post-traumatic stress disorder, poly-substance abuse disorder (including methamphetamine, cocaine, crack, alcohol, and "whatever substance he could get ahold of"), and bi-polar disorder. [PCR/XXII 1227]. Dr. Crown further testified that appellant did not appreciate the criminality of his conduct and that his ability to conform his conduct was substantially impaired because of a combination of being in a "drug withdrawal state", cycling through drug use, continuous bipolar disorder, and that appellant had not slept in several days. [PCR/XXII 1231]. Although Dr. Crown is not a neurologist or even a medical doctor, he also testified that in his opinion appellant has brain damage based on a combination of childhood trauma and drug abuse. [PCR/XXII 1233]. However, Dr. Crown acknowledged that appellant did not undergo a CT scan or MRI to confirm his opinion. [PCR/XXII 1282].

On cross-examination Dr. Crown testified that appellant made representations to him that directly contradicted some of the things appellant told police in his videotaped confession. [PCR/XXII 1259]. Dr. Crown testified that he reviewed appellant's medical records and that appellant was evaluated for competency in connection to appellant's 2001 child molestation charge in Georgia. [PCR/XXII 1263]. Dr. Crown testified that during the 2001 testing in Georgia in connection to the child molestation charge, the appellant was not

found to have neurological impairment, that there were notations in his mental health records that the appellant is easily angered, emotionally unstable, has a low frustration tolerance, low impulse control, history of being physically cruel, history of physically fighting, and history of exploiting others. [PCR/XXII 1263–64].

Dr. Crown also testified on cross-examination about his review of appellant's medical records, including the reports of at least six different doctors in Georgia that evaluated appellant in connection to the Georgia criminal justice system. *Id.* In an evaluation related to the child molestation charge, Dr. Crown conceded that one doctor in Georgia diagnosed appellant with depressive disorder, cocaine dependence, cannabis dependence, and antisocial personality disorder, but not bipolar disorder. [PCR/XXII 1267]. Dr. Crown further testified that another doctor in Georgia diagnosed appellant with borderline personality disorder, narcissistic personality disorder, cocaine abuse, and post-traumatic stress disorder. [PCR/XXII 1270–71]. Dr. Crown also acknowledged that yet a different doctor in Georgia ruled out bipolar disorder, and instead diagnosed appellant with borderline personality disorder. [PCR/XXII 1275]. Dr. Crown explained that borderline personality disorder is "a disorientation from reality…[that] establishes a sense of entitlement and creates some confusion in self-perception and the perception of others." Id. Dr. Crown further

acknowledged that yet another doctor diagnosed appellant with narcissistic and anti-social personality disorder at the Georgia Department of Corrections (DOC) in 2002. [PCR/XXII 1276–77].

Dr. Crown testified that there was also history of appellant torturing animals at a young age contained in these medical records. [PCR/XXII 1267]. Dr. Crown further admitted on the stand that there were descriptions in appellant's 2001 Georgia DOC records that the appellant has "narcissistic entitlement" which means that he does not accept responsibility for his actions and routinely blames everyone but himself for his problems. [PCR/XXII 1271]. Dr. Crown acknowledged that the many attempts to treat the appellant for his drug dependency and mental problems failed because the appellant refused to cooperate with treatment. [PCR/XXII 1272]. Dr. Crown also admitted that appellant's medical records revealed that appellant had attempted to stab a health services technician and had threatened the staff. [PCR/XXII 1273]. Dr. Crown also acknowledged that in the medical records one doctor notated that the appellant is manipulative and often used the hospital to avoid his legal problems in court. [PCR/XXII 1273]. Moreover, Dr. Crown conceded that almost all doctors that evaluated appellant specifically ruled out bi-polar disorder. [PCR/XXII 1274].

The State called Dr. Harry McClaren to testify at the evidentiary hearing on June 2, 2015. [PCR/XXIV 1600]. Dr. McClaren is a licensed psychologist and evaluated appellant twice in 2014. [PCR/XXIV 1602–04]. Dr. McClaren testified that he reviewed the medical records from the Georgia department of corrections that spanned from 1999 to 2007. [PCR/XXIV 1606]. Dr. McClaren testified that the appellant was predominately diagnosed with a mood disorder in the records. [PCR/XXIV 1607]. Dr. McClaren explained that in six to seven admissions to hospitals in Georgia while in custody of the Georgia Department of Corrections, all but one doctor ruled out bi-polar disorder and instead diagnosed appellant with a combination of depression, borderline personality disorder, narcissistic personality disorder, complicated by substance abuse. [PCR/XXIV 1608]. Dr. McClaren further testified that in his opinion, appellant does not suffer from bipolar disorder, and instead diagnosed appellant as meeting the criteria for depressive disorder, post-traumatic stress disorder, antisocial personality disorder, narcissistic personality disorder, and a very strong diagnosis of borderline personality disorder. [PCR/XXIV 1611]. Dr. McClaren explained that borderline personality disorder can look a lot like a phase of bipolar disorder at first because of the tendency for grandiosity, but testified that he can say with certainty that the appellant does not have bipolar disorder. [PCR/XXIV 1611]. Finally, Dr. McClaren testified that appellant did appreciate the criminality of his conduct and his ability to conform

his behavior to the requirements of the law was not substantially impaired. [PCR/XXIV 1612–13].

Keisha Bugler testified on appellant's behalf. [PCR/XXII 1307]. Ms. Bugler met the appellant six weeks prior to the murder at a club in Panama City and he asked her to obtain drugs for him. [PCR/XXII 1308–10]. Ms. Bugler testified that appellant asked her to find drugs for him and a girl to have sex with because he was sexually frustrated. [PCR/XXII 1313]. Ms. Bugler also testified that around July 30th 2008, appellant was purchasing a thousand dollars' worth of crack cocaine a day. [PCR/XXII 1309]. Appellant may have tried to purchased drugs around the time of the murder. [PCR/XXII 1314].

Stephanie Putnam also testified on appellant's behalf about his extensive recreational drug use. [PCR/XXII 1316]. Ms. Putnam testified she knew appellant since 1998, but had not seen him since 2003, and that they used to do many different drugs together, including crystal meth, cocaine, and ecstasy. [PCR/XXII 1316–18]. Ms. Putnam further testified that appellant used to stay up for a week at a time doing drugs. [PCR/XXII 1319]. Ms. Putnam testified she did not recall an investigator calling her prior to the trial but that it could have happened. [PCR/XXII 1329]. Ms. Putnam also testified that she recalled multiple instances of appellant displaying violent behavior towards his ex-wife. [PCR/XXII 1330].

Ms. Putnam testified appellant resented his family for allowing him to be molested. [PCR/XXII 1322].

Connie Rushman also testified for the appellant. [PCR/XXII 1331]. Ms. Rushman testified that appellant is her nephew. *Id.* Ms. Rushman testified that she is a recovering heroin addict and also testified that appellant's mother was addicted to methamphetamine. [PCR/XXII 1334–35]. Ms. Rushman testified that she never saw any violence towards the appellant by his mother and father, but that she did one time see appellant's mother and father pushing each other around. [PCR/XXII 1336–37]. Ms. Rushman testified that she had not seen appellant since 1999. [PCR/XXII 1339].

Kimberly Caylor, appellant's mother, testified for the second time at the evidentiary hearing. [PCR/XXII 1341]. Mrs. Caylor testified that she remembers speaking with Ernest Jordan (trial counsel's investigator) one time and that the first time she spoke with trial counsel was the day of trial. [PCR/XXII 1342–43]. Mrs. Caylor testified that no one from the Public Defender's office asked about appellant's family background. [PCR/XXII 1347]. Mrs. Caylor testified that she observed appellant trip as a child and sustain a head injury, sustain another head injury from someone throwing a tire iron at him, and another occasion where appellant fell down the stairs. [PCR/XXII 1350]. Mrs. Caylor explained that her husband was physically and verbally abusive to the appellant as a child.

[PCR/XXII 1351–53]. Mrs. Caylor testified that appellant previously tried to commit suicide. [PCR/XXII 1354]. Mrs. Caylor testified that she and her husband did drugs on a regular basis when appellant was a child, including methamphetamine. [PCR/XXII 1356, 1369]. Mrs. Caylor testified that appellant was molested when he was 12 years old. [PCR/XXII 1356]. Finally, Mrs. Caylor explained that her testimony at evidentiary hearing was broader because trial counsel did not ask questions about very much and therefore she was not given the opportunity to explain further. [PCR/XXII 1359].

On cross-examination Mrs. Caylor testified that trial counsel warned her before she got on the witness stand at the penalty phase that there was some bad information in appellant's background that he did not want the jury to hear. [PCR/XXII 1359]. Mrs. Caylor testified that her other son did not have behavioral problems, graduated high school, and was essentially the opposite of appellant. [PCR/XXII 1365-66]. Mrs. Caylor testified that appellant had an affair with his uncle's wife and that turned his relationship sour with the whole family. [PCR/XXII 1367–68]. Mrs. Caylor testified appellant blackmailed his uncle's wife into giving him thousands of dollars to no tell her husband. [PCR/XXII 1368]. Mrs. Caylor testified that appellant had an affair with his son's grandmother/ex-girlfriend's mother, which made a lot of his family angry. [PCR/XXII 1368]. Mrs. Caylor testified that appellant was diagnosed anti-social

personality and bipolar as a child. [PCR/XXII 1370]. Mrs. Caylor also testified that she was diagnosed bipolar in 2011 or 2012. [PCR/XXII 1372]. However, Mrs. Caylor acknowledged that her testimony at the evidentiary hearing was not distinctly different from the penalty phase in 2009.

Appellant's father, Kerry Caylor (Kerry), also testified for the second time on appellant's behalf at the evidentiary hearing. [PCR/XXIII 1379]. Kerry testified that he spoke with trial counsel over the phone before he came down to testify at the penalty phase, but did not recall speaking to trial counsel's investigator. [PCR/XXIII 1380–81]. Kerry testified that trial counsel was rude to him over the phone and that he threatened to fight trial counsel if he came down, to which trial counsel said "bring it on." [PCR/XXIII 1381–82]. Kerry testified that trial counsel asked him to help find appellant's mental health records. [PCR/XXIII 1384]. Kerry explained that he and his wife considered aborting appellant when he found out his wife was pregnant. [PCR/XXIII 1387]. Kerry testified about using methamphetamine when appellant was a child and physically abusing appellant, and allowing him to go hungry during his drug binges. [PCR/XXIII 1388–90, 1395]. Kerry testified to physically abusing his own wife in front of appellant, and verbally abusing appellant. [PCR/XXIII 1391–94]. Kerry explained that he kicked appellant out of the house at 15 or 16 and he went to live with a group of people who routinely ate out of the trash. [PCR/XXIII 1399]. Kerry also testified that

appellant tried to commit suicide and had mental problems as a child. [PCR/XXIII 1402]. Kerry admitted hitting appellant in the face when he was an infant because he was crying. [PCR/XXIII 1404]. Kerry testified that he was instructed by trial counsel to only answer four or five questions and not volunteer any other information at the penalty phase. [PCR/XXIII 1405].

On cross-examination Kerry testified that when appellant called him from jail and told him he killed someone, that he told appellant "if you killed somebody, you, you probably, you deserve to die." [PCR/XXIII 1411]. Kerry also testified that he told appellant he was never going to talk to him again after he told him about the murder, and that he was upset with him sleeping with his brother's wife. [PCR/XXIII 1412–13]. Kerry also testified that he called trial counsel up before trial and told him he was not going to the trial after trial counsel already bought him hotel and airline tickets to Panama City, which he already had accepted. [PCR/XXIII 1418].

The state and the appellant stipulated to the deposition of Jack Jarrett, appellant's paternal step-grandfather, being entered into evidence. [PCR/XXII 1373] [PCR/VII 1371] [Def. Ex. 8]. Mr. Jarrett testified that appellant's maternal grandmother refused to appear for a taped deposition in her hometown, and refused to come down for appellant's trial. [PCR/VII 1379–80]. Mr. Jarrett testified that appellant's mother resented him since he was born, and reiterated the abuse he was

subject to as a child. [PCR/VII 1372]. Mr. Jarrett testified to appellant's father abusing him and appellant's parents using drugs. *Id.* Mr. Jarrett also testified that appellant had an affair with his daughter-in-law in 2008. [PCR/VII 1378]. Mr. Jarrett testified that he was aware appellant was on trial for murder and facing the death penalty but he did not come down for the trial. [PCR/VII 1377]. Mr. Jarrett acknowledged that trial counsel called his wife before the trial and tried to get her to testify. [PCR/VII 1379]. When pressed why he did not attend the trial, Mr. Jarrett stated: "I have always been in favor of the death penalty…I am still in favor of the death penalty." [PCR/VII 1379]. Mr. Jarrett further explained that originally he felt that "the way [appellant] was raised wouldn't necessarily influenced him to turn out the way he did." *Id.* However, Mr. Jarrett explained he has since changed his opinion that how appellant was raised could influence his decisions and therefore he would say anything truthful that could reduce appellant's sentence to life. *Id.*

Finally, appellant's younger brother, Chris Caylor (Chris), testified at the evidentiary hearing. [PCR/XXIII 1420]. Chris testified that he saw his parents physically and verbally abuse each other and appellant growing up, and also abuse drugs. [PCR/XXIII 1421–24]. Chris testified he never spoke with anyone from the Public Defender's office, but if they had asked him to testify he probably would not have done so and did not want to be at the evidentiary hearing as it was.

[PCR/XXIII 1427]. On cross examination, Chris testified that his father was not interested in coming down to testify for the penalty phase in the first place. [PCR/XXIII 1432].

Ernest Jordan, the chief investigator at the Public Defender's Office, testified on behalf of the state at the evidentiary hearing. [PCR/XXIII 1469]. Mr. Jordan testified that he met with appellant on several occasions to gather information to assist in obtaining witnesses for the guilt and penalty phase of his trial. [PCR/XXIII 1471]. Mr. Jordan testified that he talked to Jean Shelton, the grandmother of appellant's son, and she provided a list to contact on behalf of appellant. [PCR/XXIII 1473]. Mr. Jordan testified that he contacted numerous people, including Stephanie Putnam, prior employers, prior co-workers, members of the band appellant belonged to, appellant's parents, appellant's aunt, appellant's grandmother, appellant's manager, and even went through a list of number's from appellant's phone. [PCR/XXIII 1471–78]. Mr. Jordan testified that appellant's parents were very hesitant to come down, and that ultimately trial counsel had to buy their airline tickets on his own credit card to get them to come to the trial. [PCR/XXIII 1479]. Mr. Jordan explained that appellant's father was very reluctant to testify and reveal family secrets. [PCR/XXIII 1479–80]. Mr. Jordan testified that he attempted to collect the records from the DOC in Georgia regarding appellant's mental health and probation. [PCR/XXIII 1492].

## Summary of the Argument

***Issue One***

The trial court correctly denied appellant's claim that his trial counsel was ineffective in investigating appellant's mental health and family history mitigation and determining not to use a mental health expert at the penalty phase. Trial counsel made a reasonable strategic decision to limit the use and investigation of mental health and family history mitigation when he discovered harmful information in appellant's mental health history and family history, including a diagnosis of anti-social personality disorder, mental health evaluations connected to appellant's past conviction for child molestation, and hostile family relationships. Furthermore, appellant has failed to establish that he was actually prejudiced by counsel's decision.

***Issue Two***

Appellant's claim that his trial counsel was ineffective because appellant felt he was not provided a competent mental health evaluation for mitigation was also properly denied as trial counsel is not required to abandon his professional judgment in order to provide mental health mitigation services when trial counsel obtained a mental health expert and, after consultation, made a reasonable strategic decision to not use a mental health mitigation expert at the penalty phase.

Furthermore, to the extent appellant is urging a violation of *Ake v. Oklahoma*, *infra*., that claim is procedurally barred and without merit.

***Issue Three***

The trial court properly denied appellant's claim that his trial counsel was ineffective for failing to challenge a juror who potentially had doubts on her ability to be fair and impartial in a death case. In order to establish such a claim, appellant must show that a truly biased juror sat on his case. Where, as here, the record shows that the juror stated she could be fair and impartial and was completely rehabilitated by the prosecutor, appellant is not entitled to relief.

***Issue Four***

The trial court correctly denied an evidentiary hearing on appellant's claim that his trial counsel was ineffective for failing to inquire of juror's feelings and opinions on the death penalty and mitigating factors because there is nothing in the record to indicate that three jurors who expressed favorable opinions on the death penalty tainted the panel or an actually biased juror sat on his case, on the contrary the record indicates other jurors who opposed the death penalty spoke up in opposition.

***Issue Five***

Appellant's claim of cumulative error must be denied as he has failed to show the existence of any error.

# ARGUMENTS

## ISSUE I

WHETHER TRIAL COUNSEL WAS INEFFECTIVE FOR HIS INVESTIGATION AND PRESENTATION OF MITIGATION EVIDENCE AT THE PENALTY PHASE

The appellant's argument that his trial counsel was ineffective in investigating mental health mitigation, including obtaining mental health records, fails because trial counsel made a reasonable strategic decision to forgo using mental health mitigation evidence at the penalty phase when he learned of harmful information in appellant's mental health history, including a diagnosis of anti-social personality disorder.

### *Trial Court's Ruling*

In the trial court's final order denying appellant's 3.851 motion, the trial court determined that, based on the evidence presented at the evidentiary hearing and the record, appellant's trial counsel made a reasonable strategic decision not to use testimony from a mental health expert during the penalty phase, and that this decision was well within the great latitude afforded to counsel in decisions regarding the use of expert witnesses. [PCR/IV 610]. The court based its findings on trial counsel's testimony at the evidentiary hearing—and the court found trial counsel credible and persuasive. *Id*. Moreover, the trial court found that, in making his decision not to put on a mental health expert at the penalty phase, trial

counsel learned about appellant's mental health history through speaking with the appellant; consulting with Dr. Jill Rowan; and through investigating the appellant's background. [PCR/IV 611].

The trial court acknowledged that there was evidence of information in appellant's mental health history that would be harmful in front of a jury, and could easily be elicited by the State if trial counsel opened the door by putting on a mental health expert. [PCR/IV 609] The harmful information included that the appellant has narcissistic and antisocial behavioral problems, long term drug dependency, a cunning and manipulative personality, numerous failed attempts to treat his mental health issues because appellant refused to cooperate, and that appellant assaulted and threatened staff at treatment centers. [PCR/IV 609].

The trial court found Dr. McClaren's testimony corroborated trial counsel's testimony that appellant's mental health history was filled with potentially harmful information. [PCR/IV 611]. The trial court also took into account trial counsel's extensive experience litigating death penalty cases in the Florida Panhandle, and trial counsel's testimony that, in his experience, jurors in the Panhandle do not respond favorably to mental health mitigation in general—but especially not to the type of information in appellant's mental health history. *Id.*

As a result, the trial court held that, under the circumstances, trial counsel made a reasonable, strategic decision not to put on the expert mental health

testimony at the penalty phase, and that there was no deficient performance under the first prong of *Strickland*. The trial court also found that, even if there were deficient performance here, there would not be any prejudice under the second prong of *Strickland*, because in light of all the testimony at evidentiary hearing, a mental health expert presented at the penalty phase would not have been helpful to the appellant because this strategy could easily have backfired. [PCR/IV 612].

***Analysis***

Trial counsel's decision to limit the mental health mitigation investigation, including the retrieval of medical records, and to forgo the use of a mental health expert at the penalty phase did not render his performance deficient under the first prong of *Strickland* for four different reasons: (1) trial counsel made a reasonable strategic decision not to use mental health mitigation because of the risk of opening the door to harmful evidence; (2) trial counsel's penalty phase strategy consisted of presenting appellant as a man taking responsibility for a mistake made out of rage, which was incompatible with also presenting his mental health history; (3) after thirty years representing capital defendants in the Florida Panhandle, trial counsel was uniquely capable of deciding whether a Panhandle jury would be unsympathetic to appellant's particular mental health circumstances; and, (4), trial counsel's mental health investigation immediately revealed information harmful to appellant.

However, even assuming, for argument's sake, that trial counsel's performance was deficient, the appellant cannot satisfy the prejudice prong of *Strickland* because appellant cannot show there is a reasonable probability that the result of the proceedings would have been any different had trial counsel presented a mental health expert, especially in light of the harmful information in appellant's medical history revealed at the evidentiary hearing.

In evaluating trial counsel's decisions and trial strategy, it is important to keep in mind that "an attorney is not ineffective for decisions that are part of trial strategy that in hindsight, did not work out to the defendant's advantage." *Mansfield v. State*, 911 So. 2d 1160, 1174 (Fla. 2005). "Even if counsel's decision appears to have been unwise in retrospect, the decision will be held to have been ineffective assistance, only if it was 'so patently unreasonable that no competent attorney would have chosen it." *Dingle v. Sec'y Dept. of Corr.*, 480 F.3d 1092, 1099 (11th Cir. 2007) (quoting *Adams v. Wainwright*, 709 F.2d 1443, 1445 (11th Cir. 1983)). Judicial scrutiny of counsel's performance must be highly deferential and must be conducted in a manner that eliminated the "distorting effects of hindsight" and considers the conduct in light of the circumstances facing the attorney at the time." *Johnson*, 921 So. 2d 490, 500 (Fla. 2000) (internal citations omitted) (citing *Strickland*, 466 U.S. at 689 –90).

***Deficiency***

To establish ineffective assistance of counsel, a defendant must satisfy a two prong test, establishing both deficient performance and prejudice. *Strickland v. Washington*, 466 U.S. 668 (1984). To establish deficient performance, a defendant must show that counsel made specific errors so serious that he was not functioning as the "counsel" guaranteed to the defendant by the Sixth Amendment. *Strickland*, 466 U.S. 688; *Pietri v. State*, 885 So. 2d 245, 252 (Fla 2004).

First, trial counsel's performance cannot be deemed deficient under the first prong of *Strickland* because trial counsel's decision to forgo presenting mental health testimony at the penalty phase was a strategic decision made to avoid the risk of opening the door for the prosecution to elicit damaging evidence. [PCR/XXIV 1525–30]. This Court has previously recognized that "trial counsel is not deficient where he 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." *Griffin v. State*, 866 So. 2d 1, 9 (Fla. 2003); *see also 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."). Presenting a mental health expert at the penalty phase risked exposing the jury to (1) the nature of appellant's previous conviction for child molestation or his sex offender probation status, (2) a list of mental health diagnosis that jury's normally do not respond favorably to, including anti-social

personality disorder, and (3) other damaging information contained in appellant's mental health history that would be counterproductive to trial counsel's strategy.

Preventing the jury from discovering the nature of appellant's previous charge for child molestation was critical[1] to the defense strategy. [PCR/XXIV 1583]. Appellant was on sex offender probation in Georgia for felony child molestation of a 13-year-old girl when he sexually assaulted and murdered the 13-year-old victim in this case. [PCR/XXIV 1524–25] Trial counsel went through "great measures" to keep this information from the jury. [PCR/XXIV 1583].

Trial counsel also did not want the jury to learn of other damaging diagnosis and information contained in appellant's mental health history. Included in appellant's mental health history were diagnoses of borderline, anti-social, and narcissistic personality disorders; a history of appellant refusing to cooperate with drug treatment programs; a history of manipulative behavior; and, descriptions of appellant's violent behavior. [PCR/XXIV 1602–08]. Trial counsel testified at evidentiary hearing that he was aware of these issues before the prosecutor handed him the Georgia records at the penalty phase, but had already decided against mental health mitigation because it could backfire under these circumstances. [PCR/XXIV 1529–30, 1586–87, 1591].

[1] It is worth noting that trial counsel was successful in achieving this remarkable result. [PCR/XXIV 1569].

This Court has already recognized that antisocial personality disorder is a "trait most jurors tend to look disfavorably upon." *Freeman v. State*, 852 So. 2d. 216, 224 (Fla. 2003). This Court has also recognized that evidence of long term drug use is not only disadvantageous, but can open the door for the prosecution to argue violence is attributable to drug use. *Reed v. State*, 875 So. 2d 415, 437 (Fla. 2004). Moreover, the United States Supreme Court has consistently held that a lawyer's misgivings about potentially harmful cross-examination or rebuttal witnesses does not render their assistance ineffective. *See, e.g., Burger v. Kemp*, 483 U.S. 776, 107 S. Ct. 3114, 3124–25 (1987) (concluding that failure to introduce character evidence was effective performance because witnesses could have been subjected to harmful cross-examination or invited other damaging evidence); *Darden v. Wainwright*, 477 U.S. 168, 106 S. Ct. 2464, 2474, (1986) (same); *Strickland*, 466 U.S. 668 (same).

Second, trial counsel's decision to limit the mental health investigation and forgo expert mental health testimony at the penalty phase cannot amount to deficient performance under *Strickland* because trial counsel made a reasonable strategic decision to use a penalty phase strategy that would render mental health mitigation counterproductive. Trial counsel's strategy at the penalty phase was to present the appellant as a man who committed a homicide out of extreme rage and resentment, but then was remorseful and went to the police and took responsibility.

[PCR/XXIV 1513, 1527]. This strategy is incompatible with expert testimony on appellant's mental health history. Trial counsel testified that mental health testimony "would not have been helpful at the penalty phase….[and] would have detracted from presenting him as an honest person who fesses up." [PCR/XXIV 1527–28]. The Eleventh Circuit has already held that offering mitigation evidence that is inconsistent with other available mitigation does not render counsel's assistance ineffective. *See Rutherford v. Crosby*, 385 F.3d 1300, 1315 (11th Cir. 2004) (rejecting ineffectiveness based on failure to present mitigating evidence when such counterproductive mitigation "would have come at a price").

Third, trial counsel's performance was not deficient because trial counsel is a highly experienced capital defense attorney capable of making strategic decisions with limited information. In deciding claims of ineffective assistance of counsel, there is "strong reluctance to second guess strategic decisions is even greater where those decisions were made by experienced criminal defense counsel" and that "the more experienced an attorney is, the more likely it is that his decision to rely on his own experience and judgment in rejecting a defense" is reasonable. *Provenzano v. Singletary*, 148 F.3d 1327, 1332. "Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Strickland*, 466 U.S. at 690. "When courts are examining the performance of an experienced trial counsel, the presumption that his conduct

was reasonable is even stronger." *Chandler v. United States*, 218 F.3d 1305, 1316 (11th Cir. 2000) Trial counsel testified that he has been trying death penalty cases in the Florida Panhandle since 1982. [PCR/XXVI 1564]. Trial counsel is uniquely capable of accurately determining whether or not mental health mitigation can sway a Panhandle jury. Moreover, in trial counsel's experience, even under the best circumstances, juries in the Panhandle do not respond favorably to mental health mitigation testimony. [PCR/XXVI 1535] Trial counsel thought that the mental health mitigation in appellant's case could have easily backfired. [PCR/XXVI 1530, 1591].

Fourth, trial counsel's performance was not deficient because trial counsel made a reasonable strategic decision to limit the investigation into mental health mitigation after discovering harmful mental health evidence. Trial "counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Strickland*, 466 U.S. at 691; *Marshall v. State*, 854 So. 2d 1235, 2003 (Fla. 2003). Trial counsel decided that further investigations into mental health mitigation were unnecessary after learning of the existence of damaging information in appellant's mental health history. [PCR/XXIV 1597–99, 1591]. "The duty to investigate does not force defense lawyers to scour the globe on the off chance something will turn up; reasonably diligent counsel may draw a line when they have good reason to think further

investigation would be a waste." *Rompilla v. Beard*, 545 U.S. 374, 383 (2005); *see also Wiggins v. Smith*, 539 U.S., at 525, 123 S. Ct. 2527 (further investigation not required where counsel has evidence suggesting it would be fruitless); *Strickland* 466 U.S. at 699, 104 S. Ct. 2052 (counsel could "reasonably surmise . . . that character and psychological evidence would be of little help"); *Burger*, 483 U.S. at 794, 107 S. Ct. 3114 (1987) (limited investigation reasonable because all witnesses brought to counsel's attention provided predominantly harmful information).

Trial counsel was capable of discovering a great deal of appellant's mental health history from speaking with appellant, and this information could be strategically kept from the State. While the appellant discounts this information, "[c]ounsel's actions are usually based, quite properly, on…. information supplied by the defendant….[a]nd when a defendant has given counsel reason to believe that pursuing certain investigations would be fruitless or even harmful, counsel's failure to pursue those investigations may not later be challenged as unreasonable." *Strickland*, 466 U.S. at 691. Trial counsel was aware of appellant's sex offender probation and previous charge of child molestation. He also spoke with appellant about his mental health history. [PCR XXVI 1597]. Trial counsel could easily conclude that a consequence of sex offender probation and a child molestation conviction was a risky mental health history, and retrieving the mental health records would only reveal the problems with the defense to the state. In other

words, limiting the mental health investigation and retrieval of medical records could be strategic.

Nevertheless, trial counsel still hired Dr. Rowan to evaluate appellant and advise on mental health mitigation. Dr. Rowan collected some of appellant's mental health records from the Georgia Department of Corrections. [Def. Ex. 1]. Dr. Rowan met with appellant and evaluated him for competency and sanity before trial. [PCR/XXIV 1551]. After the evaluation, trial counsel spoke with Dr. Rowan and learned what she found during her evaluation, and then *told her to not write a report*. [PCR/XXIV 1599].

This Court has held that trial 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). *Diaz v. State*, 132 So. 3d 93 (Fla. 2013). This Court has also held that counsel's performance is not deficient where, after receiving an initial unfavorable report from an examining mental health expert, counsel does not pursue further mental health mitigation. *See Dufour v. State*, 905 So. 2d 42 (Fla. 2005). Moreover, "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); *see Diaz v. State*, 132 So. 3d 93 (Fla. 2013). Therefore, after speaking with Dr. Rowan, it was not unreasonable for

trial counsel to cease investigating mental health mitigation because he reasonably determined that further investigation was unnecessary—or even potentially harmful to appellant's case.

***Prejudice***

To establish prejudice, the appellant must show there is a reasonable probability that but for counsel's unprofessional errors, the result of the proceedings would have been different. This Court has determined that a reasonable probability is a probability sufficient to undermine confidence in the outcome. *Rutherford v. State*, 727 So. 2d 216, 219 (Fla. 1998). "To assess that probability, we consider 'the totality of the available mitigation evidence – both adduced at trial, and the evidence adduced in the . . . [post-conviction] proceedings' – and 'reweig[h] it against the evidence in aggravation.'" *Porter v. McCollum*, 558 U.S. 30, 41 (2009).

Therefore, even if there was a deficient performance under the first prong of *Strickland*, appellant cannot show that he was prejudiced under the second prong of *Strickland* by a failure to present the mental health mitigation. In order to establish prejudice, appellant must show that had a mental expert been presented to the jury, there is a reasonable probability that he would have received a life sentence. *Rose v. State*, 675 So. 2d 567, 571 (Fla. 1996). Moreover, "[t]he defendant carries the burden to 'overcome the presumption that, under the

circumstances, the challenged action 'might be considered sound trial strategy.'" *Douglas*, 141 So.3d at 117 (quoting *Strickland*, 466 U.S. at 687).

The evidence presented at evidentiary hearing does not support a finding of prejudice because of the extensive harmful information that was revealed. Under *Strickland*, "the reviewing court must consider all the evidence—the good and the bad—when evaluating prejudice." *Wong v. Belmontes,* 558 U.S. 15, 26 (2009). Here, "the worst kind of bad evidence would have come in with the good" and "[t]he only reason it did not was because [trial counsel] was careful in his mitigation case." *Id.*

The expert mental health testimony at evidentiary hearing confirmed trial counsel's concerns about the extensive harmful evidence that would come in with what little mitigation there was in the mental health records. Trial counsel already knew of the potential bipolar diagnosis when he chose not to use mental health mitigation. Moreover, trial counsel testified at the evidentiary hearing that even with all the information available today, he still wouldn't have put expert mental health mitigation in front of the jury at the penalty phase. [PCR/XXII 1590–91, 1597]. Even the trial court agreed that testimony from a mental health expert "could have backfired." [PCR/IV 612].

This Court has previously held that "failure to present mental health mitigation evidence coupled with damaging or harmful information does not

necessarily result in prejudice." *Douglas v. State*, 141 So. 3d 107, 123 (Fla. 2012). *See, e.g*., *Jones*, 998 So. 2d at 585 (finding no prejudice where available mental health mitigation, which included information that defendant suffered from antisocial personality disorder and negative character traits, proved to be a "double-edged sword" that was "more harmful than helpful"); *see also Reed*, 875 So. at 437 ("An ineffective assistance claim does not arise from the failure to present mitigation evidence where that evidence presents a double-edged sword."). Appellant cannot show prejudice with one expert's diagnosis of bipolar that is contradicted by the state's expert at evidentiary hearing and by multiple expert's reports in appellant's medical history—especially when combined with the harmful information that would come in with this testimony.

In *Douglas*, this Court determined that "the mitigation evidence presented during post-conviction would have been more harmful than helpful" because a Doctor testified at evidentiary hearing he "diagnosed [the defendant] with a personality disorder characterized by self-centeredness, a lack of empathy, problems with restraint and inhibitions, and violent behavior with little regard for the well-being of others…[and] detected antisocial personality traits in [the defendant] and described him as a 'dangerous man' who was prone to act excessively and violently in response to minor incidents." *Douglas*, 141 So. 3d at 123. Similar to *Douglas*, the testimony presented at evidentiary hearing by both

Dr. McClaren and Dr. Crown would have been more harmful than helpful to appellant at the penalty phase. Therefore, the trial court's denial of appellant's claim of ineffective assistance of counsel regarding the mental health mitigation investigation, the mental health records, and the presentation of mental health mitigation should be affirmed.

***Appellant's Erroneous Comparisons***

Appellant's argument that trial counsel was ineffective for not using a mental health expert at the penalty phase seems to be centered around this Court previously holding that trial counsel Smith was ineffective in another capital case where there the jury did not hear of a bipolar diagnosis. Appellant argues that the result should be the same in his case. The State disagrees.

The appellant points to *Orme v. State*, 896 So.2d 725 (Fla. 2005) and attempts to claim he is entitled to relief because trial counsel was also counsel of record in *Orme*. In *Orme* this Court determined trial counsel was ineffective for failing to present evidence of a bipolar diagnosis and also failing to alert the mental health experts who testified at defendant's penalty phase about a previous diagnosis of bipolar that only trial counsel knew about. *Id*. at 731–36. This Court determined that evidence Orme was bipolar would have helped trial counsel's penalty phase argument that defendant was substantially impaired and under the influence of extreme mental or emotional disturbance at the time of the crime. *Id.*

at 736. Appellant argues that trial counsel "made the exact same error" in this case—and "at least in *Orme* [trial counsel] hired mitigation experts…." [IB. 17].

The critical difference between *Orme* and appellant's case is that in *Orme* trial counsel made a strategic decision to *present* expert mental health mitigation at the penalty phase, but failed to give his experts evidence of the bipolar diagnosis. In *Orme* the bipolar diagnosis would have naturally bolstered the penalty phase argument or at least assisted the experts who testified to Orme's mental state at the time of the crime. That is not the case here. In appellant's case, trial counsel made the strategic decision not use expert mental health mitigation at all, therefore a bipolar diagnosis could not have helped the defense strategy. In *Orme* there was an unprofessional error, here there was a strategic decision.

Appellant also argues that trial counsel's mental health investigation is analogous to *Rompilla v. Beard*, 545 U.S. 374, 125 S. Ct. 2456, (2005). However, *Rompilla* involved an investigation into mental health mitigation that turned up nothing—not an investigation that immediately turned up harmful information. *Id.* It is also worth noting that in *Rompilla*, the United States Supreme Court was especially concerned that defense counsel failed to notice a previous rape conviction, and was therefore unprepared to defend against the prosecution using it against the defendant. *Id.* at 393. The opposite is true here. Trial counsel was keenly aware of the importance of keeping appellant's history of child molestation

from the jury, and successfully did so by carefully stepping around dangerous evidence that appellant now argues he should have used.

Finally, at the very end of appellant's section on mental health, appellant improperly argues ineffective assistance of counsel based on the requirements of *Ake v. Oklahoma*, 470 U.S. 68, S. Ct. 1087 (1985). [IB 22]. Appellant argues that trial counsel's performance was deficient because "what is required is an adequate psychiatric evaluation of [the defendant's] state of mind." *Citing Blake v. Kemp*, 758 F.2d 523, 529 (11th Cir. 1985) (holding based on *Ake v. Oklahoma*). Appellant contends that his constitutional rights were violated because "an indigent defendant is entitled to a mental health expert to assist in the preparation of a defense." *Citing Garron v. Bergstrom*, 453 So.2d 405, (Fla. 1984) (holding based on *Ake v. Oklahoma*). Appellant claims the work of Dr. Rowan was deficient, because "she only saw [appellant] on one occasion to evaluate [him] for competency, not mitigation." [IB 13]. The entire argument is based on a handful of federal and state cases that either led up to, or were the progeny of, *Ake v. Oklahoma*, 470 U.S. 68, S. Ct. 1087 (U.S. 1985).

As in issue II, discussed *infra*, appellant cannot combine his *Ake* claims with his ineffective assistance claims. First, appellant's *Ake* claim is procedurally barred because it could have been raised on direct appeal. *See Cherry v. State*, 781

So. 2d 1040, 1047 (Fla. 2000) ("the claim of incompetent mental health evaluation is procedurally barred for failure to raise it on direct appeal."). But even if appellant's *Ake* claim was not procedurally barred, *Ake* does not "require" an adequate psychiatric evaluation—*Ake* requires the *State* to assure an indigent defendant "*access* to a competent psychiatrist" after the "defendant demonstrates to the trial judge that his sanity at the time of the offense is to be a significant factor at trial." *Id*. at 83 (emphasis added).

Appellant does not have a constitutional right to a "mitigation investigation" under *Ake*, nor was trial counsel "required" to put a mental health expert on the stand at the penalty phase. *Id.* *Ake* only applies where a "defendant's mental health is 'seriously in question'…and the State's obligation [does] not go beyond providing…. assistance of *one* competent psychiatric expert." *Id.* at 82–83, 105 S. Ct. 1087 (emphasis added). Appellant is not entitled to "choose a psychiatrist of his personal liking." *Id.* *Ake* does not entitle the appellant to another expert because he is dissatisfied with Dr. Rowan's assistance, nor does *Ake* require defense counsel to seek out another expert after the first mental health evaluation yielded bad news. *Id*. Moreover, *Ake* cannot be read to require trial counsel to supply Dr. Rowan with mental health records.

Citations and quotes from a line of cases that do not apply to this issue only weaken appellant's argument. It seems as though appellant is attempting to liken his case to *Orme* by using the language in *Ake* about "competent mental health experts." However, appellant cannot transmute favorable pieces of *Ake* to his *Strickland* argument and conclude trial counsel is somehow required to assure appellant received a certain level of investigation into mental health mitigation, despite trial counsel's professional decision to employ a different strategy.

***Family Background Investigation***

Appellant also argues that trial counsel's investigation into appellant's family background amounts to ineffective assistance of counsel. This claim fails because trial counsel made a reasonable investigation into appellant's family background and made a strategic decision to present family history mitigation evidence that did not risk revealing harmful information at the penalty phase.

***Trial Court's Ruling***

After the evidentiary hearing, the trial court determined trial counsel did not "render a deficient performance for purposes of *Strickland* with respect to conducting his investigation for mitigation evidence before trial, and to presenting mitigation testimony from witnesses during the penalty phase." [PCR/IV 618]. The State presented evidence that investigator Ernest Jordan contacted numerous potential witnesses, made over a hundred phone calls, and drafted multiple memos

during his investigation into appellant's background for potential mitigation. [PCR/IV 616–18]. However, many of the witnesses were reluctant to come forward with helpful information. Some of the family witnesses were reluctant to get involved because appellant had affairs with his uncle's wife and also the mother of his ex-wife. [PCR/IV 617]. Trial counsel testified that "everybody that knew [appellant] could say bad things about him so [trial counsel] was trying to cherry pick the best things and try to limit the testimony to those areas." [PCR/IV 617]. The trial court also noted that "even the [appellant's] parents did not want to get involved", especially appellant's father, who testified the only reason he came to testify was "to kick [trial counsel's] ass." [PCR/IV 617].

The trial court determined that numerous witnesses were contacted during the investigation and that it was clear the investigation yielded substantial mitigation evidence, and that trial counsel was informed of the mitigation evidence before the penalty phase, and as a result trial counsel was able to elicit testimony from Appellant's parents "about such matters as the family's difficult economic circumstances, the physical abuse by his father, his mental and emotional problems, his drug issues, his attempted suicides, and his molestation by a police officer..." [PCR/IV 618].

The trial court rejected appellant's claim that his parents portrayed him as the "villain" at penalty phase and further rejected that an "entirely broader picture"

of his background and circumstances came out at the evidentiary hearing. [PCR/IV 619]. The trial court also rejected appellant's claim that trial counsel failed to elicit the severity of appellant's troubled upbringing from his parents at the penalty phase because appellant's parents were reluctant to testify at the penalty phase "and they almost changed their minds about appearing because they were embarrassed and upset about having to testify about their parenting 'skills in the past' and 'revealing family secrets.'"

The trial court noted that, as trial counsel "explained, it can be 'dangerous' to elicit testimony from a witness who does not want to be there." [PCR/IV 619]. Therefore, the trial court reasoned that trial counsel cannot be faulted for not eliciting more information about the physical and emotional abuse appellant experienced as a child, and his decision to limit testimony was strategic. [PCR/IV 619]. The trial court held that the remaining witnesses presented only cumulative or even detrimental testimony to the evidence presented at the penalty phase. [PCR/IV 620]. Finally, the trial court held, in passing, that there is no prejudice under *Strickland* "in view of all the mitigation testimony that [trial counsel] was able to present from the witnesses during the penalty phase." [PCR/IV 622].

***Analysis***

Trial counsel's performance was not deficient under *Strickland* because trial counsel made a reasonable investigation into appellant's background and

childhood for mitigating circumstances, and trial counsel also made a reasonable strategic decision to limit the family history testimony at the penalty phase given the potential harmful information, the lack of cooperation from the family, and the bad blood between appellant and much of his family.

This Court has already held that "[c]ounsel's decision to not present mitigation evidence may be a tactical decision properly within counsel's discretion." *Brown v. State*, 439 So. 2d 872, 875 (Fla. 1983). Additionally, when "evaluating claims that counsel was ineffective for failing to investigate or present mitigating evidence, this Court has phrased the defendant's burden as showing that counsel's ineffectiveness deprived the defendant of a reliable penalty phase proceeding." *Asay*, 769 So. 2d at 985. However, the only thing appellant appears to have shown at the evidentiary hearing was that it was physically possible to get some other witnesses in to testify under subpoena, even though their testimony added little, if anything.

Trial counsel's investigation into appellant's family history was sufficient. This Court has held that "[t]he fact that a more thorough and detailed presentation could have been made does not establish counsel's performance as deficient' where nonstatutory childhood mitigation evidence was introduced." *Sexton v. State*, 997 So. 2d 1073, 1082 (Fla. 2008) (*citing Maxwell v. Wainwright*, 490 So. 2d 927, 932). Moreover, "[c]ounsel's investigation can be considered reasonable where

counsel interviews all witnesses brought to his attention, but learns little that is helpful and much that is harmful." *Id.* (*citing Wiggins*, 539 U.S. at 525). Trial counsel learned much that was harmful in this investigation and it was prudent to carefully restrict the testimony at the penalty phase. The evidentiary hearing demonstrated that harmful information would surely have come out at the penalty phase had trial counsel not careful restricted the testimony of the family.

On appeal, appellant only makes two arguments related to his claim that there was deficient performance in the investigation into family history mitigation. First, that the trial court's determination that appellant's parents were reluctant to testify and that appellant's father was hostile to trial counsel failed to acknowledge that trial counsel "created that hostility and reluctance"; and, second, that Putnam and Bulger's testimonies were not cumulative because they "corroborated" the extent of appellant's drug use, specifically that he "stayed up for days using drugs" and that his "behavior was erratic and that he could not sit still." [IB p. 28, 30]. The other claim made by appellant in this section refers to the mental health investigation, and is discussed *supra*.

Appellant cites no authority to support his assertion that trial counsel's performance may be rendered deficient if his demeanor with witnesses affected the thoroughness or extent of the witness's mitigation testimony at the penalty phase. Nevertheless, any hostility is explained in the record. Trial counsel testified at the

evidentiary hearing that he bought appellant's mother and father "airplane ticket[s] on [his] own personal credit card and booked them a room at the Comfort Inn" so that they could testify at the penalty phase. [PCR/XXIV 1520]. But then—after appellant's parents flew down for free to Panama City—trial counsel called them from the courtroom "to see when they were coming and they basically told [him they were] not coming." [PCR/XXIV 1520]. At this point, while in the courtroom, trial counsel "kind of threatened the dad" and "said, look if you don't come, I am going to have you arrested for grand theft, I am going to sue you for fraud" until appellant's father finally said, 'okay well, I am coming but the only reason I am coming is to kick your ass." [PCR/XXIV 1520]. Had trial counsel not done this, appellant's own parents would not have shown up to testify at the penalty phase on his behalf. If anything, this is evidence of how the investigation into appellant's family history turned up "little that [was] helpful and much that [was] harmful." *See Sexton*, 997 So. 2d at 1082. This also supports the argument that trial counsel made a reasonable strategic decision to limit the testimony of the family.

Next, putting on witnesses to "corroborate" the extent of appellant's drug use is cumulative—and even if it were not cumulative, this kind of information could lead to harmful information and was counterproductive to trial counsel's strategy discussed in the mental health section *supra*. This Court has held that trial

counsel is not ineffective for failing to present cumulative evidence. *Jones v. State*, 928 So 2d 1178, 1186–87 (Fla. 2006). Trial counsel elicited testimony about appellant's drug use from his parents, and this testimony was not called into question by opposing counsel. There was certainly no shortage of witnesses who could corroborate appellant's extensive drug use.

Appellant oddly relies on *Hannon v. State*, 941 So. 2d 1109 (Fla. 2006), where this Court held that defense counsel's decision to argue a character defense at the penalty proceedings and forgo any mitigation investigation, (the character defense was inconsistent with mitigation), was a strategic decision, and therefore an ineffective assistance claim was meritless even though defendant had brain damage. *Id.* At 1124–38.

However, even if there were deficient performance in a family history investigation, appellant has failed to establish he was prejudiced under *Strickland*. To establish prejudice, the defendant must show there is a reasonable probability that but for counsel's unprofessional errors, the result of the proceedings would have been different. This Court has determined that a reasonable probability is a probability sufficient to undermine confidence in the outcome. *Rutherford*, 727 So. 2d at 219. "To assess that probability, we consider 'the totality of the available mitigation evidence – both adduced at trial, and the evidence adduced in the . . . [post-conviction] proceedings' and 'reweig[h] it against the evidence in

aggravation.'" *Porter*, 558 U.S. at 41. Every witness that testified at evidentiary hearing about appellant's family history had either already testified at the penalty phase, contributed hardly any useful testimony, contributed harmful information, or some combination of the three.

At the penalty phase there was already evidence introduced that appellant was beat as a child, abused drugs early on, that his parents used drugs, that he was molested, that he attempted suicide, and had a traumatic childhood. [DAR/XXII 797–816]. Evidence of a head injury or a brain injury would not make a difference because trial counsel made a strategic decision to not use mental health mitigation, which is discussed *supra*.

Appellant's mother's testimony was hardly different from her testimony at the penalty phase, and she acknowledges this. Appellant's mother did however reveal how appellant had sex with his uncle's wife and then black mailed her for thousands of dollars to not tell her husband. Appellant's father's additional testimony led to the prosecution inquiring why he told his son on the phone that he deserved to die for what he did, that he did not want to speak with him again because a call was too expensive, and that he was angry with him for sleeping with his brother's wife. Appellant's grandfather testified that he had finally come around to the idea of testifying on appellant's behalf, but he also explained that appellant's own grandmother still refused to do so when all that was required was a

video deposition. Moreover, appellant's own brother said at the evidentiary hearing that he would not have come to the trial if asked and did not want to even be there for the evidentiary hearing as it was.

It is difficult to argue a jury would be more likely to find sympathy for the appellant after hearing how his own father had written him off over a five-dollar phone call and told him he deserved to die for what he did, or that appellant had sex with family member's wives, or that appellant's grandmother would not testify on his behalf, or that appellant's own brother had to be forced to testify on his behalf at his death penalty hearing.

Under *Strickland*, "the reviewing court must consider all the evidence—the good and the bad—when evaluating prejudice." *Wong v. Belmontes*, 558 U.S. 15, 26 (2009). Here, "the worst kind of bad evidence would have come in with the good" and "[t]he only reason it did not was because [trial counsel] was careful in his mitigation case." *Id.* Similar to the mental health mitigation, trial counsel was careful to keep out the bad in appellant's family history and did so for good reason.

## ISSUE II

WHETHER TRIAL COUNSEL WAS INEFFECTIVE FOR NOT ENSURING THAT APPELLANT RECEIVE A REASONABLY COMPETENT MENTAL HEALTH EVALUATION FOR MITIGATION

Appellant's argument that trial counsel was ineffective for not ensuring appellant received a competent mental health evaluation fails because trial counsel cannot be expected to monitor the competency of a mental health professional, especially when trial council already made a reasonable strategic decision to not use mental health mitigation. Trial counsel cannot be deemed ineffective for not retrieving mental health records from a third party hospital for a mental health expert, especially when doing so would be counterproductive to trial counsel's reasonable trial strategy. Appellant's attempt to subtly argue an *Ake* claim for the second time in order to combine the requirements of *Ake* and *Strickland* also fails because the United States Supreme Court did not intend in either case to hold lawyers responsible for the competence of the evaluations performed by the doctors they rely on for expertise. An *Ake* claim also fails because it is procedurally barred.

Appellant's argument that trial counsel's failure to collect mental health records prevented Dr. Rowan from discovering appellant's prior bi-polar diagnosis and therefore trial counsel was unable to make an informed decision fails because trial counsel made reasonable strategic decision to not use mental health mitigation

because of harmful information he discovered early on, and trial counsel testified he was aware of a potential bi-polar diagnosis. Appellant does not allege that

***Trial Court's Holding***

Appellant argued to the trial court that his rights under *Ake v. Oklahoma*, 105 S. Ct. 1087 (1985) were violated when trial counsel failed to obtain an adequate mental health evaluation, and failed to provide the necessary background information and mental health records about [appellant] to Dr. Jill Rowan prior to her examination of appellant. [PCR/IV 625]. Appellant argued that this prevented Dr. Rowan from discovering that appellant had a potential bi-polar diagnosis. [PCR/IV 625]. Moreover, the appellant argues that because trial counsel failed to provide Dr. Rowan with sufficient records, she was therefore unable to render a useful professional opinion, and as a result, trial counsel was therefore unable to make an informed decision on whether to use mental health mitigation. [PCR/IV 625].

The trial court ultimately determined that appellant was, at least in part, "rearguing his previous claim that [trial counsel] was ineffective for failure to present testimony from a mental health expert…during the penalty phase…[and] is not entitled to relief for the same reasons…" [PCR/IV 626]. Nevertheless, the trial court determined that appellant is not entitled to relief under *Ake* because Dr. Rowan examined appellant. Additionally, the trial court determined that trial

counsel provided Dr. Rowan with the records of the appellant provided to him by the state at the penalty phase and then consulted with Dr. Rowan. [PCR/IV 625]. Included in the records were references to the diagnosis of bi-polar as well as other references to his mental health history. [PCR/IV 625]. Therefore, the trial court held that there was no deficiency or prejudice under *Strickland*. [PCR/IV 626].

The trial court also held that even if the advice Dr. Rowan gave trial counsel regarding potential mental health mitigation was based on insufficient or otherwise incomplete information, the appellant is still not entitled to relief because relying on psychiatric reports cannot render trial counsel ineffective. [PCR/IV 626]. The trial court further concluded trial counsel testified that he was aware of appellant's mental health history, including the bi polar diagnosis, therefore he was able to make an "informed decision" on whether to present the mental health evidence at the penalty phase. [PCR/IV 626]. Finally, the trial court determined that trial counsel's decision to not present mental health evidence was a carefully thought-out strategic decision that was based in part on trial counsel's experience trying death penalty cases in the panhandle. [PCR/IV 626].

***Analysis***

First, to the extent that appellant is urging a violation of *Ake*, this issue is procedurally barred. "This Court has consistently held that *Ake* claims are procedurally barred if they are not presented on direct appeal." *McKenzie v. State*,

153 So. 3d 867, 877(Fla. 2014); *see, e.g.*, *Anderson v. State*, 18 So. 3d 501, 519 (Fla. 2009); *Whitfield v. State*, 923 So. 2d 375, 379 (Fla. 2005); *Marshall v. State*, 854 So. 2d 1235, 1248 (Fla. 2003). Appellant's "Issue II" is an appeal from the trial court's ruling on appellant's *Ake* claim, and the trial court conducted its analysis based on appellant's clearly marked *Ake* arguments. 470 U.S. 68, S. Ct. 1087 [PCR/IV 625–26]. In appellant's brief, appellant quotes *Ake* without citations, but cites to case law based on the holding in *Ake*.[2] Similar to appellant's arguments at the end of Section I (regarding the mental health mitigation investigation), appellant cannot now raise an argument under *Ake* because he did not present this argument on direct appeal. *See Caylor*, 78 So. 3d at 491.

Appellant attempts to avoid this bar by recasting this claim as an ineffective assistance of counsel claim. In considering the claim of ineffective assistance of counsel for failing to obtain a constitutionally adequate mental health evaluation, the trial court determined that trial counsel supplied Dr. Rowan with appellant's medical records before the penalty phase and before appellant's mental health evaluation. [PCR/IV 625–26] Appellant seizes on a discrepancy between the trial court's order and trial counsel's testimony at evidentiary hearing. Appellant argues the trial court's holding is based on a mistake because trial counsel testified

[2] With the exception of this Court's ruling in *Davis* beginning with a citation to *Ake*. [IB 46].

at evidentiary hearing he did not give Dr. Rowan any of appellant's medical records before her evaluation. It is worth noting that this argument does not take into account Dr. Rowan's ability and professional duty to procure her patients medical history from third party medical facilities in her professional capacity prior to meeting with one of her patients, and the resulting confidentially associated with the doctor patient relationship. Trial counsel is not responsible for retrieving medical records for a doctor that are at pubic medical facilities, especially when trial counsel made a reasonable strategic decision to not use mental health mitigation. This argument also takes for granted that the records given by the state were the only records Dr. Rowan saw prior to the evaluation.

However, even if the trial court made a factual mistake as alleged by appellant, any mistake is immaterial because the trial court rejected appellant's *Ake* arguments when it alternatively held that 1) "even to assume for the sake of argument that whatever advice Dr. Rowan might have given [trial counsel] was based on insufficient information or was otherwise incomplete, [appellant] would still not be entitled to relief" and 2) trial counsel's performance was not deficient independently of Dr. Rowan's report [PCR/IV 626]. This Court has already held that "[c]ounsel cannot be deemed ineffective under the standards set forth in [*Strickland*], simply because he relied on what may have been less than complete pretrial psychiatric evaluations." *State v. Sireci*, 502 So. 2d 1221, 1223 (Fla.

1987). Moreover, the trial court noted that "to the extent [] the [appellant] appears to be rearguing his previous claim that [trial counsel] was ineffective for failure to present testimony from a mental health expert…during the penalty phase…he is not entitled to relief for the reasons stated [in the analysis of issue I]." [PCR/IV 626].

The determination that counsel was not ineffective is correct as appellant is not entitled to relief under *Ake*. In *Ake*, the United States Supreme Court held that "when a defendant demonstrates to the trial judge that his sanity at the time of the offense is to be a significant factor at trial, the State must, at a minimum, assure the defendant access to a competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense." *Ake*, 470 U.S. at 83. *Ake*'s holding relates to an indigent defendant's access to expert psychiatric assistance—not whether or not trial counsel's performance was defective for decisions relating to presentation and investigation of mental health mitigation. *See generally id*. *Ake* applies where a "defendant's mental health is 'seriously in question'…and the State's obligation [does] not go beyond providing…. assistance of *one* competent psychiatric expert." *Id.* at 82–83, 105 S. Ct. 1087 (emphasis added). The Appellant was evaluated by Dr. Rowan and she assisted with the preparation of appellant's defense at the penalty phase by talking to trial counsel—this alone satisfied *Ake*. *Ake* does not entitle the Appellant to

another expert because he is dissatisfied with Dr. Rowan's assistance, nor does *Ake* require defense counsel to seek out another expert after the first mental health evaluation yielded bad news. *Id.*

For the most part, appellant is essentially rearguing his premiere claim—that trial counsel's performance was deficient because trial counsel decided to forego the use of expert mental health mitigation testimony without properly investigating appellant's mental health—under *Ake*'s requirement that the state assure an indigent defendant "access to a competent psychiatric evaluation." *Id*. at 83.

The appellant likens his claim to *Davis v. State*, where this Court determined, for arguments sake, whether or not a *doctor*'s evaluation amounted to "competent mental health assistance" under *Ake*, where the doctor did not perform "an adequate evaluation" into Davis's background in support of his report. *Davis v. State*, 928 So.2d 1089, 1122–23 (Fla. 2006). However, this Court in *Davis*—before reviewing the trial court's *Ake* determination for argument's sake—held that "to the extent that Davis is asserting a true *Ake* claim, and is not simply reasserting his ineffective assistance of counsel claim, it is procedurally barred because it could and should have been presented on direct appeal." *Id*. This Court also denied the hypothetical *Ake* claim by concluding the trial court's findings were, in any event, based on competent substantial evidence. *Id.* at 1124–25.

*Ake* and *Strickland* analyses are not interchangeable, even for the sake of argument, and doing so causes unnecessary confusion (confusion the procedural bar prevents). This Court has held that where an appellant "simply recasts his ineffective assistance of counsel argument" as an *Ake* argument it will be rejected for the same reasons the ineffective assistance argument was rejected. *Hodges v. State*, 885 So. 2d 338 (Fla. 2003). Therefore, the parts of appellant's arguments under this section that are not purely *Ake* claims (and thus barred) are deemed simply *Strickland* claims that were already appropriately evaluated by the trial court and (and this brief, see issue I mental health mitigation, *supra*) under the proper *Strickland* analysis.

Nevertheless, appellant also cites to *Wyatt v. State* under this subheading. Appellant compares the factual determinations listed in this Court's analysis of *Wyatt* pertaining to a claim of ineffective assistance (that alleges failure to investigate and present mental health mitigation) to the factual determinations made by the trial court in this case. *Wyatt v. State*, 78 So. 3d 512, 528–30 (Fla. 2011). In this instance, the portion of *Wyatt* appellant cites in his brief does not relate to *Ake*, but instead relates to whether or not counsel's decisions on mental health mitigation were strategic—an analysis of this issue is contained within Issue I of this brief, *supra*. Moreover, this Court affirmed the trial court's denial of relief

on any conceivable *Strickland* or *Ake* claim in both *Wyatt* and *Davis*—the only cases appellant relies on in this section.

Appellant appears to cite to *Wyatt* and *Davis* because this Court affirmed the trial court's decision to deny relief with arguably more evidence to support its decision than it would under appellant's facts presented here. However, it does not follow that this Court's deference to a trial court's determination of facts including a thorough and lengthy recitation of facts in the trial court's finding supports any finding other than that appellant's claim was properly denied.

## ISSUE III

WHETHER THE TRIAL COURT ERRED IN DENYING APPELLANT'S CLAIM THAT COUNSEL WAS INEFFECTIVE FOR FAILING TO CHALLENGE JUROR WEAVER BECAUSE SHE WAS NOT IMPARTIAL

Appellant argues that trial counsel was ineffective in failing to challenge Juror Weaver because she was a victim of a crime, knew one of the witnesses, and was not certain if she could be fair and impartial during the trial.

During voir dire, when the prosecutor was addressing the venire, the prosecutor asked Juror Weaver if she could be fair and impartial even though she had been a victim of a crime. Juror Weaver responded "I'm in favor of the death penalty…in some cases." The prosecutor followed up with asking Juror Weaver if she could be "fair and impartial in this case", to which Juror Weaver responded

"yes, sir." The prosecutor further asked Juror Weaver if she had formed an opinion as to appellant's guilt at that point, which she responded "No, sir." The prosecutor further asked Juror Weaver if she would base her decision on the evidence and keep an open mind, to which she responded "Yes, sir." [DAR/XVII at 172 – 73, 187 – 88]

Next the prosecutor read a list of witnesses and asked the venire if a name was familiar. Juror Weaver responded that Margaret Davis was familiar. Margaret Davis worked at the hotel where appellant murdered the victim. Juror Weaver explained that Margaret Davis was "her two daughter's aunt" but that she does not see her often, and stated she would evaluate her testimony as she would any other witness in the case. [DAR/XVII at 172 – 73, 187 – 88].

***Trial Court's Holding***

The trial court determined that in order for "[appellant to prove that his trial counsel was ineffective during the jury selection process for failing to remove a juror from the panel, [appellant] must show that an actually biased juror sat on his jury." [DAR/IV 597] *citing Carratelli v. State*, 961 So. 2d 312, 324 (Fla. 2007). However, the trial court held that the appellant is unable to make this showing because it is conclusively refuted by the record when the prosecutor rehabilitated Juror Weaver. [DAR/IV 598].

The trial court also noted that Weaver indicated she had formed no opinion regarding appellant's guilt, and she could keep an open mind and base her decision on the evidence. [DAR/IV 598]. Additionally, the court noted that Weaver indicated her knowledge of Davis was limited and she stated she would weigh Davis' testimony like any other witness and in accordance with the court's instructions. [DAR/IV 598].

The trial court held that, based on this information, appellant's claim regarding Weaver was conclusively refuted by the record because appellant cannot show that an actually biased juror sat on his jury in accordance with *Carratelli*. [DAR/IV 598]. Therefore, there was no deficient performance under *Strickland*.

***Analysis***

Trial counsel was not ineffective for not striking or questioning juror Weaver because she clearly indicated she could be fair and impartial, and the record conclusively refutes any attempt by the appellant to show she was actually biased.

Appellant concedes that under *Carratelli* a "jury selection error justifying post-conviction relief is so fundamental and glaring that it should have alerted the trial judge to intervene, even in the absence of a proper objection." *Carratelli*, 961 So. 2d at 323. The appellant also concedes that he must demonstrate that Weaver was "actually biased", which means he must demonstrate that "[she] was not

impartial" …and "the evidence of bias must be plain on the face of the record." *Johnson v. State*, 63 So. 3d 730 (Fla. 2011).

However, appellant argues that because Juror Weaver previously indicated she was not sure if she could be impartial, and because six other jurors who were unsure if they could be fair or impartial were excused by the trial judge for cause, the trial judge should have also dismissed Juror Weaver for cause, and therefore the prosecutor's rehabilitation of Weaver on the record does not prevent appellant from demonstrating that Weaver was actually biased.

In supporting this conclusion, the appellant relies on *Thomson v. State*, 796 So. 2d 511 (Fla. 2011), which held that counsel was ineffective for not challenging a juror for cause or using a preemptory to strike on a juror who indicated she was "having extreme difficulty accepting the notion that the defendant has a right not to testify." *Id*. at 517. In *Thomson*, this Court held that the claim that the juror was not impartial was "not conclusively refuted by the record" and therefore remanded the claim for an evidentiary hearing. *Id.* at 516. However, the holding in *Thomson* is premised on the uncertainty surrounding whether the juror was rehabilitated. *Id*. at 516–517. In *Thomson*, the prosecution never rehabilitated the juror (Juror Wolcott) after the juror indicated her questionably impartiality, instead, the state argued on appeal that the juror was rehabilitated based on "the fact that the prospective panel, as a whole, acknowledge that the case would have to be decided

on the strength of the State's evidence, and that the defendant had a fundamental right not to testify." *Id.* at 517. Juror Wolcott was never questioned individually about her ability to follow the law. *Id.* At 517. That is not the case here. At appellant's trial, the prosecutor individually asked Juror Weaver whether she could be impartial and there was no ambiguity in her response. An evidentiary hearing to ask her essentially the same thing would be redundant.

Appellant also argues this Court has previously ruled that "[a]ssurances of impartiality after a proposed juror has announced prejudice is questionable at best." *Matarranz v. State*, 133 So. 3d 473, 485 (Fla. 2013). However, in *Matarranz* this Court was determining "whether a trial court's denial of a challenge for cause constitutes reversible error" notwithstanding "tortured attempts at rehabilitation." *Id*. at 484, 488. Moreover, there is no requirement that the defendant prove actual bias on a direct appeal, therefore in *Matarranz* the standard was whether there was a "reasonable doubt" on whether the juror could be fair and impartial. *Id*. at 484.

Appellant also looks to the federal courts to support his contention that the record does not preclude his claim for ineffective assistance of counsel. Appellant cites *Hughes v. U.S.*, 258 F.3d 453, 456 (6th Cir. 2001), in which a juror flat out said "I don't think I can be fair", was not rehabilitated, and afterwards defense counsel did not follow up, challenge, or strike the juror. However, *Hughes* is not

analogous to appellant's arguments because the prosecutor at appellant's trial clearly and unequivocally rehabilitated Juror Weaver when he asked her individually if she could be fair and impartial, and she responded "yes." On the contrary, *Hughes* cautions that "[c]ounsel is also accorded particular deference when conducting voir dire" and that "[a]n attorney's actions during voir dire are considered to be matters of trial strategy." *Hughes*, 258 F. 3d at 457. Moreover, *Hughes* also concludes that "[a] strategic decision cannot be the basis for a claim of ineffective assistance unless counsel's decision is shown to be so ill-chosen that it permeates the entire trial with obvious unfairness. *Id*. In appellant's case, trial counsel could easily have a strategic reason for not badgering a juror who just clearly said she could be fair and impartial in front of the entire venire during voir dire.

In any event, appellant is not entitled to an evidentiary hearing on whether juror Weaver was impartial because the record conclusively refutes a claim by appellant that juror weaver is actually biased. *See Carratelli*, 961 So. 2d at 324.

## ISSUE IV

WHETHER THE TRIAL COURT ERRED IN DENYING AN EVIDENTIARY HEARING ON APPELLANT'S CLAIM THAT TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO INQUIRE ABOUT JUROR'S FEELINGS AND OPINIONS ON THE DEATH PENALTY AND MITIGATING FACTORS

Appellant alleged in the post-conviction trial court that trial counsel was ineffective for failing to object, request further injury, and move to strike the panel when three jurors expressed favorable views on the death penalty in front of the rest of the panel. Therefore, appellant argues, his trial counsel was ineffective for failing to protect him from a tainted jury.

Appellant also alleged that trial counsel was ineffective for failing to ask prospective jurors about their views on mental health, addiction, remorse, rehabilitation, mercy, experts, or any other potentially mitigating factor that might be presented at the penalty phase.

### *Trial Court's Holding*

**Views on Death Penalty**: The trial court determined the appellant is not entitled to relief because he failed to make a showing that the venire was somehow tainted due to the three juror's remarks that they were strongly in favor of the death penalty during jury selection. [DAR/IV 601]. The trial court reasoned that when a juror expresses their opinion in front of the venire, that opinion, without more is ordinarily not enough to taint the remainder of the panel. [DAR/IV 602]. In

making this determination, the trial court found it noteworthy that when the three jurors made the comments, the record reflects that other jurors spoke up in opposition to the death penalty, therefore, the trial court concluded that any notion the panel was tainted was refuted by the record. [DAR/IV 602].

**Mitigation Questions**: The trial court denied the appellant's claim because he was unable to show that an actually biased juror sat on his jury due to trial counsel's alleged failure to inquire on the stated mitigation matters. [DAR/IV 600].

***Analysis***

Appellant makes no conceivable allegation that there was a biased juror on his panel regarding the mitigation matters or the death penalty questions. The appellant must demonstrate there was an "actually biased juror" on the jury, and "the evidence of bias must be plain on the face of the record." *Johnson v. State*, 63 So. 3d 730 (Fla. 2011). There is nothing in the transcript of voir dire that in anyway indicates a juror was biased as a result of trial counsel's failure to ask questions about potential mitigation, and appellant has not indicated otherwise. Additionally, there is nothing in the record that indicates the juror's expressing their opinions on the death penalty resulted in an actually biased juror on the panel, on the contrary, the record indicates the jurors expressing these opinions resulted in other jurors speaking up and announcing they were against the death penalty. Appellant relies on *Thomson*, which was remanded for an evidentiary hearing for

other reasons, and the court only mentions death penalty questions and mitigation questions in passing without elaboration. *Thomson*, 796 So. 2d at 516. Without more, this Court cannot remand for an evidentiary hearing so that the appellant may question his entire jury based on conjecture.

## ISSUE V

WHETHER APPELLANT'S TRIAL WAS FRUAGHT WITH ERRORS, THAT AS A WHOLE DEPRIVED HIM OF A FAIR TRIAL

Appellant's claim of cumulative error is without merit because appellant has not presented the court with any identifiable errors. Appellant does not identify any purported errors beyond the ones already addressed in his briefs. Appellant simply asserts that the effect of the errors must be considered cumulatively. This Court has previously held when the alleged individual errors are without merit, the contention of cumulative error is also without merit. *Anderson v. State*, 18 So. 3d 501, 520 (Fla. 2009) (citing *Israel v. State*, 985 So. 2d 510, 520 (Fla. 2008); *see Griffin v. State*, 866 So. 2d 1, 22 (Fla. 2003) ("[W]here individual claims of error alleged are either procedurally barred or without merit, the claim of cumulative merit must fail."). Therefore, appellant is not entitled to relief on this claim.

## CONCLUSION

Based on the foregoing discussions, the State respectfully requests this Honorable Court to affirm the trial court's denial of Appellant's Motion to Vacate Judgments of Conviction and Sentence.

## CERTIFICATE OF SERVICE

I certify that a copy hereof has been furnished by eportal to Michael P. Reiter, 4 Mulligan Court, Ocala, FL 34472, mreiter37@comcast.net on the 15th day of June 2016.

## CERTIFICATE OF COMPLIANCE

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

Respectfully submitted,

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