

In the Supreme Court of Florida

MICHAEL HERNANDEZ, JR.,

Appellant,

v.

CASE NO. SC13-718

STATE OF FLORIDA,

Appellee.

_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE FIRST JUDICIAL CIRCUIT,
IN AND FOR SANTA ROSA COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

Appellant, MICHAEL HERNANDEZ, JR., the defendant in the trial court, will be referred to as appellant, the defendant 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. (1997), this brief will refer to a volume according to its respective designation within the Index to the Record on 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. All double underlined emphasis is supplied.

STATEMENT OF THE CASE AND FACTS

This is a postconviction appeal of a trial court's denial of an initial postconviction motion in a capital case.

The facts of this case, as recited in the Florida Supreme Court's direct appeal opinion, are:

According to the testimony at trial, in the fall of 2004, Hernandez and his wife, Stephanie Hernandez, moved from Murfreesboro, Tennessee, to Milton, Florida. In Milton, Hernandez worked with Richard Hartman Sr.,¹ one of his mother's former husbands, and with Christopher Shawn Arnold, who was dating and had a baby with the daughter of Richard Sr.'s wife, Daveine (Tammy) Hartman.

On the morning of November 18, 2004, Arnold left the home he shared with Richard Sr.'s stepdaughter, Michelle Rose, in his car and returned an hour later with Hernandez. Arnold and Hernandez then left in Arnold's car, bought crack cocaine, and smoked it. Arnold had a crack addiction, and his primary connection for crack was David Everett, who was also known as "Snapper." David lived with his mother, Ruth Everett, who drove him to work before 8 a.m. on the morning of November 18. That same morning, Hernandez and Arnold later drove to the Everett house, looking for more crack or money.

Hernandez and Arnold went up to the door, knocked, and started talking with Ruth. They asked if David was home, and Ruth told them that he was not there. After finding out that David was not there, they decided to get money from her. Arnold told Hernandez to "grab her," and Hernandez grabbed Ruth and took her inside the house. Arnold made up a story about her son owing him money in an attempt to get money from her, and she told them that all she had was \$20. Arnold then asked to use the bathroom and came back with a pillow. Arnold stuck the pillow over Ruth's face, and Arnold told Hernandez to grab Ruth's hands, which he did. Hernandez later told different stories about what happened next. Ultimately, Ruth's neck was broken, and Hernandez stabbed her in the neck with a pocket knife.

Arnold then took Ruth's purse, and they left. They found Ruth's debit card and PIN in her purse, and they used her debit card at several ATMs. In all, they took \$500, which they spent on crack. They also stopped at Arnold's house and cleaned out his

¹ Because several individuals in this case share the same surnames, those individuals-with the exception of the defendant-will be referred to by their given names, and "Jr." or "Sr." will be used for further identification when necessary.

car, and Arnold threw the purse away in a dumpster near his house.

David, who had finished up work, called his house at noon. After he did not get an answer, he received a ride home from a coworker. When he entered his home, he saw his mother lying on the couch and called 911. Deputy Charles Stephens of the Santa Rosa County Sheriff's Office responded. The victim was pronounced deceased at the scene.

Meanwhile, Hernandez and Arnold spent all of the money from the ATMs on crack. Arnold then dropped Hernandez off at Hernandez's home and returned to his own home that evening.

The next morning, November 19, 2004, Arnold had a conversation with Rose, after which Rose called Tammy, who came over and spoke with Arnold. After they spoke, they went outside to Arnold's car, and Arnold pulled a pocket knife from under the passenger seat. Tammy placed the knife in a white cloth and observed a brown substance on the knife that she thought was blood. Arnold also told her that he had thrown the victim's purse in the dumpster and showed Tammy a trash bag with the purse in it. Tammy took the bag (with the purse in it) and the knife to the bed of Richard Sr.'s truck, which she had driven there. Tammy then drove to her home to get Richard Sr.

She and Richard Sr. then drove to Hernandez's house, where Hernandez was with his wife and children. Tammy asked Hernandez if "he wanted to talk to [her] about the crack party he just went on" and if he wanted to tell her "about the lady," and she told him that she had "the bloody knife and her purse." Hernandez told Tammy that "[h]e was hoping [she] only knew about the crack." He also said that the lady "was old and it was her time to go."

At some point while the Hartmans were at the Hernandezes' house, Tiffany Telin, Stephanie's sister, and her husband walked into the house. Hernandez and his wife had left their two children in Tennessee with Telin and her husband for a visit, and Telin and her husband had brought the children to Florida to be reunited with the Hernandezes the night before. Telin observed Stephanie crying and asked Stephanie what had happened. Stephanie said that Hernandez and Arnold had killed a woman. Telin then asked Hernandez what had happened. Hernandez told her that he and Arnold had gone over to the house of Arnold's friend, trying to get crack. Hernandez told Telin that Arnold had come up with the idea to get some money for crack when the friend was not there. Hernandez also told Telin that Arnold got a pillow and "stuck it over the lady's face." Hernandez told Telin that Hernandez killed the lady when she was "almost dead" by stabbing her in the throat. Hernandez also said that he and Arnold went to ATMs to get money with the lady's ATM card.

The Hartmans, the Hernandezes and their children, and the Telins then drove over to Arnold and Rose's house. After discussing it with his wife, Hernandez had decided to turn himself in and was going over there so he and Arnold could turn themselves in. Inside the house, Arnold, Hernandez, and the Hartmans began arguing, and somebody called the police. Hernandez and his wife left, passing the police in their car on their way out. Arnold turned himself in to law enforcement at the house. Richard Sr., who had moved the trash bag with the knife and purse in it from his truck back into the dumpster, got it out, and the bag was turned over to law enforcement.

Later that day, Hernandez drove to the Milton Police Department and turned himself in. His wife also brought to the police station the clothing, including a grey T-shirt, which Hernandez had been wearing on November 18. Detective Jeffrey Shuler of the Santa Rosa County Sheriff's Office Major Crime Unit transported Hernandez to his office, and he and Detective Lawrence Tynes interviewed Hernandez. An audio recording of Hernandez's statements was introduced at Hernandez's trial.

According to Hernandez's statements, the following events occurred on November 18 and 19, 2004. Hernandez left his house at 8:30 a.m. on November 18 to go to work, but he and Arnold instead "went to a crack friend's house and got some crack ... with the gas money and cigarette money [Hernandez] had for the day." Although he had used crack before moving to Florida, Hernandez had not used it since moving to Florida. They were "doing crack," and Arnold suggested going to the house of "Snapper," an individual whom Arnold knew. Arnold had done cocaine with "Snapper" before, but Hernandez did not know him. Arnold told him "he was going to try and get some money." Hernandez and Arnold drove to "Snapper's" house in Arnold's car. They went to the door and spoke with an "old lady" at the house. Arnold told Hernandez to "grab her," and Hernandez grabbed the lady by the mouth and pulled her into the house. Hernandez "got her quiet" and told her, "shh, calm down, calm down. We ain't going to hurt you." The lady sat down in a chair. Arnold told the lady that "Snapper" owed him \$300 and that Arnold had a gun put to his head over this money. Arnold had made up this story. Arnold told her that they would try to get the money from her and that they would leave her son alone if they got the money. The lady told them that all she had was \$20. Arnold said, "All right," and then asked to use the bathroom and came back with a pillow. Arnold stuck the pillow over the lady's face while she was still in the chair. Arnold told Hernandez to grab the lady's hands, and Hernandez did. Hernandez and Arnold were "suffocating her" and she was "struggling." While Hernandez and Arnold were "choking her," "she stopped moving for a minute." Hernandez said the following then occurred: "And we let her up and tried to drag her over to the couch and lay her down. And she drops, and I go to grab her, and I grab her head. And her head cracked. And Shawn helped me get her on the couch. And I ... got the knife

from him and cut her neck.... After she was dead." Hernandez had grabbed Arnold's pocket knife before entering the house and had used it to "chop up a crack block earlier." Hernandez said he did not know why he cut the lady's neck.

According to Hernandez's statements, Arnold then took the lady's purse, and they left carrying it as well as the pillow. They threw the pillow away on the highway.² Hernandez and Arnold also went through the lady's purse together, finding only \$40. Hernandez remembered seeing that the lady's name was "Ruth something." Hernandez and Arnold then went to get some crack and tried to use the debit card in the purse. Arnold found the PIN written on a card in the wallet, and Hernandez and Arnold then stopped at several ATMs. Arnold obtained money from one of the ATMs, and Hernandez obtained money from the others. They spent the money on crack. They also stopped at Arnold's house and cleaned out his car, and Arnold threw the purse away in a dumpster near his house. They then went back out and got more crack, using the money taken from the lady's account. They spent all of the money, and Arnold dropped off Hernandez at his home after they took a last hit of crack that afternoon. The next day, Richard Sr. showed up at Hernandez's house, and Hernandez told him and Stephanie what had happened.

After Hernandez and Arnold were arrested, Tammy visited them both in jail. Hernandez told her that they went to the lady's house to "get some more crack." Hernandez told her that they had gone to the door and asked if "Snapper" was home, and the lady told them that he was not home. Hernandez said he thought he heard Arnold say, "Grab her," so Hernandez "got a hold of her in a choke hold" and brought her in the house. Hernandez told her that Arnold went to the bathroom and came back with a pillow, which he put over the lady's face. Hernandez said that "the woman just wouldn't die" when Arnold put the pillow over her face. Hernandez told Tammy that Arnold then took a baggy and tried to help the lady breathe because she was hyperventilating and "so she could calm herself down." Hernandez said Arnold "was a pussy; he couldn't do it." Hernandez told Tammy that Arnold said to him, "I told you we weren't going to do this." Hernandez said that he knocked Arnold back. Hernandez told Tammy that he then snapped the lady's neck, and he demonstrated to Tammy how he did it. Hernandez told Tammy that "she was grabbing him, trying to scratch him, and she just wouldn't die and he snapped her neck." Hernandez said that he and Arnold then put the lady on a chair, and Hernandez stuck a knife in her neck. Hernandez told Tammy that he killed the lady and cut her throat "[b]ecause she'd seen their faces."

On December 13, 2004, Hernandez was indicted with one count of premeditated or felony murder while carrying a knife and one

² The pillow was never recovered.

count of robbery with a deadly weapon. Hernandez was later charged by information with one count of burglary with an assault or battery. The court consolidated these charges, over defense objection.

At Hernandez's trial, the jury heard testimony from Deputy Stephens, David Everett, Michelle Rose, Tammy Hartman, Tiffany Telin, Detective Shuler, and other witnesses (including crime scene technicians and a representative from the victim's bank), in addition to hearing Hernandez's statements about the matters discussed above. Hernandez did not present any witnesses.

Dr. Andrea Minyard, the medical examiner who had performed the autopsy of Ruth Everett, also testified. Minyard testified that the victim had a wound on her neck that was between one-half-inch and one-inch deep and four-and-a-half-inches across. She testified that the victim's fifth cervical vertebra was fractured and that she had a laceration to her spinal cord beneath the fracture. Minyard also testified that the victim had bruising on her face and body. She testified that some of the bruising on the victim's face could have been from being smothered, and some of it could have been caused by a person grabbing her across the face. She also testified that bruising to the victim's body was consistent with her having been grabbed and forced upon. She testified that the victim's broken neck was consistent with having been caused by an upward motion. However, she also testified on cross-examination that a pillow being pushed against the victim's face could have caused a fracture to her neck or that she could have fractured her neck if she had been dropped. Minyard testified that the wound on the victim's neck appeared to have been caused by a knife being taken across her neck from right to left and that the knife that had been obtained by law enforcement at Arnold's house was capable of causing the wound.

Minyard testified that the victim's cause of death was "combined effects of blunt and sharp force injuries of the neck." Minyard explained that either the broken neck with the laceration of the spinal cord or the slash through the neck could have been fatal. Minyard testified that the victim possibly could have survived either the broken neck and lacerated spinal cord or the slashed neck if she had received medical intervention. Minyard testified that there would have been some loss of function from the ruptured spinal cord, but how much was unclear. Minyard testified that the victim could have been seeing and hearing what happened to her after her neck was broken and could have felt pain if she was conscious when her neck was cut. However, she also testified on cross-examination that she could not say whether the victim was conscious after her neck was broken. Minyard testified that based on the amount of blood, she concluded that the victim's heart was still beating and that she was still alive when her neck was cut.

Curtis Browning, a crime laboratory analyst, also testified. He testified that blood on the knife recovered by law enforcement had DNA that matched Ruth's DNA. He also testified that Hernandez was a possible contributor of DNA found under the victim's fingernails and that Arnold's DNA was not present. Browning also testified that DNA obtained from blood found on Hernandez's grey T-shirt also matched the victim's DNA.

On February 6, 2007, the jury found Hernandez guilty on all three counts: first-degree murder while using, carrying, or possessing a weapon;³ robbery with a deadly weapon; and burglary of a dwelling with assault or battery.⁴

During the penalty phase, the State presented victim impact evidence through Elaine Simpson and Judy Morrissey, friends of Ruth. They testified that Ruth was a supportive friend and a hard worker, who was concerned about her son David's drug use.

The State also presented testimony from Santa Rosa County detention deputies concerning Hernandez's behavior while he was incarcerated. Deputy Matthew Bartley testified about Hernandez's attack on his codefendant while they were housed in the same cell. The State introduced into evidence Arnold's medical records concerning his treatment as a result of the altercation and a copy of the judgment of Hernandez's conviction and sentence for battery upon a jail detainee. The State also presented testimony from Deputy John Wade Jarvis, who testified about being attacked by Hernandez while transporting him to a doctor's office for a psychological evaluation. The State introduced into evidence a copy of the judgment of Hernandez's conviction and sentence for aggravated battery on a law enforcement officer.

The State also presented testimony from the defendant's wife. Stephanie testified that when the Hartmans came to their house on November 19, 2004, Hernandez told them that he cut the victim's throat "[t]o make sure she was dead."

The defense then presented testimony from Hernandez's half-brother, Richard Hartman Jr., and Hernandez's mother,

³ The jury did not specify whether it found Hernandez guilty of first-degree premeditated murder or first-degree felony murder.

⁴ On the burglary count, the jury found the following: Hernandez committed an assault or battery in the course of committing a burglary; Hernandez was armed with a dangerous weapon; and the dwelling was occupied by Ruth Everett during the commission of the burglary.

Cheryl Walker,⁵ about Hernandez's dysfunctional childhood in which he was exposed to drugs and violence from a young age. According to their testimony, Cheryl and Hernandez's father, Michael Hernandez Sr., used marijuana on a regular basis in Hernandez's presence when he was a child and also used crystal methamphetamine and cocaine. They wandered around the country and were in hiding from the Bandidos, a motorcycle group from which they had fell out of favor. Cheryl later left Michael Sr. and relocated to California with Hernandez. In California, Cheryl, who was no longer using methamphetamines but was drinking heavily, briefly reunited with Michael Sr. They later separated, and Cheryl left Hernandez, who was approximately three years old at the time, with his father while she sold drugs. Michael Sr. lived with the Esterbrooks, who were also using and dealing drugs.

Richard Jr. and Cheryl testified that Hernandez returned to live with Cheryl several years later after she met and married Michael Murphy. Murphy, who also abused drugs, beat Cheryl in front of her children and was jailed for putting a gun in her mouth. Cheryl sent Hernandez back to his father because she was afraid for his life when she was with Murphy. Hernandez lived with his father in a hotel room until his father's death from a drug overdose.

Richard Jr. and Cheryl also testified that Hernandez lived with Cheryl and her new husband, Anthony Walker. Anthony was verbally and physically abusive, and Hernandez witnessed him choke, beat, and shake Cheryl. Anthony also once punched Hernandez so hard that he needed an appendectomy. Furthermore, both Cheryl and Anthony used alcohol and marijuana.

According to the testimony of Hernandez's relatives, Cheryl later sent Hernandez to live with the Esterbrooks once more, and Hernandez never lived with her again. Hernandez reported being beaten and molested at the Esterbrooks' home, and he eventually left their home and was in the custody of the state.

In addition, Richard Jr. and Cheryl testified that Hernandez's paternal grandparents, Al and Barbara Hernandez, later took him to live with them, and he never saw his mother again until he testified for her at her trial for killing Anthony. Hernandez then stayed with Richard Jr. as well as with his other half-brother, Shawn Hartman. Hernandez also lived on the streets. After Richard Jr. found this out, he talked Hernandez into living with him again in Florida, where Hernandez alternated living with Richard Jr. and Richard Sr. Hernandez

⁵ Cheryl testified through a videotaped deposition because she was serving a sentence in a correctional facility for killing her husband, Anthony Walker.

used cocaine during this time and smoked marijuana. Hernandez later moved to Tennessee with his wife.

The defense also presented testimony from Dr. John Bingham, a mental health counselor. Bingham testified that Hernandez met the diagnostic criteria for a chemical dependency to marijuana and cocaine. Bingham also testified that he believed that Hernandez and Arnold's actions on November 18, 2004, appeared to reflect "an absence of thinking and more reaction to the situation as it unfolded.... All they were interested in is responding in the sense of getting crack cocaine." Bingham testified that he believed that Hernandez's ability to appreciate the criminality of his conduct or conform his conduct to the requirements of law was substantially impaired as a result of his chronic cocaine use and being under the influence at the time as well as because of the psychological and physical abuse he had experienced.

The defense also presented testimony from Dr. Brett Turner, a neuropsychologist. Turner testified that because of Hernandez's "lack of participation" and lack of motivation several of the tests he had performed were invalid, including the neurological testing. However, Turner testified that Hernandez's IQ score was accurate; Hernandez's full scale IQ score was 89, which was in the low-average range. Turner also testified that Hernandez's achievement testing, which also was valid, identified a learning disability for spelling and written expression. Moreover, Turner testified that while he was not able to substantiate damage to Hernandez's frontal lobe because of the invalid neurological test score, he believed that Hernandez's history suggested it. Turner also had several diagnoses, including polysubstance dependence disorder, depressive disorder, posttraumatic stress disorder, impulse control disorder or cognitive disorder not otherwise specified, and antisocial personality disorder. Turner also opined that Hernandez was "under extreme emotional disturbance at the time of the offense as a result of a chronic history of emotional instability deficits and behavior control and deficits in his reasoning and cognitive abilities all acutely exacerbated by the effects of cocaine intoxication." In addition, Turner opined that Hernandez's capacity to appreciate the criminality of his conduct was substantially impaired "because appreciate actually means to be fully aware, and I do not believe that he was fully aware at the time of the incident offense. I believe he was engaged in a string of behavioral responses, one leading to the next...."

The defense also offered into evidence Arnold's judgment and sentence for the crimes. Arnold pleaded nolo contendere to felony murder with a deadly weapon and was sentenced to a term of life imprisonment without the possibility of parole.

The State then presented testimony from Dr. Harry McClaren, a forensic psychologist. McClaren testified that one of the two

psychological tests he had administered was invalid due to an overreporting of psychopathology and that the other one was technically valid but also was exaggerated by Hernandez. McClaren also noted that the IQ test showed that Hernandez had a full scale IQ of 89, which was in the upper bounds of the low-average range. McClaren also opined that Hernandez suffered from posttraumatic stress disorder and some form of depression, which was compounded by polysubstance dependence. McClaren also testified that based on a history of head injuries and records indicating a learning disability, Hernandez might have some degree of brain dysfunction, which McClaren characterized as a cognitive disorder not otherwise specified. McClaren also testified that Hernandez had antisocial personality disorder and borderline personality disorder. When asked if the mental health disorders had a causal effect on Hernandez's conduct in the murder of Ruth Everett, McClaren said no. He testified that posttraumatic stress disorder, depression, antisocial personality disorder, and borderline personality disorder might heighten the risk of substance abuse, which "would be an indirect rather than a direct link" to his criminal conduct. McClaren also opined that Hernandez was not under extreme mental or emotional disturbance. McClaren explained that Hernandez was intoxicated on cocaine, which in McClaren's belief, did not give rise to the level of the statutory mitigating circumstance. McClaren also opined that Hernandez was not acting under extreme duress or under the substantial domination of another person. McClaren further testified that Hernandez's ability to appreciate the criminality of his conduct or conform his conduct to the requirements of law was not substantially impaired. McClaren testified that while Hernandez was impaired from cocaine at the time, he was not substantially impaired and was able to engage in "goal-oriented behavior."

The State also entered into evidence a copy of Hernandez's judgment and sentence in Tennessee for misdemeanor theft.

On February 9, 2007, the jury recommended the death penalty by a vote of eleven to one. The court then held a *Spencer*⁶ hearing on March 9, 2007. As rebuttal to the statutory mitigator of lack of significant prior criminal history, the State offered testimony regarding Hernandez's conviction for petit theft. The defense then offered unsworn testimony from Barbara Hernandez (Hernandez's step-grandmother) and Richard Jr., and defense counsel read a statement that Hernandez had prepared.

At the sentencing hearing held on March 22, 2007, the court sentenced Hernandez to death. The court found four aggravating circumstances: (1) Hernandez was previously convicted of another felony involving the use or threat of violence to the person, namely aggravated battery on a law enforcement officer with

⁶ *Spencer v. State*, 615 So.2d 688 (Fla.1993).

great bodily harm and with a weapon and battery upon a jail detainee (great weight); (2) the capital felony was committed while Hernandez was engaged in the commission of the crimes of robbery with a deadly weapon and burglary of a dwelling with assault or battery while armed with a dangerous weapon and while the dwelling was occupied by a person (great weight); (3) the capital felony was committed for the purpose of avoiding or preventing lawful arrest or effecting an escape from custody (great weight); and (4) the capital felony was especially heinous, atrocious, or cruel (HAC) (great weight).⁷ The trial court found the statutory mitigator of lack of significant history of prior criminal activity (some weight).⁸ The court also evaluated the nonstatutory mitigating circumstances offered by Hernandez.⁹

⁷ The court rejected the aggravating circumstance that the victim of the capital felony was particularly vulnerable due to advanced age or disability.

⁸ The court rejected the following statutory mitigators: the crime was committed while Hernandez was under the influence of extreme mental or emotional disturbance; Hernandez's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired; Hernandez acted under extreme duress or under the substantial domination of another person; and Hernandez's age, twenty-three, at the time of the crime.

⁹ Hernandez offered twenty-eight circumstances, and the court added the twenty-ninth circumstance. The court found the following: (1) "He lived in dysfunctional, neglectful, and impoverished childhood circumstances" (some weight); (2) "He had essentially no family home with anything normal in it; he did not have any regular schooling; his parents were separated and he was bounced from parent to parent, to abusive foster homes, and to abandonment" (substantial weight); (3) "His parents were outlaws, motorcycle gang members, hard drug dealers and abusers, who were under threat of death from the motorcycle gang" (substantial weight); (4) "His parents introduced Defendant to narcotics at an early age" (substantial weight); (5) "His mother had many live-in paramours, who were physically, mentally, and emotionally abusive to her and to Defendant" (some weight); (6) "Defendant witnessed physical abuse of mother on many occasions" (some weight); (7) "Defendant was abandoned by mother on more than several occasions and placed in foster care, where he was further mentally, physically, and emotionally abused" (substantial weight to the abandonment aspect, but no weight to the rest because it was addressed in factor (9)); (8) "Defendant's father was overdosed by drugs at the hands of his girlfriend, while Defendant was living with him" (some weight); (9) "The Defendant was mentally, physically, emotionally, and sexually

The court gave great weight to the jury's recommendation and found that "[a]llthough mitigating circumstances exist in this case, the serious aggravating circumstances which have been proven beyond a reasonable doubt greatly outweigh the mitigating circumstances." The court sentenced Hernandez to death for the first-degree murder and sentenced him to consecutive life sentences for the robbery and burglary.

abused in foster care over a four year period as a pre-teen/early teen" (some weight); (10) "The Defendant ran away because of the abuse and because his mother would not come to his aid; his mother also told him goodbye, and that she was going to commit suicide" (some weight); (11) "The Defendant was dysfunctional by this time, and began to live on the streets and continue in drug usage" (some weight); (12) "The Defendant lived with his ½ brother for a period of time, but was subjected to continued drug exposure and use at the hands of his ½ brother's father, Richard Hartman" (some weight); (13) "The Defendant attended learning disabled classes in school when he attended" (some weight); (14) "The Defendant was able to marry and supported his family for two years" (some weight); (15) "The Defendant has been characterized as a loving person, loving father and husband" (some weight); (16) "The Defendant has a life-long addiction to controlled substances due to his involuntary exposure to them at an early age" (some weight); (17) "The Defendant was enticed into binging on cocaine at the time of the instant offense by the co-Defendant" (no weight); (18) "The Defendant had been drinking the night before and was still under the influence of alcohol on the morning of the offense" (some weight); (19) "The offense was unplanned, and was initiated by the co-Defendant" (no weight); (20) "The resulting homicide was a spontaneous, unplanned act" (no weight); (21) "The co-Defendant actually took the property of the decedent in hopes of finding money or means to get money to purchase cocaine" (no weight); (22) "When confronted, the Defendant accepted responsibility for taking part in the offense" (substantial weight); (23) "The Defendant has continuously shown remorse for his conduct" (slight weight); (24) "The Defendant has cooperated with the police to resolve the offense" (some weight); (25) "The Defendant has two documented suicide attempts" (some weight); (26) "The co-Defendant was offered a life sentence and was equally culpable, and actually initiated the entire episode" (no weight); (27) "The Defendant is not worthy of the death penalty for his participation in this crime" (no weight); (28) "Defendant has other mental and cognitive disorders that do not qualify as statutory mitigating circumstances" (some weight); and (29) "Defendant's family members have given sworn and unsworn testimony and provided letters attesting to Defendant's good character" (some weight).

Hernandez v. State, 4 So.3d 642, 647-656 (Fla. 2009)(footnotes included).

On appeal to the Florida Supreme Court, Hernandez raised eight issues: (1) the trial court erred by denying his motion to strike the venire and motion for a mistrial after a prospective juror who was stricken for cause saw Hernandez in shackles; (2) the trial court erred in refusing to grant Hernandez's challenge for cause to juror Lindquist; (3) the trial court erred by excusing the State's mental health expert from the rule of sequestration during the penalty phase; (4) the trial court erred in failing to dismiss the indictment because it did not alleged the particular aggravators; (5) the trial court erred in giving the standard jury instruction on victim impact evidence; (6) the trial court erred in finding that he committed the murder for the purpose of avoiding or preventing a lawful arrest because that was not the dominant motive; (7) the trial court erred in finding that the murder was especially heinous, atrocious, or cruel because there was no evidence that the victim, Ruth Everett, was conscious after her neck was broken; and (8) the death sentence was disproportionate because the co-defendant, Christopher Arnold, who was equally capable, was sentenced to life. The Florida Supreme Court addressed sufficiency of the evidence as well. *Hernandez*, 4 So.3d at 656, 671-673. The Florida Supreme Court affirmed the convictions and death sentence. *Hernandez*, 4 So.3d at 674.

Hernandez then sought certiorari review in the United States Supreme Court raising the shackling claim. The United States Supreme Court denied certiorari review on October 5, 2009. *Hernandez v.*

Florida, 558 U.S. 860, 130 S.Ct. 160, 175 L.Ed.2d 101 (2009)(No. 08-10909).

On September 24, 2010, Hernandez filed a 3.851 motion in state trial court raising two claims: 1) ineffective assistance of counsel at guilt and penalty phase with numerous subclaims; and 2) a *Brady/Giglio* claim. On November 29, 2010, the State filed an answer to the 3.851 motion. The trial court conducted a four part evidentiary hearing on the claims on January 9-13, 2012; May 25, 2012; July 16, 2012; and July 25, 2012. Both parties submitted extensive post-evidentiary hearing memorandums of law. Postconviction counsel filed a 148-page post-evidentiary hearing memorandum of law. (Vol V 905-999 - Vol. VI 1001-1053). The State then filed a 173-page post-evidentiary hearing memorandum of law. (Vol VI 1077-1200 - Vol. VII 1201-1249). Postconviction counsel then filed a 24-page reply. (Vol VII 1265-1288).¹⁰ The trial court denied the 3.851 motion for

¹⁰ This Court is currently considering an amendment to 3.851 rule prohibiting subclaims. In the reply post-evidentiary hearing memo, postconviction counsel pointed out that the State missed an entire subclaim in its post-evidentiary hearing memorandum of law. (Vol. VII 1287). Even though the State wrote a 173 post-evidentiary hearing memo, undersigned counsel missed an entire subclaim. Writing 3.851 motions with 40 unlabeled subclaims and with subclaims within subclaims, is intentionally designed to cause the State and the trial court to miss one of the subclaims. This establishes the wisdom of the proposed amendment.

Indeed, this Court should likewise prohibit subclaims in capital appellate briefs. One of the issue raised in the initial brief by opposing counsel is basically Claim I(B)(i), albeit not even labeled clearly as being that. Indeed, claim I(b) is a mishmash of ineffectiveness claims, one relating to the admissibility of the wife's testimony and other two claims regarding perceived flaws in the prior convictions used as aggravators in the penalty phase. The initial brief contains subclaims within subclaims. Undersigned counsel would not be surprised to discover she missed a subclaim yet again in her answer brief. There is no reason why each claim of ineffectiveness presented to this Court should not be clearly and

postconviction relief in a 54-page order (Vol. VII 1290-1343). This appeal follows.

SUMMARY OF ARGUMENT

ISSUE I

Hernandez asserts that his trial counsels, Ted Stokes and Michael Rollo, were ineffective on various grounds. As the trial court found, there was no deficient performance or prejudice in any of the claims. The trial court properly denied this claim following an evidentiary hearing on the matter.

ISSUE II

Hernandez asserts that the prosecutor violated *Giglio v. United States*, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972), by presenting the inconsistent testimony of Tammy Hartman. *Giglio* is not violated when a presents a witness who is unclear about certain matters or whose testimony is inconsistent in certain areas. *Giglio* is only violated when the prosecutor knowingly presents false testimony. As the trial court explained, "mere inconsistencies" in a witness' testimony "do not establish the knowing use of false testimony." The trial court noted that the defendant had not established that Tammy Hartman's "trial testimony was actually false" as required to establish a *Giglio* violation. The trial court also

separately raised as well as in the trial court.

found that the defendant failed to establish that the prosecutor knowingly presented false testimony because other witness could corroborate certain aspect's of her testimony. Thus, the trial court properly denied the *Giglio* claim.

ARGUMENT

ISSUE I

WHETHER THE TRIAL COURT PROPERLY DENIED THE CLAIM OF INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL FOLLOWING AN EVIDENTIARY HEARING?
(Restated)

Hernandez asserts that his trial counsels, Ted Stokes and Michael Rollo, were ineffective on various grounds. As the trial court found, there was no deficient performance or prejudice in any of the claims. The trial court properly denied this claim following an evidentiary hearing on the matter.

Standard of review

This Court reviews claim of ineffective assistance of counsel *de novo*. *Johnson v. State*, 104 So.3d 1010, 1022 (Fla. 2012)(explaining that the appellate court reviews *de novo* the postconviction court's rulings on the performance and prejudice prongs, but defers to that court's findings of fact as long as such findings are supported by competent, substantial evidence in the record).

Merits

The Florida Supreme Court explained the legal test for ineffective assistance of counsel claims in *Bradley v. State*, 33 So.3d 664, 671-672 (Fla. 2010)(citing *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)). A claim for ineffective assistance of trial counsel must satisfy two criteria.

First, counsel's performance must be shown to be deficient. Deficient performance in this context means that counsel's performance fell below the standard guaranteed by the Sixth Amendment. When examining counsel's performance, an objective standard of reasonableness applies, and great deference is given to counsel's performance. The defendant bears the burden to "overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" This Court has made clear that strategic decisions do not constitute ineffective assistance of counsel. There is a strong presumption that trial counsel's performance was not ineffective.

Second, the deficient performance must have prejudiced the defendant, ultimately depriving the defendant of a fair trial with a reliable result. A defendant must do more than speculate that an error affected the outcome. Prejudice is met only if there is a reasonable probability that "but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome."

Both deficient performance and prejudice must be shown.

A. Ineffectiveness for not impeaching Tammy Hartman

Hernandez asserts Ted Stokes was ineffective for not objecting to, or impeaching, Tammy Hartman regarding her inconsistencies concerning which of the two defendants told her what. IB at 50.

Trial

Davine Tamala (Tammy) Hartman testified at trial during the guilt phase. (T. Vol. VIII 1192). She testified that she went by the name of Tammy Hartman. (T. Vol. VIII 1193). She was married to Richard Hartman. Michael Hernandez is her step-son. (T. Vol. VIII 1194). Hernandez lived with them from about the age of 15 or 16 years old. (T. Vol. VIII 1194). Hernandez lived next door to them in his own trailer, in November of 2004, when the crime occurred. (T. Vol. VIII 1195). Michelle Rose is her daughter. (T. Vol. VIII 1197). Michelle Rose was engaged to Chris Arnold, the co-perpetrator. (T. Vol. VIII 1197). Rose and Arnold had a child together. (T. Vol. VIII 1197).

She testified as to the events of Thursday, November 18, 2004 and Friday, November 19, 2004. (T. Vol. VIII 1199). On Friday, November 19, 2004, she went to her daughter's house, off Parker Road. (T. Vol. VIII 1197, 1200). Her daughter asked her to come over alone. (T. Vol. VIII 1201). She talked with her daughter Michelle Rose, and then with Chris Arnold, the co-perpetrator. (T. Vol. VIII 1201). Arnold was shaking and crying hysterically and was "just out of control." (T. Vol. VIII 1202).

She went to Arnold's car and got the small pocketknife that was hidden under the front passenger seat. (T. Vol. VIII 1202). Tammy Hartman testified that she put the knife in a bag. (T. Vol. VIII

1203). The bag was from a dumpster and Arnold had pointed out the bag to her. (T. Vol. VIII 1204). The bag had a purse in it. (T. Vol. VIII 1204). She put the bag in the bed of her husband's truck. (T. Vol. VIII 1205,1206).

She then went to get her husband and they went to Hernandez's trailer on Eastgate. (T. Vol. VIII 1196,1205-1206). Hernandez, Hernandez's wife, Stephanie and their babies were there. (T. Vol. VIII 1206). Stephanie's sister from Tennessee, Tiffany, and her husband, Humphrey Telin, were also present. (T. Vol. VIII 1206,1207,1211).

Tammy Hartman asked Hernandez about the crack party. (T. Vol. VIII 1207). Tammy Hartman asked Hernandez to tell her about the lady, the bloody knife, and the purse. (T. Vol. VIII 1208). Hernandez told his wife to pack his stuff because he was leaving. (T. Vol. VIII 1208). Hartman asked Hernandez what he had done to the lady in Skyline. (T. Vol. VIII 1209). Tammy Hartman told Hernandez he was not leaving Michelle and Arnold to go through this alone. (T. Vol. VIII 1208). Hartman told Hernandez that she was going back to Michelle's and she would wait for Hernandez there (T. Vol. VIII 1208,1209). Hartman testified that she kept hitting Hernandez in the chest. (T. Vol. VIII 1208). She told Hernandez that they had to go to the police. (T. Vol. VIII 1210).

Hartman testified that she and her husband then went to Arnold's house. (T. Vol. VIII 1211). Michelle, Arnold, and the baby were present. (T. Vol. VIII 1211). Hernandez and his wife Stephanie arrived. (T. Vol. VIII 1211). Stephanie's sister, Tiffany Telin, arrived in a different vehicle. (T. Vol. VIII 1212). Tammy Hartman could not remember if Tiffany's husband, Humphrey Telin, was present.

(T. Vol. VIII 1212). Arnold and Hernandez were talking between themselves with the others present. (T. Vol. VIII 1213). Hernandez said to Arnold well you put the pillow over her face. (T. Vol. VIII 1213). Defense counsel objected on hearsay grounds. (T. Vol. VIII 1214-1217). The prosecutor then instructed Hartman to only testify as to those things that Hernandez said, not Arnold. (T. Vol. VIII 1217). Hartman testified she could not remember what else Hernandez said. (T. Vol. VIII 1217). She testified that she told Hernandez he needed to turn himself into the police. (T. Vol. VIII 1217). Hartman testified that she could not remember what Hernandez said at Shelley's house. (T. Vol. VIII 1218-1219). Hartman testified that she told Hernandez about having "the bloody knife" and "the lady's purse." (T. Vol. VIII 1219). In response, Hernandez said that he was hoping she only knew about the crack. (T. Vol. VIII 1219).

The prosecutor asked her if Hernandez said anything else about the lady and Hartman responded: "I don't think so; I don't know." (T. Vol. VIII 1219). The prosecutor then attempted to impeach Hartman with her deposition. (T. Vol. VIII 1219-1222). Tammy Hartman had given the police a taped statement and a written statement on November 19, 2004 and on August of 2005, she gave a deposition. (T. Vol. VIII 1220). Defense counsel objected to the State impeaching its own witness. (T. Vol. VIII 1221). Hartman read her prior deposition. (T. Vol. VIII 1221). Hartman then testified that Hernandez told her in response to her questions about the lady at Skyline that "she was old and it was her time to go." (T. Vol. VIII 1222). She was not sure if Hernandez accused Arnold of doing anything else beside the pillow. (T. Vol. VIII 1222). Hernandez and his wife drove off just as the police arrived.

(T. Vol. VIII 1222-1223). The police arrested Arnold and took the bag with the knife and the purse. (T. Vol. VIII 1224).

After Hernandez turned himself in, Tammy Hartman went to the jail to visit him. (T. Vol. VIII 1225,1226). She talked to Hernandez about what happened to Ruth Everett on Skyline Drive. (T. Vol. VIII 1226). Hernandez told Hartman that he went to the victim's house to get more crack. (T. Vol. VIII 1226). Hernandez told her that he grabbed the victim in a choke hold. (T. Vol. VIII 1227). Arnold went in the bedroom and came out with a pillow. (T. Vol. VIII 1228). Arnold attempted to smother the victim with the pillow but she "just wouldn't die." (T. Vol. VIII 1228). Hartman then testified that she should not say that because she was not sure whether Hernandez or Arnold told her that. (T. Vol. VIII 1228). Hernandez said Arnold was a "wuss" and a "pussy." (T. Vol. VIII 1228-1229). Hartman then testified that she didn't know what Hernandez did next. (T. Vol. VIII 1229). The prosecutor pushed her saying you don't know or you will not tell us. (T. Vol. VIII 1230). Hartman then testified that Hernandez told her he "snapped her neck." (T. Vol. VIII 1230). The victim was grabbing him and scratching him. (T. Vol. VIII 1230). Hernandez demonstrated this to Hartman. (T. Vol. VIII 1230). Hernandez then knifed her in the neck. (T. Vol. VIII 1230). Arnold had the victim's legs. (T. Vol. VIII 1231). Hernandez told her he killed the lady because she had seen their faces. (T. Vol. VIII 1231). The prosecutor again impeached her with her deposition. (T. Vol. VIII 1233-1234). Hartman then testified that Hernandez told her that he pushed Arnold back. (T. Vol. VIII 1235).

Defense counsel cross-examined her about her closer relationship to Arnold than Hernandez. (T. Vol. VIII 1235,1240,1246). Hartman testified that both Arnold and Hernandez used crack. (T. Vol. VIII 1236,1237). Hartman testified that Hernandez's "shark eyes" the next day meant he had been using crack the day before. (T. Vol. VIII 1238). (T. Vol. VIII 1235). She and Hernandez had had a falling out earlier. (T. Vol. VIII 1247).

Defense counsel also noted that Hartman had difficulty differentiating between Hernandez and Arnold and that she was confusing them. (T. Vol. VIII 1235). Hartman admitted that they both told her different things at different times. (T. Vol. VIII 1247). She knew what Hernandez told her but she heard "so many things" in the past two years. (T. Vol. VIII 1247-1248).

On redirect, Hartman testified that Hernandez told her he snapped the victim's neck and slashed her throat. (T. Vol. VIII 1248). The falling out was over damage Hernandez did to the trailer they rented from him when he was when drunk. (T. Vol. VIII 1251-1252). She had forgiven him. (T. Vol. VIII 1252).

Tiffany Telin also testified during the guilt phase. (T. Vol. VIII 1255). She also testified as to the events of November 19, 2004. (T. Vol. VIII 1235). Hernandez was her brother-in-law. (T. Vol. VIII 1257). Hernandez is married to her sister Stephanie Hernandez. (T. Vol. VIII 1257). She was living in Tennessee and came down to Florida on Thursday November 18, 2004. (T. Vol. VIII 1259). She and her husband came down to Milton to return her two nieces. (T. Vol. VIII 1260). They stayed with her husband's family. (T. Vol. VIII 1261).

She and her husband went over to her sister's house about 1:00 the next day. (T. Vol. VIII 1261). When she arrived at the Hernandez's house, the Hartmans were present. (T. Vol. VIII 1261). Hernandez, Stephanie, Tammy Hartman and Rick Hartman were present. (T. Vol. VIII 1263,1266). When she arrived, her sister Stephanie was crying. (T. Vol. VIII 1262). She asked Stephanie what happened and Stephanie told her that Hernandez and Arnold had killed a woman. (T. Vol. VIII 1263). She asked Hernandez what happened and Hernandez told her he had killed the woman and that she was "already almost dead." (T. Vol. VIII 1264). Hernandez told her he had stabbed her in the throat. (T. Vol. VIII 1265). Hernandez told her that he and Arnold went to the house for crack. (T. Vol. VIII 1265).

Hernandez also told her that he used the victim's ATM card to get money. (T. Vol. VIII 1268). She told him that ATMs have cameras but Hernandez said that he went to a store that had no cameras. (T. Vol. VIII 1268-1269). She asked Hernandez if he had touched the victim and Hernandez admitted that he touched her face but insisted that they could not get fingerprints off a face. (T. Vol. VIII 1269). Hernandez was "kind of cold" and emotionless during this discussion but worried. (T. Vol. VIII 1270).

They then went over to Arnold's house. (T. Vol. VIII 1266). Hernandez and Arnold were going to turn themselves in. (T. Vol. VIII 1266). She did not pay attention to what they were saying to each other. (T. Vol. VIII 1235). They had called her mother and her mother's boss had called the police. (T. Vol. VIII 1267). The police arrived but the Hernandezes drove away. (T. Vol. VIII 1267). She and her husband left to find Hernandez. (T. Vol. VIII 1268).

On cross, she admitted that she could not recall everything said that day. (T. Vol. VIII 1274). In her August 2005 deposition and in her November 19, 2004 taped statement, she had said that Hernandez told her that he stabbed the woman. (T. Vol. VIII 1276-1277). Her testimony matched her deposition and her statements. (T. Vol. VIII 1277).

Evidentiary hearing testimony

At the evidentiary hearing, guilt phase counsel Ted Stokes testified that he read Tammy Hartman's Nov 19, 2004, written statement and her November 24 statement to Detective Shuler prior to the trial. (Evid. H Vol. VI at 624-625). Stokes stated that it was "well established" that Hartman contradicted herself. (Evid. H Vol. VI at 634). She made contradictory statements in her direct testimony. (Evid. H Vol. VI at 634). Stokes observed that the prosecutor had to correct her several times. (Evid. H Vol. VI at 635). Stokes commented on her contradictions. (Evid. H Vol. VI at 635). The prosecutor impeached Hartman with her deposition (Evid. H Vol. VI at 635).

Stokes did not object because he did not know what basis he could object on. (Evid. H Vol. VI at 631-632). Ted Stokes testified that he did not object because it was beneficial to his case to show that Hartman was unsure and confused. It gave him "fire" for closing argument that she did not know what she was talking about. (Evid. H Vol. VI at 629-630) Stokes did not use her contradictory statements in the deposition itself to impeach her. (Evid. H Vol. VI at 637). Rather, his strategy for dealing with Hartman was to show her bias in favor of Arnold who was the father of her grandchild rather than

impeaching her. (Evid. H Vol. VI at 637). Stokes was not as concerned with her inconsistencies as with her motivation. (Evid. H Vol. VI at 637). His strategy for dealing with Hartman was to show her bias because she was the grandmother of Arnold's child rather than impeachment. (Evid. H Vol. VI at 637). Guilt phase counsel Stokes was not as concerned with her inconsistencies as with her motivation. (Evid. H Vol. VI at 637). Stokes' focus was not her accuracy but her bias. (Evid. H Vol. VI at 663). Stokes' theme was that the witness was protecting Arnold and putting his words into Hernandez's mouth. (Evid. H Vol. VI at 638).

The trial court's ruling

The trial court rejected this claim of ineffectiveness finding no prejudice because the defendant confessed to grabbing the victim head and hearing her neck snap and then stabbing her. (Vol. Vol VII 1295-1299). The trial court rejected the claim of ineffectiveness for failing to prepare for Tammy Hartman's testimony finding that guilt phase counsel Stokes read Hartman's deposition over the weekend before she testified. (Vol. VII 1301). The trial court also found that guilt phase counsel Stoke's strategy of highlighting Tammy Hartman's bias in favor of Arnold who is the father of her grandchild, was reasonable. (Vol. VII 1302-1303).

Merits

There was no deficient performance. Defense counsel objected to Hartman's testimony on hearsay grounds at one point. (T. Vol. VIII 1214-1217). Stokes objected to Hartman's testifying about Hernandez's

statement to Arnold that you put the pillow over her face based on hearsay grounds. (T. Vol. VIII 1214-1217). The prosecutor then instructed Hartman to only testify as to those things that Hernandez said, not Arnold. (T. Vol. VIII 1217).

Ted Stokes testified that he did not object further because it was beneficial to his case to show that Hartman was unsure and confused. It gave him "fire" for closing argument that she did not know what she was talking about. (Evid. H Vol. VI at 629-630). Defense counsel cross-examined Hartman regarding her confusion over who said what. And the prosecutor impeached Hartman with her deposition.

Stokes testified that not objecting further was a matter of trial strategy. (Evid. H Vol. VI at 634). There were so many inconsistencies in Tammy Hartman's actual trial testimony that he did not need to use the inconsistencies between her testimony and her deposition to establish that she could not really say whether it was Hernandez or Arnold that made certain statements. Further impeachment was simply not necessary. His strategy for dealing with Hartman was to show her bias because she was the grandmother of Arnold's child rather than impeaching her with her inconsistencies. (Evid. H Vol. VI at 637). Guilt phase counsel Stokes was not as concerned with her inconsistencies as with her motivation. Stokes' focus was not her accuracy but her bias. (Evid. H Vol. VI at 663). It is perfectly reasonable for defense counsel to focus on a witness' bias rather than her inconsistency, especially when the witness's inconsistency was already established by the prosecutor no less. This is a reasonable strategic decision.

Nor was there any prejudice. Regardless of Hartman's testimony, other witnesses testified to Hernandez's confession to the murder. Hernandez's sister-in-law, Tiffany Telin also testified during the guilt phase. (T. Vol. VIII 1255). Hernandez told her he had stabbed the victim in the throat. (T. Vol. VIII 1265). Telin testified as to incriminating details that Hartman did not, such as Hernandez going to a store with no camera to use the victim's ATM card. Arnold was not present at the time of this conversation, so there is no doubt that Hernandez made these statements.¹¹ But even more to the point, as Stokes testified, the biggest problem in the case was Hernandez's taped confession. (Evid. H Vol. VI at 670-671). Hernandez admitted he caught the victim by the neck and her neck snapped in the taped confession played for the jury. (T. 1527). Hernandez also admitted to being the person who slashed the victim's throat in his taped confession. (T. 1526). As Stokes testified, the biggest problem in

¹¹ There is no valid Confrontation Clause objection to Hartman's testimony. *Crawford v. Washington*, 541 U.S. 36, 53-54, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004). The Confrontation Clause bars "admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination." *Crawford*, 541 U.S. at 53-54. But Hartman testified at trial. Moreover, *Crawford* does not apply to statements that are admissible under the admission-by-a-party-opponent hearsay exception. Those statements that Hartman could definitely identify as having been made by Hernandez are admissible. Nor was there any possible confrontation clause problem under *Crawford* with Telin's testimony. Hernandez was speaking with his sister-in-law. Such conversations are not testimonial and therefore, *Crawford* does not prohibit them. *Crawford*, 541 U.S. at 51, 124 S.Ct. at 1364 ("An accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not."); *Franklin v. State*, 965 So.2d 79, 91 (Fla. 2007)(holding the victim's statement to a friend was not testimonial).

the case was Hernandez's taped confession in which he admitted grabbing her by the neck and hearing her neck snap. (Evid. H Vol. VI at 670-671). As defense counsel testified at the evidentiary hearing, the taped confession was the "gorilla" in the room. (Evid. H Vol. VI at 670). Regardless of whether counsel had managed to get additional parts of Hartman's testimony excluded on hearsay grounds based on her inability to identify the source of the admission, the jury would have convicted Hernandez of this murder based on his own words. Opposing counsel totally ignores the confession in his analysis of this issue. There was no ineffectiveness.

B. Ineffectiveness for not challenging aggravation

Hernandez asserts that penalty phase counsel Rollo was ineffective for not correcting perceived flaws in the two prior convictions used to establish the prior violent felony aggravating circumstance. IB at 57. Hernandez also asserts that penalty phase counsel Rollo was ineffective for not objecting on the basis of the martial privilege to the State calling the defendant's wife to testify.

1) Prior conviction for battery on a detainee

Hernandez claims that his penalty phase counsel was ineffective for not having part of the judgment used to establish the prior violeted felony conviction redacted. IB at 58. The original charge against Hernandez was attempted first-degree murder of co-defendant Arnold in count I but the jury hung on count I. Hernandez was also charged and convicted of battery on a detainee in count II. (Evid. H Vol. VII at

851). Once the verdict of guilty as charged on count II was given, the prosecutor *nolle prossed* count I. (Evid. H Vol. VII at 852).

During the penalty phase, the judgment showing both count I, the attempted first-degree murder charge and the conviction for battery on a detainee was introduced as State's exhibit #21. (T. 998)

At the evidentiary hearing penalty phase counsel Rollo testified regarding the judgement for the conviction for battery on a jail detainee containing a reference to attempted murder, Rollo testified that it "would have been better to have kept that out." (Evid. H Vol. IX at 953-954). Rollo agreed that the prosecutor made it clear that Hernandez was only convicted of battery on a detainee, not attempted murder. (Evid. H Vol. IX at 954).

Rollo's opinion was that there was no good-faith basis to exclude Deputy Bartley's testimony that he saw Hernandez strangling Arnold from the penalty phase (Evid. H Vol. IX at 961). Hernandez's personal opinion that the deputy was committing perjury is not a legal basis for exclusion but if the deputy testified under oath that is what he saw, then "just because the medical records did not show" any indication of strangulation, the deputy can still testify as to his personal observations. (Evid. H Vol. IX at 962).

The trial court rejected this claim of ineffectiveness. (Vol. VII 1308-1311). The trial court did not address deficient performance for failing to redact the attempted murder charge from the judgment and sentence but found no prejudice. (Vol. VII 1309). The trial court noted that the prosecutor "made it clear" to the jury that the conviction was for battery on a detainee. (Vol. VII 1309). The trial court also noted that the detainee conviction was not necessary to the

prior violent felony aggravator because there was a second separate conviction based on Hernandez attacking a deputy (Vol. VII 1309). The conviction for battery on a LEO was sufficient to establish the prior violent felony aggravator. (Vol. VII 1309). The trial court noted that even if the judgment had been redacted, the jury would have heard the details of the detainee conviction in which Hernandez attacked his co-perpetrator Arnold. (Vol. VII 1309 citing *Franklin v. State*, 965 So.2d 79, 96 (Fla. 2007)). The trial court concluded that there was no reasonable probability of a lesser sentence if the judgment had been redacted. (Vol. VII 1309).

Assuming penalty phase counsel Rollo should have moved to redact the first-degree murder charge and only permit the verdict for battery on a detainee to be admitted, there was no prejudice. The prosecutor Bobby Elmore only referred to the conviction as being battery on a fellow detainee, not as an attempted murder, to the penalty phase jury.

Furthermore, there were two convictions supporting the prior violent felony aggravator - one for battery on a LEO and one for battery on a detainee. Regardless of any error in the paperwork for the conviction for battery on a detainee, the jury would have found the prior violent aggravator based on the conviction for battery on a LEO which was even more violent than the inmate battery conviction. Hernandez, in an escape attempt, hit the guard, Deputy Jarvis, over the head with the toilet lid while at Dr. Larson's office. The conviction for inmate battery was not necessary to the prior violent felony aggravator.

Moreover, regardless of the nature of the charges in connection with the inmate battery, the penalty phase jury still would have heard the details of both convictions. *Franklin v. State*, 965 So.2d 79, 96 (Fla.2007)(noting that details of any prior violent felony conviction rather than the bare admission of the conviction is admissible because such testimony assists the jury in determining what weight to give to the prior felony aggravator). There was no prejudice.¹²

2) Prior conviction for battery on a LEO

Hernandez also asserts penalty phase counsel was ineffective regarding the battery on a law enforcement officer conviction arguing

¹² The trial court also found there was no collateral estoppel issue with the admission of Deputy Bartley's testimony that he saw Hernandez strangling Arnold. (Vol. VII 1309-1310). There is no double jeopardy problem because there was no acquittal on the charge of attempted first-degree murder of Arnold by the jury in the detainee case. The jury that mistried that count. *Sattazahn v. Pennsylvania*, 537 U.S. 101, 123 S.Ct. 732, 154 L.Ed.2d 588 (2003)(contrasting the effects of a mistrial versus an acquittal in a capital case); *Richardson v. United States*, 468 U.S. 317, 326, 104 S.Ct. 3081, 82 L.Ed.2d 242 (1984)(rejecting a double jeopardy claim where there was a mistrial because "the failure of a jury to reach a verdict is not an event which terminates jeopardy."). The same is true of collateral estoppel. *Yeager v. United States*, 557 U.S. 110, 129 S.Ct. 2360, 174 L.Ed.2d 78(2009)(holding mistrial on a count was a "nonevent" for purposes of collateral estoppel). Collateral estoppel only applies when the first jury "actually and necessarily decided in the defendant's favor." When there is a mistrial, the jury decided not to decide which cannot give rise to either a double jeopardy or a collateral estoppel claim. No facts were determined in Hernandez's favor by that jury regarding the strangulation. Rollo did not see a good-faith basis for making a double jeopardy or collateral estoppel objection and he was correct there is not one. (Evid. H Vol. VII at 861). The deputy's testimony is not excludable on either double jeopardy or collateral estoppel grounds.

counsel should have introduced the actual verdict showing the jury's finding only of slight injury to the officer. IB at 63.

Penalty phase counsel Rollo testified at the evidentiary hearing regarding the battery on a LEO conviction. The court explained that the judgment shows Hernandez was convicted of aggravated battery with great bodily harm when he was convicted of aggravated battery with slight bodily harm. (Evid. H Vol. IX at 951-952 citing T. vol. VI 1004). Rollo was aware of the facts underlying because the incident at Dr. Larson's office where Hernandez hit Deputy Jarvis with a toilet lid occurred when he was counsel of record and he was the one who arranged for Dr. Larson to examine his client. (Evid. H Vol. IX at 952-953). The prosecutor noted that in the penalty phase, Deputy Jarvis testified that he just had a bump of his head and a scratch or two. (Evid. H Vol. IX at 926 citing T. 2076). Rollo remembered that testimony (Evid. H Vol. IX at 952). The Court noted that the jury was made aware of the extent of the injuries in spite of the language of the judgment. (Evid. H Vol. IX at 953). The difficulty Rollo faced was that despite the actual minor injuries, the prosecutor argued that Hernandez could have killed the deputy. (Evid. H Vol. IX at 953).

The trial court rejected this claim of ineffectiveness. (Vol. VII 1312-1313). The trial court found that it would have been clear to the penalty phase jury that Deputy Jarvis was not seriously harmed because his own testimony in front of the penalty phase jury was that he received a knot on his head and immediately subdued Hernandez. (Vol. VII 1313). The trial court also found there was no prejudice because, in light of the other aggravators, there was no reasonable

probability of a life sentence if the prior jury's verdict had been given to the penalty phase jury.

There was no deficient performance. The jury verdicts specifically stated that they convicted Hernandez of aggravated battery with a deadly weapon, adding that they found only slight injury. Postconviction counsel at the evidentiary hearing noted that there was a difference between the verdict which read aggravated battery with a deadly weapon and the judgment which read aggravated battery with great bodily harm. (Evid. H Vol. VII at 864). There are two forms of aggravated battery - one involves great bodily harm and the other involves a deadly weapon. See § 784.045(1)(a), Fla. Stat. What the jury was finding in its verdict was that the heavy porcelain toilet lid with which Hernandez hit the deputy was a deadly weapon. Either way, Hernandez was convicted of aggravated battery on a LEO. The conviction for battery on a LEO remains valid. There was no deficient performance.

Nor was there any prejudice. As the trial court found, the penalty phase jury heard from Deputy Jarvis himself during his testimony at the penalty phase of this trial that his injuries were not extensive. The prosecutor never misrepresented the facts of the aggravated battery on a LEO conviction. Postconviction counsel fails to explain how the jury would have been in doubt regarding the extent of the deputy's injuries in light of the deputy's own testimony that his injuries were limited to a knot on his head. There was no prejudice and no ineffectiveness.

3) Husband-wife privilege

Hernandez asserts that attorneys were ineffective for not objecting on the basis of marital privilege to the defendant's wife Stephanie Hernandez's testimony that he told her that he had cut the victim's throat to "make sure she was dead" during the penalty phase. IB at 64 (citing Vol. XV 2063).

Rollo testified that he required a proffer to determine if the statement Hernandez made to Tammy Hartman that he cut the victim's throat was made in the presence of others. (Evid. H Vol. VII at 879). After the proffer, Rollo determined there was no basis for any objection based on the marital privilege. (Evid. H Vol. VII at 879).

The trial court rejected this claim of ineffectiveness explaining that Hernandez's statement was not made to his wife; rather, it was made to Tammy Hartman and therefore was not covered by the marital privilege. (Vol. Vol VII 1293-1295). The trial court noted that Hernandez made the statement to Tammy Hartman in response to her questions, not to his wife. (Vol. VII 1294). The trial court found that counsel's performance was not deficient because any objection to the wife's testimony based on marital privilege "would have been overruled." (Vol. VII 1294). The trial court also found that there was no prejudice because the jury heard the equivalent testimony to the wife's testimony via the testimony of both Tammy Hartman and Tiffany Telin. (Vol. VII 1294-1295).

The husband-wife privilege statute, § 90.504(1), provides: "A spouse has a privilege during and after the marital relationship to refuse to disclose, and to prevent another from disclosing, communications which were intended to be made in confidence between

the spouses while they were husband and wife." The marital privilege is intended only to protect confidential communication. See CHARLES W. EHRHARDT, FLORIDA EVIDENCE (2007)(explaining the privilege would not apply to a loud conversation between a husband and wife at a cocktail party because it protects only confidential communications). The defendant's communication was not confidential. Rather, it was made in the presence of two other people beside his wife. *Proffitt v. State*, 315 So.2d 461, 464-465 (Fla. 1975)(observing "for the marital privilege to apply, the communication in question must have been made in confidence" and rejecting a martial privilege claim where a roommate overheard the conversation between the husband and wife and explaining that "the privilege character of the communication was lost when they were speaking in a manner and place where they had a reasonable chance of being overheard, and they knew of that possibility at that time."); cf. *Mobley v. State*, 409 So.2d 1031, 1037-38 (Fla. 1982)(finding the attorney-client privilege did not apply because a third party, another inmate, was present).

Hernandez's admission to cutting the victim's throat to "make sure she was dead" was not covered by the marital privilege and therefore, was admissible. Hernandez admitted to cut the victim's throat to "make sure she was dead" to his wife in front of the Hartmans. His wife was simply one of those present. The marital privilege does not apply when a spouse makes a statement to other person in the presence of the other spouse. Statements made by one spouse to another person are not covered by the privilege. Hernandez is married to Stephanie Hernandez, not Tammy Hartman. Whether Mr. Hartman actually overheard the conversation or was willing to testify to that effect is

irrelevant, as this Court in *Proffitt* explained. The statement was not made in confidence in the first place.¹³ The privilege does not apply both because it was not made to the wife and because it was made in the presence of other persons.

Counsel's performance was not deficient. The husband-wife privilege does not apply and counsel was not ineffective for recognizing this well-established limitation on the privilege. *Lynch v. State*, 2 So.3d 47, 77 (Fla. 2008)(rejecting a claim of ineffective assistance of counsel for failing to move to exclude a suicide letter written by the defendant because the defendant "never intended for the transmitted communication to be confidential" and therefore, the letter was "nonprivileged and admissible"). As the trial court found, any objection to the wife's testimony on the basis of marital privilege would have been overruled. There was no deficient performance.

¹³ This actually seems to be a claim that the prosecutor may not call a wife to testify against her husband period. But that is not the law. The marital privilege does not extend to "facts" or "acts." CHARLES W. EHRHARDT, *FLORIDA EVIDENCE*, 462 & n.3 (ed. 2011)(citing *Kerlin v. State*, 352 So.2d 45 (Fla. 1977)). This Court in *Kerlin*, relying on Wigmore's treatise on evidence and McCormick's treatise on evidence, explained that the privilege "extends only to communications, not to acts which are in no way communications." *Kerlin*, 352 So.2d at 51. This Court in *Kerlin* held that a wife's testimony as to observed conduct was properly admitted into evidence. *Kerlin*, 352 So.2d at 53; see also *Kaczmar v. State*, 104 So.3d 990, 999 (Fla. 2012)(approving the prosecution calling a wife to testify because her testimony was "of her husband's actions rather than communications between them, privilege does not apply to this testimony" citing *Kerlin*); see also *Pereira v. United States*, 347 U.S. 1, 6, 74 S.Ct. 358, 361-362, 98 L.Ed. 435 (1954)(observing that the privilege, generally, extends only to utterances, and not to acts.). Under the facts and acts exception to the privilege, it is clear that the prosecution may call a wife to testify.

Nor was there any prejudice. As the trial court found, both Tammy Hartman and Tiffany Telin testified to similar statements Hernandez made to them. Additionally, the wife's testimony matches Hernandez's own taped confession which was read to the jury. The jury heard the much the same statement from the defendant's own mouth. There was no prejudice. Penalty phase counsel was not ineffective.

C. Ineffectiveness for failing to present additional lay mitigation

Hernandez asserts that penalty phase attorney Rollo was ineffective for failing to present additional family background mitigation. IB at 66.

Penalty phase

At the penalty phase, the defense presented two mental health experts who discussed Hernandez's exceptionally dysfunctional childhood and early adult years – which included exposure to drugs and alcohol from a very early age. Dr. John Bingham, a mental health counselor, testified as to Hernandez's childhood privation and cocaine addiction. (T. Vol XVI 2224-2304). Dr. Brett Wayne Turner, a neuropsychologist, testified regarding Hernandez's drug addiction and depression (T. Vol. XVI 2311-74). The State's medical expert, Dr. Harry McClaren, testified as to Hernandez's IQ and various mental disorders. (T. Vol XVII 2412, 2432, 2446-48); *see also Hernandez*, 4 So.3d at 653-654 (describing in detail the mental health testimony presented at the penalty phase).

Evidentiary hearing testimony

Penalty phase counsel Rollo testified at the evidentiary hearing. (Evid. H Vol. VII at 771). Rollo testified that he was admitted into the practice of law in 1993 and the majority of his practice had been criminal defense. (Evid. H Vol. VII at 874). He was death qualified. (Evid. H Vol. VII at 874-875). He has handled six or seven capital cases as first or second chair prior to Hernandez's case. (Evid. H Vol. VII at 875). He attends the life over death seminars which is a week-long seminar held every other year. (Evid. H Vol. VII at 875-876). He has attended six or seven of those seminars. (Evid. H Vol. VII at 876). Rollo, while understanding the postconviction process, took professional and personal exception to the accusation that he only went through the motions in this case, such an accusation was "absolutely untrue." (Evid. H Vol. VII at 876-877).

He was appointed penalty phase counsel on April 12, 2005, which was approximately a year and a half before trial. (Evid. H Vol. VII at 772). Originally, Richard Hill was lead counsel. (Evid. H Vol. VII at 772). He and Mr. Hill agreed that Hill would guilt phase counsel and he would be penalty phase counsel. (Evid. H Vol. VII at 773). Mr. Hill withdrew because Hernandez wanted to withdraw his guilty plea. (Evid. H Vol. VII at 773). Ted Stokes was appointed to replace Mr. Hill. (Evid. H Vol. VII at 773). His responsibility remained penalty phase, however, when Stokes was appointed. (Evid. H Vol. VII at 774). Rollo explained that it had been five years since the trial, so he could not recall every detail of his actions. (Evid. H Vol. VII at 776).

As part of his penalty phase preparation, he met with Hernandez. (Evid. H Vol. VII at 776-777). Rollo wanted to build a rapport and to learn about Hernandez background. (Evid. H Vol. VII at 777). He did not recall how many times he met with Hernandez. While Hernandez had a "nice personality" and "friendly demeanor," he was guarded about the information he would disclose to Rollo. (Evid. H Vol. VII at 777). Rollo had a hard time getting background information from Hernandez. (Evid. H Vol. VII at 777). Rollo eventually got Hernandez to fill out a form which was a standard socio, educational and family history questionnaire. (Evid. H Vol. VII at 777-778). The form was entitled "Confidential Forensic Assessment" which was introduced as defense exhibit #8. (Evid. H Vol. VII at 778, 781). Hernandez identified several potential mitigation witness in the form including Joe Rudis who was Deanna Merritt's husband. (Evid. H Vol. VII at 781-782).

Rollo thought he filed a motion for an investigator which was granted. (Evid. H Vol. VII at 783). Rollo did not retain an investigator however, because he did not think that any of the investigators in the circuit were decent. (Evid. H Vol. VII at 784). He did not trust the available investigator to work up a capital defense, so he did the investigating himself. (Evid. H Vol. VII at 784).

Rollo attempted to retain a mitigation specialist. (Evid. H Vol. VII at 785). He had written an email about locating a mitigation specialist in the Panhandle area. (Evid. H Vol. VII at 785). The email contained a sentence stating that Rollo did not know if he could do it all. (Evid. H Vol. VII at 786). The mitigation specialist Rollo contacted in the email was no longer available but she recommended

other mitigation specialists. (Evid. H Vol. VII at 786). Rollo did not ultimately retain a mitigation specialist, because none of person he contacted were sufficiently up for the challenge. (Evid. H Vol. VII at 786-787).

Rollo presented two lay witnesses at the penalty phase, the defendant's mother Cheryl Walker and Hernandez's half-brother Richard Hartman. (Evid. H Vol. VII at 787). Rollo also spoke with Hernandez's grandparents in Washington, Barbara Hernandez and Al Hernandez. (Evid. H Vol. VII at 787). Rollo spoke mainly with the grandmother, Barbara. (Evid. H Vol. VII at 788).

Rollo also spoke with social workers in Calaveras County and introduced those records in penalty phase. (Evid. H Vol. VII at 788). Rollo did not talk to Leola Estabrook or her son, Shawn Estabrook (Evid. H Vol. VII at 788). Rollo did not talk with Brandy Hagashi. (Evid. H Vol. VII at 788). Rollo did not speak with Jennifer Hartman. (Evid. H Vol. VII at 789). Rollo did not speak with Brandi Kahl-Hayman either. (Evid. H Vol. VII at 789). Rollo did not remember speaking with Shawn Hartman. (Evid. H Vol. VII at 789). Rollo did not speak with Joe Rudis either. (Evid. H Vol. VII at 790). Rollo did not speak with Deanna Merritt , Wayne Merritt, or Tiffany Fields. (Evid. H Vol. VII at 790).

Rollo did speak with Cheryl Walker, Hernandez's mother and Richard Travis Hartman, both of whom testified at the penalty phase. (Evid. H Vol. VII at 790). Rollo also spoke with the grandparents. He spoke both with Hernandez's maternal and paternal grandparents. (Evid. H Vol. VII at 790).

Rollo explained that he could not say everyone he spoke with because he did not have his original file. (Evid. H Vol. VII at 791). Postconviction counsel returned a copy of the file to Rollo but not the original file and the copy Rollo received was "incomplete." (Evid. H Vol. VII at 791). The copy were letter size, not legal size so the copies cut-off material including his trial notes which consisted of four or five legal pads. (Evid. H Vol. VII at 791).

Rollo believed that the most important mitigation was going to be that of the experts, not lay witnesses. (Evid. H Vol. VII at 793). Rollo agreed that the testimony of family who say they love the defendant can have an important emotional impact with the jury but jurors who heard the facts of the crime during guilt phase are not necessarily moved by that type of testimony. (Evid. H Vol. VII at 794). Rollo thought the experts "were going to be the best avenue" to present familial dysfunction, dysfunctional childhood and drug abuse. (Evid. H Vol. VII at 796). Rollo noted that he presented the defendant mother and he thought that the additional mitigation from other lay witnesses would be cumulative to that testimony. (Evid. H Vol. VII at 796).

Rollo spoke with Stephanie Hernandez and listed her as a witness but did not call her to testify at the penalty phase. (Evid. H Vol. VII at 800). Postconviction counsel introduced the Amended Reciprocal Discovery listing her as a witness as defense exhibit #12. (Evid. H Vol. VII at 800). Rollo was aware that she attended the trial and penalty phase. (Evid. H Vol. VII at 801). They spoke while she was at the trial but he could not recall the details of their conversations. (Evid. H Vol. VII at 801).

Rollo did not call Hernandez's grandmother to testify, although she provided a lot of information that he relayed to Dr. Bingham and Dr. Turner, due to reluctance on her part. (Evid. H Vol. VII at 801). Rollo filed a motion to continue the penalty phase based on extreme hardship. (Evid. H Vol. VII at 802). In the motion, Rollo characterized the grandmother as a necessary witness. (Evid. H Vol. VII at 802). Postconviction counsel introduced the motion as defense exhibit #13. (Evid. H Vol. VII at 802).

Rollo wrote a memo to Dr. Bingham dated June 9, 2006 regarding Richard Hartman Junior and the Calaveras County records. (Evid. H Vol. VII at 805-806). Postconviction counsel introduced the memo as defense exhibit #16. (Evid. H Vol. VII at 808). Postconviction counsel introduced a document from Dr. Bingham suggesting question to ask Cheryl Walker as defense exhibit #17. (Evid. H Vol. VII at 808).

Rollo also wrote a letter to Hernandez dated November 17, 2005. (Evid. H Vol. VII at 811). The letter requested the Hernandez fill out the mitigation form with as "much detail as possible." (Evid. H Vol. VII at 811). The letter was dated six months after Rollo appointment. (Evid. H Vol. VII at 811). Postconviction counsel introduced the letter to the defendant as defense exhibit #18. (Evid. H Vol. VII at 812). Rollo did not help Hernandez fill out the form. (Evid. H Vol. VII at 813). Rollo could have gotten the form from the Florida Association of Criminal Defense Attorneys but he did not recall. (Evid. H Vol. VII at 813).

Cheryl Walker, Hernandez's mother, was in prison for murder at the time of the trial and penalty phase. (Evid. H Vol. VII at 814). At first she agreed to testify in person but then she did not want to

testify in person. (Evid. H Vol. VII at 814). Her father, Mr. Howell called Rollo and told him his daughter had claustrophobia and could not be transported. (Evid. H Vol. VII at 814). Rollo's billing record reflect a conversation with Mr. Howell on June 8, 2006. (Evid. H Vol. VII at 814-815). Rollo discovered her whereabouts through a search of the Nevada Bureau of Prison and he talked with the mother's classification officer on the phone for 20 or 30 minutes. (Evid. H Vol. VII at 815). The officer gave Rollo "some good information" and based on it Rollo decided to present the mother at the penalty phase. (Evid. H Vol. VII at 815-816). Rollo also testified that the Cheryl Walker was "very strangely ambivalent" and "emotionally ambivalent" about disclosing facts about her son, which Rollo though was due to her "own shame or guilt." (Evid. H Vol. VII at 816). Rollo had to persuade her to be helpful. (Evid. H Vol. VII at 816).

Rollo's billing records were discussed. (Evid. H Vol. VII at 817). Rollo stated that the records should be accurate regarding how much time he spent with the defendant. (Evid. H Vol. VII at 822). Later, Rollo clarified that he could have left out or forgotten to add certain things in his billing. (Evid. H Vol. VII at 853). Rollo spent approximately six hours with Hernandez prior to the trial. (Evid. H Vol. VII at 828). His billing records also reflect one conversation with the defendant's wife, Stephanie. (Evid. H Vol. VII at 829). Rollo decided not to call her as a witness because her she was not helpful. (Evid. H Vol. VII at 829-830). He could have presented her to say that she loved Hernandez and that he loved the children and was a wonderful guy when he was not using drugs but she was too willing, indeed "eager" to talk about the bad things too. (Evid. H Vol. VII at

830-831). She also talked about her husband's drug use and how he was wasn't there as a father when he was out binging. (Evid. H Vol. VII at 831). She was a "mixed bag." (Evid. H Vol. VII at 831). Rollo felt that Dr. Bingham was "safer" so, he had Dr. Bingham talk to her and then had Dr. Bingham testify rather than her. (Evid. H Vol. VII at 831).

Rollo acknowledged that Hernandez's mother was in and out of his life and that it was a "mess." (Evid. H Vol. VII at 833). All she knew about Hernandez's time living with the Estabrooks was what she was told. (Evid. H Vol. VII at 833). She did not see the defendant again after he was 11 years old. (Evid. H Vol. VII at 834). Rollo thought she was good at establishing Hernandez early childhood and drug abuse as far back as his infancy. (Evid. H Vol. VII at 834). She could testify that Hernandez was rolling joints for his dad while in diapers and participating in biker gang parties. (Evid. H Vol. VII at 834). Rollo thought that she held back some horrible things. (Evid. H Vol. VII at 835). Postconviction counsel introduced Rollo's billing record as defense exhibit #19 (Evid. H Vol. VII at 846).

Regarding the failure to call Brandi Kahl-Hayman as a witness in mitigation, Hernandez did not list her on the mitigation form. (Evid. H Vol. VIII at 891-892). Nor did Rollo recall Hernandez or anyone else mentioning her to him. (Evid. H Vol. VIII at 892). Rollo would not have presented her as a mitigation witness anyway because her testimony regarding Hernandez protecting her from her ex-husband and helping her with her children's lice was not compelling mitigation. (Evid. H Vol. VIII at 892-893). Attempting to portray Hernandez as non-violent in light of this murder, his attacks on the co-defendant

and Deputy Jarvis would be almost "laughable." (Evid. H Vol. VIII at 893). It would be almost insulting to the jury. (Evid. H Vol. VIII at 893).

Regarding the failure to call Jennifer Hartman, Rollo thought he might have spoken with her. (Evid. H Vol. VIII at 891-892). Rollo did not believe he needed an additional witness to establish drug abuse from an early age which was elicited from the experts and mother as well as the half-brother. (Evid. H Vol. VIII at 894). Her meth use would not have given her any "special credibility as a witness." (Evid. H Vol. VIII at 895). Her testimony that Hernandez stole tools and drugs would have caused Rollo to reject the idea of calling her as a mitigation witness. (Evid. H Vol. VIII at 895).

Regarding the failure to call Hernandez's brother Shawn Hartman, Rollo testified that because Shawn had just gotten out of prison and he was already calling Hernandez's mother who was in prison, that he would not have called him to testify. (Evid. H Vol. VIII at 895-897). Hernandez's older brother had been convicted three times of felonies and imprisoned ten times which would have "hurt his credibility." (Evid. H Vol. VIII at 897). Rollo had a vague recollection of having a discussion about the older brother. (Evid. H Vol. VIII at 897). He was also a meth addict at the time of the trial which Rollo believed would not be helpful. (Evid. H Vol. VIII at 898). He would also testify that Hernandez stole drugs from him which was "not good" and something that Rollo did not want to come out. (Evid. H Vol. VIII at 898). It also would have provided the prosecutor with more ammunition that the no significant criminal history mitigator did not apply. (Evid. H Vol. VIII at 898-899). The brother's testimony about

Hernandez not having a violent bone in his body would have been "borderline absurd." (Evid. H Vol. VIII at 899).

Rollo also noted that the argument that Hernandez was a wonderful person when not using drugs was not helpful because he used drugs his entire life. (Evid. H Vol. VIII at 899). In Rollo's words, Hernandez's life story was abusing drugs and relapsing. (Evid. H Vol. VIII at 899).

Regarding the failure to call Sean Estabrook, Rollo testified that he thought using the Calaveras report was more effective due to the lack of cross-examination. (Evid. H Vol. VIII at 901-902,903). Shawn Estabrook filed the complaint that the abuse and ill-treatment of him and Hernandez by the Estabrooks resulting in the Calaveras County report. (Evid. H Vol. VIII at 902903). But Rollo explained that if he presented Dan or Leola Estabrook they could be cross-examined about it and deny all abuse. (Evid. H Vol. VIII at 902).¹⁴ Rollo, instead presented the informed via one of his mental health experts, Dr. Bingham. (Evid. H Vol. VIII at 904). Rollo explained that the advantage of presenting mitigation evidence through experts is that it cannot be cross-examined easily and for that reason he prefers to present mitigation through experts. (Evid. H Vol. VIII at 905-906). The prosecutor would have to have brought Dan Estabrook from California to rebut the report. (Evid. H Vol. VIII at 903). Hernandez did not suggest presenting either Sean Estabrook or the older brother, Eric Estabrook. (Evid. H Vol. VIII at 904).

¹⁴ While postconviction counsel presented the testimony of Leola Estabrook at the evidentiary hearing, who was divorced from her husband, postconviction counsel did not present Dan Estabrook.

Rollo represented Leola Estabrook as a wicked stepmother at the penalty phase. (Evid. H Vol. VIII at 910). Rollo testified that the Estabrook household was "a corrupt household all the way around." (Evid. H Vol. VIII at 910). They were a foster home that were really only interested in getting a check; they were a "factory" (Evid. H Vol. VIII at 910). The Calaveras report painted her in a very bad light. (Evid. H Vol. VIII at 910). While Rollo thinks he is a good questioner, he doubted he could get Leola Estabrook to admit that she was a wicked person. (Evid. H Vol. VIII at 910). His decision to not even contact her was "absolutely tactical." (Evid. H Vol. VIII at 911).

Rollo testified that it was obvious to the jury that Hernandez's wife, Stephanie and their children attended the trial. (Evid. H Vol. VIII at 911). She was identified as Hernandez's wife and she was sitting there with two small children. (Evid. H Vol. VIII at 911). Dr. Bingham also testified as to Hernandez's family life. (Evid. H Vol. VIII at 911). Hernandez referred to his children in his taped confession. (Evid. H Vol. VIII at 912). Rollo agreed that the prosecutor could have cross-examined Stephanie about Hernandez's abandoning them to go on drug binges. (Evid. H Vol. VIII at 912-913).

The prosecutor could have also crossed her on Hernandez commission of burglary and theft while living in Tennessee. (Evid. H Vol. VIII at 913). In light of all this, Rollo believed it was better to have Dr. Bingham testify that his wife says he is a wonderful husband and father. Rollo testified that it was a tactical decision not to present Stephanie herself. (Evid. H Vol. VIII at 913).

Rollo testified that Hernandez was "very sensitive" about putting his loved ones on the stand. (Evid. H Vol. VIII at 915). Hernandez did not want to "drag his family through a trial" (Evid. H Vol. VIII at 917). Hernandez mentioned his great care and concern about his Grandma Hernandez. (Evid. H Vol. VIII at 915). His grandmother decided that she did not want to testify. (Evid. H Vol. VIII at 915-916). Rollo billing records for June 26, 2006 contain a notation about the call to Mrs. Hernandez and that she did not want to come to trial. (Evid. H Vol. VIII at 916). The notation is referring to Barbara Hernandez. (Evid. H Vol. VIII at 916). Rollo thought that she believed it would be too stressful. (Evid. H Vol. VIII at 917). Rollo was aware that the prosecutor could have cross-examined his grandmother with the fact that his grandparent offered Hernandez a home after the Estabrooks and he threw that away and choose to be a drug addict on the street. (Evid. H Vol. VIII at 917-918). Rollo was also aware that the prosecutor could have cross-examined his grandmother with the fact Hernandez went to live with his uncle and stole a truck. (Evid. H Vol. VIII at 918). Dr. Bingham only presented the positive fact that Hernandez's grandparents loved him without any of this damaging testimony. (Evid. H Vol. VIII at 918).

Rollo testified that he never told the grandmother that Hernandez getting the death penalty was a foregone conclusion. (Evid. H Vol. IX at 937). Rollo testified his standard practice is not to make definitive predictions of the result to his clients or their family. (Evid. H Vol. IX at 937). Rollo told her that this was a very serious situation and that the State had a strong case and that a death-qualified Santa Rosa jury would be "predisposed" to recommend death.

(Evid. H Vol. IX at 937-38). Rollo stated that he "would have never guaranteed anything" (Evid. H Vol. IX at 938). Rollo "absolutely" did not tell her there is no need for her come because her grandson would get the death penalty anyway. (Evid. H Vol. IX at 938). Indeed, Rollo discussed travel arrangements and reimbursements with her. (Evid. H Vol. IX at 938-939). Rollo never discouraged her from testifying and was "in fact counting on her to testify." (Evid. H Vol. IX at 939). Rollo did not know why she developed a reluctance to testify. (Evid. H Vol. IX at 940). Rollo also noted that if he presented her, she would also testify that she and her husband gave Hernandez an opportunity for a good life but that Hernandez threw away by skipping school and using drugs. (Evid. H Vol. IX at 940).

Regarding not presenting Wayne Merritt who is Hernandez's father-in-law, Rollo testified that he would not present him. (Evid. H Vol. IX at 926). Rollo did not recall whether he ever talked with Mr. Merritt. (Evid. H Vol. IX at 926). Rollo explained that it was better to stick with one theme. (Evid. H Vol. IX at 927). Rollo agreed that the prosecutor could have highlighted that Mr. Merritt advised Hernandez to turn himself into the Tennessee authorities for the burglary and theft but he did not heed that advice. (Evid. H Vol. IX at 928). Rollo expressed the opinion that bringing out this additional bad conduct of Hernandez's would have been counterproductive. (Evid. H Vol. IX at 928).

Rollo did not recall talking to Deanna Merritt, Stephanie Hernandez's mother. (Evid. H Vol. IX at 928-929). Rollo has had the experience of a witness only giving glowing testimony. (Evid. H Vol. IX at 929). She attempted to portray Hernandez as a devout Christian

but as Rollo noted the murder itself was "contraindicative of leading a Christian life." (Evid. H Vol. IX at 930). This type of testimony would not have "any affect whatsoever" with a Santa Rosa death-qualified jury. (Evid. H Vol. IX at 931). And such testimony might well offend members of the jury. (Evid. H Vol. IX at 926).

Regarding the claim of ineffectiveness for failing to call Richard William Hartman, Junior, the husband of Tammy Hartman, to testify in mitigation that Hernandez was a "good worker," Rollo testified that the entire Hartman family was a "kind of tribal morass of all kinds of peripheral bad news" including allegations of drug abuse at their house (Evid. H Vol. IX at 935). Rollo explained that calling Hartman in mitigation was contrary to the basic theme of the defense which was that Tammy Hartman was selling Hernandez down the river. (Evid. H Vol. IX at 935). The defense theme was that the Hartman were getting Hernandez to confess to save their prospective son-in-law Arnold. (Evid. H Vol. IX at 936). Furthermore, Hartman could be cross-examined regarding Hernandez's statements admitting the murder because he was present when those statements were made. (Evid. H Vol. IX at 936).

Rollo testified that a large part of the mitigation strategy was to present Hernandez as a drug addict and endured a very dysfunctional childhood in the company of some unsavory people. (Evid. H Vol. IX at 1009). The defendant's mother was in prison for murder herself. (Evid. H Vol. IX at 1009-1010).

Regarding presenting mitigation that Hernandez was a good husband, father and worker when he was sober, Rollo explained that in Santa Rosa County drug abuse is viewed as an excuse. (Evid. H Vol. IX at

1036-1040). Drug abuse and relapsing will not "resonate with them." (Evid. H Vol. IX at 1040). That is why he presented the mitigation case as child abuse and drug abuse interwovenly. (Evid. H Vol. IX at 1040).

Rollo was aware that the few crimes Hernandez committed before this murder were basically property crimes which were probably drug related but Rollo did not know. (Evid. H Vol. IX at 1044). Rollo did not agree that it would be helpful to try to portray Hernandez as non-violent. (Evid. H Vol. IX at 1045-1046). Rollo agreed that the defense is trying to humanize the defendant. (Evid. H Vol. IX at 1048).

Regarding the Calavares report, Rollo testified that he elected to present the substance through his expert. (Evid. H Vol. IX at 1050-1051). He was not certain that talking to the Estabrooks in an attempt to get them to admit the sexual abuse would have been helpful. (Evid. H Vol. IX at 1051). But he did not talk with them but he did speak with the case worker. (Evid. H Vol. IX at 1051-1052). Rollo testified that he did not see any reason to talk to them. (Evid. H Vol. IX at 1052). Rollo stated that if Leola Estabrook testified at the evidentiary hearing that she was a principal to capital sexual abuse that would surprise him greatly. (Evid. H Vol. IX at 1052-1053). But again he did not talk to her. (Evid. H Vol. IX at 1053).

Rollo thought it was possible that Hernandez knew more than the four or five people that he listed in the form. (Evid. H Vol. IX at 1053). Rollo did not rely exclusively on Hernandez as a source for possible mitigation witnesses; he spoke with others, including Hernandez's grandparents both maternal and paternal. (Evid. H Vol. IX at 1057). Rollo also attempted to obtain Hernandez school records but

Washington had purged then so he could not speak with Hernandez's classmates. (Evid. H Vol. IX at 1057).

Rollo did not want to call mitigation witnesses with criminal histories. (Evid. H Vol. IX at 1055). Some mitigation witnesses are better than others. (Evid. H Vol. IX at 1056). But even a person without a criminal records, would only be a good mitigation witness depending on what they had to say about Hernandez. (Evid. H Vol. IX at 1056).

Rollo testified that he studied the Calaveras report carefully. (Evid. H Vol. X at 1063). The report details a required meeting where the Estabrooks claimed that the dog ate the case plan. (Evid. H Vol. X at 1064). From the information Rollo gathered about the Estabrooks, he concluded that they were unsavory people who would not be helpful to Hernandez. (Evid. H Vol. X at 1064). "They certainly were not going to admit abusing the system as a kind of prostituted foster home" and they certainly were not going to admit to abusing Hernandez. (Evid. H Vol. X at 1064). They denied any abuse in the Calaveras report. (Evid. H Vol. X at 1065).

On surdirect, Rollo testified that he did not attempt to secure an additional evaluation. (Evid. H Vol. X at 1067). Rollo acknowledged that the Calaveras report was written in 1995 or 1996 when Hernandez was 14 or 15 years old, which was years before the trial. (Evid. H Vol. X at 1068). Rollo acknowledged that with the passage of time it was possible that one of the Estabrooks would admit their misconduct but the misconduct he would be looking for them to admit would be sexual battery. (Evid. H Vol. X at 1068). He would want to establish sexual abuse and physical abuse. (Evid. H Vol. X at 1069).

The trial court's ruling

The trial court rejected this claim of ineffectiveness following the evidentiary hearing. (Vol. VII 1324-1328). The trial court noted that penalty phase counsel presented the testimony of two mental health experts who testified as to the defendant's "exceptionally dysfunctional childhood." (Vol. VII 1324). The also noted that penalty phase counsel presented the testimony of Hernandez's mother and his half-brother as well as a report of a California human services agency (the Calaveras report). (Vol. VII 1324). The trial court found that counsel's strategy of presenting most of the background mitigation through the testimony of the experts was reasonable. (Vol. VII 1325). The trial court also found no prejudice because the additional background mitigation presented at the evidentiary hearing was not "dramatically different" from that presented at the penalty phase. (Vol. VII 1325). The trial court noted that the sentencing court found that defendant's "dysfunctional, neglectful, and impoverished childhood" as mitigation. (Vol. VII 1325-1326). The trial court also found that the additional mitigation was "greatly outweighed" by the aggravation. (Vol. VII 1326). There was no reasonable probability of a lesser sentence. (Vol. VII 1326).

The trial court noted the double-edged sword of some of the additional mitigation such as when the defendant lived with his grandmother Barbara Hernandez, which was a "loving and stable home," but he refused to go to school and was involved with gangs. (Vol. VII 1326-1327). Hernandez stole a truck when he was sent to live with his uncle almost causing this uncle to lose his job. (Vol. VII 1327).

The trial court concluded that was not ineffective for failing to present additional lay witnesses (Vol. VII 1328).

The trial court also address Rollo not hiring an investigator or a mitigation specialist in favor of investigating mitigation himself. (Vol. VII 1328). The trial court relied on Rollo's testimony at the evidentiary hearing that there was no investigator or mitigation specialist that he trusted to develop the mitigation. (Vol. VII 1328).

Merits

There was no deficient performance. Defense counsel presented Hernandez's "dysfunctional childhood in which he was exposed to drugs and violence from a young age." *Hernandez*, 4 So.3d at 652. Defense counsel presented the testimony of the closest family members - his mother and brother who testified as to Hernandez's unstable and abusive childhood. Hernandez's father was dead from a drug overdose and therefore could not testify. *Hernandez*, 4 So.3d at 652 (noting the father's death from a drug overdose).

As this Court explained, the fact that other mitigation witnesses could have been called "usually proves at most the wholly unremarkable fact that with the luxury of time and the opportunity to focus resources on specific parts of a made record, post-conviction counsel will inevitably identify shortcomings in the performance of prior counsel." *Stein v. State*, 995 So.2d 329, 339 (Fla. 2008)(quoting *Waters v. Thomas*, 46 F.3d 1506, 1514 (11th Cir. 1995)). But "perfection is not the standard of effective assistance." *Stein*, 995 So.2d at 340. Counsel need not be perfect, indeed not even very good,

to be constitutionally adequate. *Dean v. Young*, 777 F.2d 1239, 1245 (7th Cir. 1985).

In *Bobby v. Van Hook*, 558 U. S. 4, 130 S.Ct. 13, 175 L.Ed.2d 255 (2009), the United States Supreme Court reversed the Sixth Circuit's granting of habeas relief and concluded that counsel was not ineffective at penalty phase for failing to investigate and present mitigating evidence. The *Van Hook* Court rejected a claim that counsel began their mitigation investigation too late or waited until the last minute. The Court concluded Van Hook's attorneys met the constitutional minimum of competence under the correct standard. "Despite all the mitigating evidence the defense did present, Van Hook faulted his counsel for failing to find more." He asserted that what his counsel did discover gave them "reason to suspect that much worse details existed," and that suspicion should have prompted them to interview other family members—his stepsister, two uncles, and two aunts—as well as a psychiatrist who once treated his mother, all of whom "could have helped his counsel narrate the true story of Van Hook's childhood experiences." The Supreme Court rejected this all-possible-mitigation must-be-presented argument because "there comes a point at which evidence from more distant relatives can reasonably be expected to be only cumulative, and the search for it distractive from more important duties." The Court also found no prejudice because the additional mitigation witnesses would have "added nothing of value." And "the minor additional details" . . . "would not have made any difference." see also *Wong v. Belmontes*, 558 U.S. 15, 130 S.Ct. 383, 175 L.Ed.2d 328 (2009)(per curiam)(reversing the granting of habeas relief and concluding counsel was not ineffective at penalty

phase for failing to investigate and present family and expert mitigating evidence because the family mitigation was cumulative and the expert testimony was not necessary).

As the trial court noted some of the additional mitigation had a downside. Barbara Walker, Hernandez's grandmother, testified that when Hernandez lived with them he refused to go to school and was involved with gangs. His grandparents attempted to give him a stable home but Hernandez repeatedly disappeared. She also testified that when Hernandez was living with his uncle, Hernandez stole a truck and wrecked it, almost causing his uncle to lose his job. This type of testimony is not mitigating because it portrays Hernandez as basically a bad kid, who even when provided with a stable, loving home, skipped school, used drugs, and was involved with gangs. The prosecutor could have exploited these lay witnesses' testimony turning this "mitigation" into aggravation. *Windom v. Sec'y, Dep't of Corr.*, 578 F.3d 1227, 1251 (11th Cir. 2009)(finding prejudice prong not satisfied where proposed mitigation testimony would have opened the door to damaging evidence).

Furthermore, the presentation of church-going as mitigation can easily backfire, especially among the more religious jurors. Such jurors could well be offended that anyone claiming to be Christian could murder a woman for money for illegal drugs and then use Christianity as mitigation. Rollo testified that such testimony might well offend members of the jury. (Evid. H Vol. IX at 926). It is not deficient performance not to present mitigation that has a serious downside or that can backfire.

Many of the lay witnesses added nothing of significant mitigation value either. Joe Rudis, Hernandez's father-in-law, for example testified at the evidentiary hearing but he was of marginal value. He knew nothing about Hernandez's drug problems or his prior crimes in Tennessee. He was not familiar with either the incident where Hernandez attacked the guard at Dr. Larson's office nor the incident where Hernandez attacked his co-defendant Arnold.

There was no prejudice because the additional mitigation was largely cumulative and because the additional mitigation did not outweigh the aggravation. In *Kilgore v. State*, 55 So.3d 487, 504 (Fla. 2010), the Florida Supreme Court rejected a similar claim of ineffectiveness for failing to present a more detailed portrait of the defendant's childhood. The *Kilgore* Court observed that there was "no question that Kilgore suffered a difficult childhood." The evidence presented during the postconviction evidentiary hearing was directed to this type of information. However, although the evidence presented during the postconviction hearing enhanced much of the evidence presented during the 1994 penalty phase, it did not really add anything new. The Court observed that the only real "new" evidence presented was that related to the Oakley school itself, but the material did not establish anything dramatically different from that which was established during the 1994 trial. Therefore, the Florida Supreme Court, relying on *Bobby v. Van Hook*, determined that Kilgore failed to demonstrate prejudice.

As the trial court found, much of the additional background evidence presented at the evidentiary hearing was cumulative to that presented at the penalty phase. *Reynolds v. State*, 99 So.3d 459, 497

(Fla. 2012)(finding no prejudice where the mitigation would have been cumulative because it had already been considered by the trial court); *Wyatt v. State*, 78 So.3d 512, 529 (Fla. 2011)(stating that “counsel cannot be found ineffective for failing to investigate and present cumulative mitigation evidence” citing *Downs v. State*, 740 So.2d 506, 516 (Fla.1999); *Mendoza v. State*, 87 So.3d 644, 659 (Fla. 2011)(stating: “the presentation of cumulative evidence in the postconviction proceedings does not provide a basis for determining that trial counsel’s performance was deficient.”); *Darling v. State*, 966 So.2d 366, 378 (Fla. 2007)(holding that trial counsel was not ineffective for failing to present cumulative and redundant psychiatric mitigation).

In *Tanzi v. State*, 94 So.3d 482, 492-493 (Fla. 2012), the Florida Supreme Court rejected a claim of ineffectiveness for failing to present his sexual abuser, two former neighbors, an additional mental health expert, and a former camp counselor that were available but never called to testify. Tanzi also asserted his mother's testimony during the penalty phase was incomplete. During the penalty phase, trial counsel presented the testimony of two mental health experts to support the proposed statutory mental mitigators. In an effort to humanize Tanzi, trial counsel presented the testimony of Tanzi’s mother. The Florida Supreme Court found neither deficient performance nor prejudice. The Court explained that the additional mitigation witnesses “would barely have altered the sentencing profile presented to the sentencing judge” because the additional mitigation presented at the evidentiary hearing was “largely cumulative of the mitigation

evidence presented during the penalty phase.” And therefore, there was no prejudice. *Tanzi*, 94 So.3d at 492.

Additionally, the additional mitigation does not outweigh the aggravation. *Stein v. State*, 995 So.2d 329, 340-41 (Fla. 2008)(finding no prejudice from the failure to present additional mitigation because the additional mitigation was not substantial and was not likely to have overcome the aggravation). There are four aggravators including HAC.

Additionally, there was no prejudice because the prosecutor never disputed that Hernandez’s childhood was anything other than abysmal. The prosecutor also conceded that Hernandez suffered from post traumatic stress disorder and the State’s expert, Dr. McClaren, testified that Hernandez suffered from PTSD.

Opposing counsel states that the defense presented two lay witnesses. IB at 67. While defense counsel presented two lay witnesses, he also presented two expert witnesses as well. Penalty phase counsel Rollo presented Hernandez's half-brother, Richard Hartman Jr., and Hernandez's mother, Cheryl Walker, as well as Dr. John Bingham and Dr. Brett Turner. Such a mitigation presentation cannot be accurately described as “bare-bones.” Postconviction counsel may not create prejudice by dividing the mitigation into types. There was no ineffectiveness in the mitigation presentation.

D. Ineffectiveness for not presenting qEEG mitigation

Hernandez asserts his penalty phase counsel Rollo was ineffective for not presenting qEEG evidence of brain damage as mitigation. IB at 79. While this is a claim of ineffectiveness, there is a threshold

question of whether qEEG testing is admissible. *Mendoza v. State*, 87 So.3d 644, 666 (Fla. 2011)(finding that the trial court did not abuse its discretion by excluding Quantitative Electroencephalogram (QEEG) test results from postconviction relief hearing related to capital murder trial, where qEEG testing had not passed the *Frye* test at the time of the murder trial). The State filed a motion to prohibit qEEG evidence at the evidentiary hearing relying on *Mendoza*. (Vol. III 546-549). The trial court conducted a *Frye* hearing to determine the admissibility of qEEG testing.

Evidentiary hearing testimony

At the evidentiary hearing, penalty phase counsel Rollo testified. He testified he was not familiar with qEEG. (Evid. H Vol. IX at 1035). Rollo had never heard of qEEG testing. (Evid. H Vol. IX at 941). qEEG testing was never mentioned at the numerous life over death seminars he has attended. (Evid. H Vol. IX at 942). Nor has any seasoned capital litigator mentioned qEEG to him. (Evid. H Vol. IX at 942).

Rollo testified he would have to have a *Frye* hearing for qEEG testimony to be admissible and even if you get it in, it will inject one more level of impeachment into the mitigation case. (Evid. H Vol. X at 1065-1066). If your expert has to admit that the science is controversial, it diminishes the mitigation value of the results. (Evid. H Vol. X at 1066). Rollo was not afraid of a *Frye* hearing but if the impeachment is of the science itself, then you are "really wasting your time" because you cannot impress a jury that the science

is solid if it is not and at some point you "risk losing all credibility." (Evid. H Vol. X at 1069-1070).

On May 25, 2012, Dr. Kaplan, a professor of neurology at Johns Hopkins, testified at the evidentiary hearing. (Evid H May 25, 2012 at 8). Dr. Kaplan testified that qEEG is not accepted by neurologists and is not reliable. (Evid H May 25, 2012 at 38). Dr. Kaplan stated that qEEG is "not used in neurology." (Evid H May 25, 2012 at 21).

Dr. Kaplan testified that the panel of the American Clinical Neurologphysiology Society (ACNA) that published an article in 1997 entitled *Assessment of Digital EEG; Quantitative EEG and EEG Brain Mapping: Report of the American Academy of Neurology and the American Clinical Neurophysiological Society*, which took the position that "qEEG is not recommended for use in civil or criminal judicial proceedings" was as true today as it was in 1997. (Evid H May 25, 2012 at 23-36). Dr. Kaplan testified that qEEG "is still not valid."

(Evid H May 25, 2012 at 35-36). Dr. Kaplan agreed that qEEG produces "false positive results," in other words, "abnormal results in normal subjects and incorrect diagnosis in patients." (Evid H May 25, 2012 at 29-30). qEEG does not have "objective safeguards to prevent statistical or unintended errors" and has a "great potential for abuse." (Evid H May 25, 2012 at 29-30). The article and Dr. Kaplan noted the "lack of general acceptance" of qEEG. (Evid H May 25, 2012 at 30).

Dr. Kaplan acknowledged the usefulness of qEEG for research, just not for clinical diagnosis. (Evid H May 25, 2012 at 44-46). Dr. Kaplan found the use of a database to reach a clinical diagnosis,

which is how qEEG operates, to be “deeply flawed” and “wrong.”(Evid H May 25, 2012 at 51, 53-54).

Dr. Kaplan also explained that the patients needs to lay still and follow instructions such as opening their eyes when directed and that if a criminal defendant malingered or intentionally did not cooperate by moving, it could cause invalid results (Evid H May 25, 2012 at 55-56, 57).

The trial court's ruling

The trial court rejected this claim of ineffectiveness following a *Frye* hearing on qEEG evidence. (Vol. VII 1336-1338). The trial court relied on the testimony of the State's expert at the *Frye* hearing, Dr. Peter Kaplan, a professor of neurology at John Hopkins, who testified that qEEG “is not widely accepted” among neurologists. (Vol. VII 1336). “The flaws in QEEG and the reasons for its lack of acceptance were true in 2007 and 2012.” (Vol. VII 1336). The trial court noted that the defense expert neurologists, Dr. Koberda, a local private practitioner, admitted that there was some controversy regarding the use of qEEG testing. (Vol. VII 1337). The defense expert did not start using qEEG testing until two years ago and did not use qEEG testing in 2007. (Vol. VII 1337). The article the defense expert relied upon during his testimony was written in 2010. (Vol. VII 1337-1338). The trial court ruled that Hernandez “failed to establish that QEEG would have passed the *Frye* test at the time of the murder trial.” (Vol. VII 1337, 1338). Because qEEG testing was not admissible in 2007, the trial court found that counsel was not

ineffective. (Vol. VII 1338 citing *Mendoza v. State*, 87 So.3d 644, 666 (Fla. 2011)).

The trial court also noted that the defense expert that penalty phase counsel hired to determine brain damage, Dr. Turner, acknowledged that there was a dispute as to whether qEEG was valid clinically and had not recommended qEEG testing to penalty phase counsel at the time. (Vol. VII 1338). The trial court also observed that even if qEEG testing was admissible, there was no evidence that Hernandez would have cooperated with the testing, just as he was uncooperative with Dr. Turner's testing. (Vol. VII 1338). The trial court explained that counsel "cannot be blamed" for the defendant's "misconduct" that prevents the presentation of mitigation. (Vol. VII 1338 citing *Schriro v. Landrigan*, 550 U.S. 465, 478, 127 S.Ct. 1933, 1942, 167 L.Ed.2d 836 (2007), and *Morton v. Sec'y, Fla. Dep't of Corr.*, 684 F.3d 1157, 1172-73 (11th Cir. 2012)).

The trial court also addressed the qEEG issue as a claim of newly discovered evidence (Vol. VII 1339). The trial court rejected the claim finding that the qEEG evidence, even if admissible, would not probably result in a life sentence as required to establish a proper claim of newly discovered evidence. (Vol. VII 1339 citing *Riechmann v. State*, 966 So.2d 298, 316 (Fla. 2007)).

Merits

To this day, qEEG is not reliable and therefore, inadmissible under either *Frye v. United States*, 293 F. 1013 (D.C.Cir.1923), or the newly amended statute adopting the *Daubert v. Merrell Dow Pharmaceuticals*,

Inc., 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993), standard.¹⁵

Admissibility of qEEG testing in 2007

While normally a *Frye* determination is made at the time of the appeal, this is not true when the claim is actually a claim of ineffective assistance of counsel for not employing the new science. Compare *Gosciminski v. State*, 2013 WL 5313183, 15 (Fla. Sept. 12, 2013)(stating that general acceptance under *Frye* is determined at the time of the appeal rather than at the time of trial in a direct appeal

¹⁵ The Florida Legislature recently amended Florida's evidence code adopting the *Daubert* standard. The testimony by experts statute, § 90.702, Florida Statutes (2013), now provides:

If scientific, technical, or other specialized knowledge will assist the trier of fact in understanding the evidence or in determining a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify about it in the form of an opinion or otherwise, if:

- (1) The testimony is based upon sufficient facts or data;
- (2) The testimony is the product of reliable principles and methods; and
- (3) The witness has applied the principles and methods reliably to the facts of the case.

See Ch. 2013-107, Laws of Fla. While there is a debate among commentators as to whether the *Frye* standard or the *Daubert* standard is the stricter standard, under either standard, qEEG evidence is inadmissible. *Marsh v. Valyou*, 977 So.2d 543, 546 (Fla. 2007)(noting the debate among courts and commentators as to whether the *Daubert* standard is more lenient or more strict). The main focus under either test, however, should be on reliability of the new science with particular attention paid to the false positive rate. And qEEG testing is not reliable. While *Frye* is the proper standard because that is the standard that counsel would have to have met at the time of the penalty phase (or at the time of the appeal), under either *Frye* or *Daubert*, qEEG evidence is not admissible.

case), with *Mendoza v. State*, 87 So.3d 644, 666 (Fla. 2011)(finding that the trial court did not abuse its discretion by excluding Quantitative Electroencephalogram (QEEG) test results from postconviction relief hearing related to capital murder trial, where qEEG testing had not passed the *Frye* test at the time of the murder trial). Opposing counsel argues that *Mendoza* does not control because its reasoning regarding the qEEG results is dicta. It was not dicta. The holding of *Mendoza* was that the trial court properly excluded the qEEG results.

Opposing counsel also argues that *Mendoza* conflicts with cases such as *Marsh v. Valyou*, 977 So.2d 543, 547 (Fla. 2007), which hold that general acceptance under *Frye* is considered at of the time of the appeal. There is no conflict. This is a claim of ineffectiveness for not presenting qEEG evidence during the penalty phase, not a straight *Frye* claim. All claims of ineffectiveness are evaluated at the time of the representation, not by hindsight, and certainly not by requiring penalty phase counsel to have a crystal ball regarding scientific developments.¹⁶ Both the United States Supreme Court and

¹⁶ *Reynolds v. State*, 99 So.3d 459, 483 (Fla. 2012)(explaining that review of ineffective assistance of counsel claims “must be from the perspective of defense counsel at the time of trial rather than with the heightened perspective of hindsight” citing *Patton v. State*, 784 So.2d 380, 391 (Fla. 2000)). As the United States Supreme Court in *Strickland* itself observed, “a fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time.” *Strickland*, 466 U.S. at 689. The *Strickland* Court also noted that “a court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct.” *Strickland*, 466 U.S. at 690.

the Florida Supreme Court have repeatedly and consistently held that ineffective assistance of counsel claims are evaluated at the time of the representation, not in hindsight.

Counsel's performance simply cannot be judged in light of future events, such as scientific developments, that counsel cannot possibly foresee. In *Smith v. Sec'y, Dept. of Corr.*, 572 F.3d 1327, 1350 (11th Cir. 2009), the Eleventh Circuit rejected a claim of ineffectiveness for failing to challenge expert testimony regarding lead compositional analysis, the science of which, "has since been called into some doubt," reasoning that "just as counsel are not required to anticipate changes in the law, neither are they required to anticipate changes in science." *Smith*, 572 F.3d at 1350 (quoting *Strickland's* language that counsel's conduct must be judged "from counsel's perspective at the time."). Counsel's conduct must be reasonable at the time of trial or penalty phase in light of then existing available knowledge and standards, not at some future date. Because this is an ineffectiveness claim, not a *Frye* claim, opposing counsel's alternative argument that this Court should determine general acceptance in 2009 when the direct appeal occurred must fail.

But the date for determining the admissibility is not important in this case. Nor is choosing between the *Frye* and *Daubert* standards important in this particular case. qEEG testing is not admissible - not in 2007, not in 2009, and not today. qEEG testing is not admissible under either standard or on any date.

The admissibility of qEEG testing under *Frye*

At the time of the penalty phase, novel scientific evidence was required to meet the test established in *Frye v. United States*, 293 F. 1013 (D.C.Cir.1923), to be admissible in Florida's courts. See *Marsh v. Valyou*, 977 So.2d 543, 547 (Fla. 2007); see generally See CHARLES W. EHRHARDT, *FLORIDA EVIDENCE*, 694-715 (2010). The purpose of the *Frye* test is "to ensure that a jury will not be misled by experimental scientific methods which may ultimately prove to be unsound." *Davis v. Caterpillar, Inc.*, 787 So.2d 894 (Fla. 3d DCA 2001). As the Florida Supreme Court has observed, if the scientific community considers a procedure or process unreliable for its own purposes, then the procedure must be considered less reliable for courtroom use. *Stokes v. State*, 548 So.2d 188, 193-194 (Fla. 1989).

Under *Frye*, the proponent of the new science must show that the science is generally accepted by the relevant members of the particular field. *Hadden v. State*, 690 So.2d 573, 576 (Fla. 1997).¹⁷ As the proponent of the evidence, Hernandez bears the burden of establishing by a preponderance of the evidence the general acceptance

¹⁷ "General acceptance" has been defined as "acceptance by a clear majority of the members of the relevant scientific community with consideration by the trial court of both the quality and quantity of those opinions." *Hadden*, 690 So.2d at 576 n.2. *Frye* requires generally accepted by the relevant members of the particular field. The relevant scientific community for purposes of determining whether qEEG testing is accepted is limited to neurologist, who are medical doctors, not family therapists or social workers, as postconviction counsel would have it. Psychologists, family therapists, and social workers simply do not have the necessary scientific background and expertise to be considered part of the relevant community. Hernandez must show the qEEG evidence to be accepted as valid by the majority of neurologists and he did not.

of the underlying scientific principles and methodology. *Gosciminski v. State*, 2013 WL 5313183, *14 (Fla. Sept. 12, 2013); *Marsh v. Valyou*, 977 So.2d 543, 548 (Fla. 2007). To determine a *Frye* issue, a court may consider three types of evidence: 1) expert testimony, 2) scientific and legal writings, and 3) judicial opinions. *Gosciminski*, 2013 WL 5313183 at *15; *Castillo v. E.I. DuPont De Nemours & Co.*, 854 So.2d 1264, 1268 (Fla. 2003).

1) Expert testimony

The expert testimony at the evidentiary hearing established that qEEG is not widely accepted. Dr. Kaplan testified that qEEG is not accepted by neurologists and is not reliable. (Evid hearing May 25, 2012 at 38). Dr. Kaplan stated that qEEG is “not used in neurology.” (Evid hearing May 25, 2012 at 21). Dr. Kaplan testified that the panel of the American Clinical Neurophysiology Society (ACNA) that published an article in 1997 entitled *Assessment of Digital EEG; Quantitative EEG and EEG Brain Mapping: Report of the American Academy of Neurology and the American Clinical Neurophysiological Society*, which took the position that “QEEG is not recommended for use in civil or criminal judicial proceedings” was as true today as it was in 1997. (Evid hearing May 25, 2012 at 23-36). Dr. Kaplan testified that qEEG “is still not valid.” (Evid hearing May 25, 2012 at 35-36). Dr. Kaplan agreed that qEEG produces “false positive results,” in other words, “abnormal results in normal subjects and incorrect diagnosis in patients.” (Evid hearing May 25, 2012 at 29-30). qEEG does not have “objective safeguards to prevent statistical or unintended errors” and has a “great potential for abuse.” (Evid hearing May 25, 2012 at 29-

30). The article and Dr. Kaplan noted the "lack of general acceptance" of qEEG. (Evid hearing May 25, 2012 at 30).

Even postconviction counsel's expert, Dr. Koberda, admitted that most neurologists do not use qEEG. (Evid H July 16, 2012, Vol. I at 153). Dr. Koberda also admitted that there was a "little bit of controversy" regarding the use of qEEG to diagnosis brain injury. (Evid H July 16, 2012, Vol. I at 164). Dr. Turner also acknowledged there was a dispute whether qEEG was valid clinically. (Evid H 7/25 at 75). Some researchers did not believe that qEEG was "up to snuff." (Evid H 7/25 at 75). Dr. Turner testified that no one in town performs qEEG. (Evid H 7/25 at 77). This is not evidence that a technique is "widely" accepted - far from it - this is evidence that qEEG is not widely used in Florida.

Dr. Kaplan, who is a professor at America's premier teaching hospital, Johns Hopkins, and who was a past president of the American Clinical Neurophysiology Society (ACNA) is in a better position to determine acceptance of qEEG among his professional peers than a sole practitioner such as Dr. Koberda. (Evid H May 25, 2012 at 8, 9; Evid H July 16, 2012 Vol I at 127). Furthermore, Dr. Kaplan is certainly more "independent" and "impartial" than Dr. Gluck. *Gosciminski v. State*, 2013 WL 5313183, 16 (Fla. Sept. 12, 2013). Furthermore, this Court has directly rejected an argument that the community is limited to those who "use and accept" the science. *Gosciminski v. State*, 2013 WL 5313183, 16 (Fla. Sept. 12, 2013). The expert testimony establishes that qEEG is not widely accepted by the relevant scientific community which is that of neurologists.

2) Scientific and legal writings

Additionally, the scientific literature establishes that qEEG testing does not meet *Frye* because it is not generally accepted. The American Clinical Neurophysiological Society (ACNC) and the American Academy of Neurology (AAN) have published a report finding that qEEG testing should not be used at judicial proceedings. See Marc Nuwer, *Assessment of Digital EEG; Quantitative EEG and EEG Brain Mapping: Report of the American Academy of Neurology and the American Clinical Neurophysiological Society*, 49 *Neurology* 277 (1997); see also *Quantitative Electroencephalography: A Report on the Present State of Computerized EEG Techniques*, *Am.J. of Psych.*, 148:7, July 1991, at 962. The article highlighted the problems with qEEG and recommended that qEEG not be used in judicial proceedings.

The article states:

Medical-legal abuse. In some trial law and insurance circulars and advertisements, EEG brain mapping and other QEEG techniques have been cited as reliable tests. A major disadvantage of these tests in legal disputes is the occurrence of false-positive results, i.e., "abnormal" results in normal subjects and incorrect diagnoses in patients. Results also can be dramatically altered during the subjective process of selecting portions of an EEG for quantitative analysis. There are no objective safeguards to prevent statistical or unintended errors. Probative value and even the test-retest reproducibility can be poor. There is great potential for abuse.

When statistical testing is used to compare a patient to a normative database, statistical "abnormalities" detected may be clinically meaningless. Some normal variant EEG waveshapes are statistically "unusual" but have no known clinical significance. Automated QEEG processes fail to take this into account, and instead flag these EEG features as "abnormal."

The use of these techniques to support one side or the other in court proceedings can readily result in confusion, abuse, and false impressions. These are contrary to the qualities cited as suitable for scientific evidence used in the courtroom. Indeed, these problems and a lack of general acceptance were cited in state and federal court decisions disallowing the use

of EEG brain mapping as evidence, under the older *Frye* rules and under the recent *Daubert* rules.

On the basis of clinical and scientific evidence, opinions of most experts, and the technical and methodologic shortcomings, **QEEG is not recommended for use in civil or criminal judicial proceedings.**

Id. at 8 (footnotes omitted)

Nor is this just one article or Dr. Nuwer's personal opinion. This article was written by a committee of the American Academy of Neurology. The article was written by a "panel of experts, jointly appointed by the American Clinical Neurophysiology Society (ACNS, formerly the American EEG Society) and the American Academy of Neurology," who "reviewed and summarized the relevant literature." *Id.* at 1. The panel included Marc R. Nuwer, MD, PhD, Panel Chairperson and Senior Author; Richard P. Brenner, MD; Gastone G. Celesia, MD; John Desmedt, MD; John S. Ebersole, MD; Bruce J. Fisch, MD; Michael L. Goldstein, MD; Douglas S. Goodin, MD; Richard N. Harner, MD; Ronald P. Lesser, MD; Fumisuke Matsuo, MD; Ken Nagata, MD; and William W. Sutherling, MD. *Id.* at 9. The panel contacted "many experts in the field" and requested their opinions as well. *Id.* at 1. This article is more akin to a position paper by the leading scientific society. It was subtitled a "Report of the American Academy of Neurology and the American Clinical Neurophysiology Society." The leading society of neurologists does not endorse qEEG and recommends that it not be admitted in court.

3) Judicial opinions

Additionally, numerous appellate courts, using *Frye* or *Daubert*, have held that qEEG testing is not admissible. *Tran v. Hilburn*, 948

P.2d 52, 54-57 (Colo. App. Ct. 1997)(explaining that the relevant scientific community is the community of clinicians who diagnose and treat brain injured patients and concluding that there was no indication that "QEEG has reached a general level of acceptance in that community" using *Frye*); *In re Breast Implant Litigation*, 11 F.Supp.2d 1217, 1238 (D.Colo.1998)(finding that qEEG testing was "not well recognized in the clinical setting" and that "QEEG techniques are very predisposed to false-positive errors" and that "QEEG is an unreliable, unacceptable methodology for diagnosing cognitive disorders and is not generally accepted by the relevant scientific community for that purpose" using *Daubert*); *Craig v. Orkin Exterminating Co., Inc.*, 2000 WL 35593214, *2-*3 (S.D. Fla. 2000)(unreported)(granting a motion in limine to exclude qEEG test results because qEEG testing "has sparked substantial controversy among neurologists" using *Daubert*).

As the Ninth Circuit has observed, qEEG is "error-prone." *Nadell v. Las Vegas Metro. Police Dep't*, 268 F.3d 924, 927-928 (9th Cir. 2001)(using *Daubert*). The Ninth Circuit concluded, based on testimony by the leader of a joint task force of the American Academy of Neurology and the American Clinical Neurophysiology Society that the qEEG technique's subjectivity and tendency to produce "false positives" have kept it from achieving general acceptance for the clinical diagnosis of closed head injuries. *Nadell*, 268 F.3d at 927-928.

Thus, the expert testimony presented at the evidentiary hearing, the scientific literature, and the appellate court opinions all

establish that qEEG is not generally accepted by neurologists. qEEG does not meet the *Frye* standard.

Ineffectiveness

There was no deficient performance. Counsel cannot be ineffective for not presenting inadmissible evidence. *United States v. Cronin*, 466 U.S. 648, 656 n.19, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984)(observing the Sixth Amendment "does not require that counsel do what is impossible...."); *cf. Evans v. State*, 946 So.2d 1, 11 (Fla. 2006)(rejecting a claim of ineffectiveness for not presenting a diminished capacity defense because the defense is not recognized). If Rollo had tried to present qEEG testing, the State would have demanded a *Frye* hearing on qEEG, just as it did in the postconviction proceedings and the trial court would have excluded the qEEG testing.

Furthermore, the defense expert that penalty phase hired to determine brain damage never recommended additional testing to him. Dr. Turner did not recommend qEEG testing to Rollo. (Evid H 7/25 at 85). The reason Dr. Turner did not recommend qEEG testing to Rollo is that, as he testified at the evidentiary hearing, there is a dispute regarding qEEG testing's clinical validity. (Evid H 7/25 at 75). Counsel is entitled to rely on the opinion of the experts as to whether further testing is required. *Reese v. State*, 14 So.3d 913, 917-18 (Fla. 2009)(rejecting a claim of ineffectiveness for not doing neuropsychological testing because the mental health expert did not recommend further testing and explaining that "defense counsel is entitled to rely on the evaluations conducted by qualified mental

health experts" citing *Darling v. State*, 966 So.2d 366, 377 (Fla. 2007)).

Moreover, there is a good reason not to present qEEG testing as mitigation. As Rollo testified at the evidentiary hearing, if there is a question about the validity of the science, then you are "really wasting your time" presenting as mitigation because you cannot impress a jury with junk science and at some point you "risk losing all credibility." (Evid. H Vol. X at 1069-1070). This is a reasonable strategic decision.¹⁸ There was no deficient performance for all these reasons.

Nor was there any prejudice. Just as a defendant may not waive the presentation of mitigation and then raise a claim of ineffectiveness for not presenting additional mitigation, Hernandez may not refuse to cooperate in testing to determine brain damage and then raise a claim of ineffectiveness for not doing additional testing for brain damage. *Schriro v. Landrigan*, 550 U.S. 465, 478, 127 S.Ct. 1933, 1942, 167 L.Ed.2d 836 (2007)(holding a capital defendant who refused to allow the presentation of any mitigating evidence could not establish *Strickland* prejudice); *Morton v. Sec'y, Fla. Dep't of Corr.*, 684 F.3d 1157, 1172-73 (11th Cir. 2012)(rejecting a claim of ineffectiveness

¹⁸ While Rollo testified that he had never heard of qEEG testing, that does not prevent a finding that not presenting qEEG testing is a reasonable strategic decision. *Strickland* is an objective standard which means reasonable counsel's view of the matter is at issue. Rollo's testimony that junk science is not worth presenting is a reasonable view. While obviously Rollo himself never actually made the decision not to present qEEG at the time, because he did not know about qEEG testing, his view is a perfectly reasonable view that many a reasonable attorney could and would take that presenting junk science as mitigation is not a wise strategic move.

for not presenting brain damage as mitigation because the defendant told his attorneys "he didn't want any more testing" and explaining that when a defendant prevents his trial counsel from presenting mitigating evidence, he cannot argue on collateral review that he was prejudiced by the failure to present that evidence" citing *Landrigan*, 550 U.S. at 475, 127 S.Ct. at 1941)). As the trial court noted, counsel "cannot be blamed" for the defendant's "misconduct" that prevents the presentation of mitigation. (Vol. VII 1338). Hernandez refused to cooperate with Dr. Turner's original testing for brain damage and that refusal ends this claim of ineffectiveness.

Furthermore, even if the qEEG testing had been admissible at the time of the penalty phase in 2007 and Hernandez cooperated, the qEEG results would not have resulted in a life sentence in light of the aggravation including HAC. Additionally, any testimony that Hernandez suffered from significant brain damage would have been undermined by the testimony that Hernandez's behavior was normal unless he was using cocaine. Dr. Turner admitted that Hernandez's conduct was normal when he was not taking drugs which undermines any idea that Hernandez's brain injury adversely effected his conduct. (Evid H 7/25 at 82). Furthermore, even have being shown the qEEG results at the evidentiary hearing, Dr. Turner's opinion was still that Hernandez suffered from "mild" brain injury. (Evid H 7/25 at 74). Mild brain injury would not have changed the sentencing calculus. Penalty phase counsel was not ineffective for not establishing brain damage via qEEG testing during the penalty phase.

E. Ineffectiveness for not presenting mental mitigation

Hernandez asserts that penalty phase counsel Rollo was ineffective for not presenting additional mental mitigation. IB at 84. Postconviction counsel assert that Rollo “just scratched the surface” of the mental mitigation rather than presenting “solid evidence” of brain damage. Hernandez asserts that the counsel’s flaw was that none of the defense mental health experts testified as to his possible brain damage including QEEG testing. IB at 87. Postconviction counsel faults penalty phase counsel for not providing information about the crime to the defense experts.

Penalty phase and sentencing order

At the penalty phase, defense counsel also presented mental health experts who discussed Hernandez’s exceptionally dysfunctional childhood and early adult years, which included exposure to drugs and alcohol from a very early age. Dr. John Bingham, a mental health counselor, testified as to Hernandez’s childhood privation and cocaine addiction. (T. Vol XVI 2224-2304). Dr. Brett Wayne Turner, a neuropsychologist, testified regarding Hernandez’s drug addiction and depression (T. Vol. XVI 2311-74). The State’s medical expert, Dr. Harry McClaren, testified as to Hernandez’s IQ and various mental disorders (T. Vol XVII 2412, 2432, 2446-48); *see also Hernandez*, 4 So.3d at 653-654 (describing in detail the mental health testimony presented at the penalty phase).

In its sentencing order, the trial court gave substantial weight to the mitigating circumstances of Hernandez’s troubled home life; Hernandez’s parents belonging to an outlaw motorcycle gang; to Hernandez’s exposure to drugs at a very early age and to Hernandez’s

being abandoned by his mother. And the trial court additionally gave some weight to the mitigating circumstances of Hernandez being repeatedly abused while in foster care; his mother refusing to rescue him from an abusive foster care situation; his drug addiction being caused by his early childhood exposure to drugs and to Hernandez having several mental and cognitive disorders.

Evidentiary hearing testimony

At the evidentiary hearing, penalty phase counsel Rollo testified. (Evid. H Vol. VII at 771). Rollo believed that the most important mitigation was going to be that of the experts, not lay witnesses. (Evid. H Vol. VII at 793). Rollo thought the experts “were going to be the best avenue” to present familial dysfunction, dysfunctional childhood, and drug abuse. (Evid. H Vol. VII at 796). Rollo did not call Hernandez’s grandmother to testify, due to reluctance on her part, but she provided a lot of information that he relayed to Dr. Bingham and Dr. Turner. (Evid. H Vol. VII at 801).

Rollo wrote a memo to Dr. Bingham dated June 9, 2006 regarding Richard Hartman Junior and the Calaveras County records. (Evid. H Vol. VII at 805-806). Postconviction counsel introduced the memo as defense exhibit #16. (Evid. H Vol. VII at 808). Postconviction counsel introduced a document from Dr. Bingham suggesting questions to ask Cheryl Walker as defense exhibit #17. (Evid. H Vol. VII at 808).

Rollo retained Dr. Bingham as a mental health expert because he has an “excellent reputation.” (Evid. H Vol. IX at 943). Dr. Bingham does competency evaluations for the courts frequently. (Evid. H Vol. IX at 943). Dr. Bingham is a “seasoned” mental health expert who has

good rapport with clients. (Evid. H Vol. IX at 943). Rollo consulted "extensively" with Dr. Bingham. (Evid. H Vol. IX at 944).

Rollo retained Dr. Brett Turner as a neuropsychologist to have Hernandez examined with neuropsychological testing. (Evid. H Vol. IX at 945). Rollo wanted Hernandez examined for mental mitigation. (Evid. H Vol. IX at 945).

Both experts, Dr. Bingham and Dr. Turner, testified that the statutory mental mitigators were present. (Evid. H Vol. IX at 945-946). There was a problem with Hernandez's lack of cooperation with the experts. (Evid. H Vol. IX at 946). Rollo testified that he advised Hernandez to cooperate and be honest and candid with the experts. (Evid. H Vol. IX at 946-947). Dr. Turner had to admit that some of his tests were invalid and that Hernandez appeared to be malingering. (Evid. H Vol. IX at 946).

Rollo initially hoped to use Dr. Larson as an expert as well. (Evid. H Vol. IX at 947). He has used Dr. Larson in the past and has a good working relationship with Dr. Larson, so he made an appointment for Dr. Larson to examine Hernandez. (Evid. H Vol. IX at 948). But Hernandez attacked Deputy Jarvis at the doctor's office which led to the aggravated battery on the LEO charges and made the court not trust Hernandez. (Evid. H Vol. IX at 926). Hernandez not only had additional criminal charges due to his behavior but "prejudiced himself in front of the court" which made "things really worse." (Evid. H Vol. IX at 948). Dr. Larson withdrew from the case because of the attack. (Evid. H Vol. IX at 949).

Rollo had never heard of qEEG testing. (Evid. H Vol. IX at 941). qEEG testing was never mentioned at the numerous life over death

seminars he has attended. (Evid. H Vol. IX at 942). Nor has any seasoned capital litigator mentioned qEEG to him. (Evid. H Vol. IX at 942). Rollo was aware of other types of scanning techniques used to determine brain damage such as PET scanning. (Evid. H Vol. IX at 942). He had used a PET scan in a death penalty case circa 2000. (Evid. H Vol. IX at 942). He was also aware of the standard interviews and written tests that neuropsychologists use to determine brain damage (Evid. H Vol. IX at 942).

The trial court's ruling

The trial court rejected this claim of ineffectiveness. (Vol. VII 1328-1331). The trial court noted that penalty phase counsel presented two mental health experts, Dr. John Bingham and Dr. Brett Wayne Turner, that testified regarding mental mitigation. (Vol. VII 1329). The trial court recounted both experts' testimony at the penalty phase. (Vol. VII 1329-1330). The trial court noted that Dr. Turner became involved in the case to identify possible brain damage but Hernandez was "uncooperative" during the testing. (Vol. VII 1330). The trial court found no deficient performance because Rollo supplied the defense experts with "extensive information" as to the defendant's background. (Vol. VII 1330). The fact that brain damage could not be fully presented was not due to some deficiency on counsel's part but due to Hernandez's refusal to cooperate. (Vol. VII 1330). The trial court also noted that both experts testified that the two statutory mental mitigation applied. (Vol. VII 1330). The trial court noted that Dr. Turner would have like to have reviewed Hernandez's medical records, but noted such records were no longer available. (Vol. VII

1331). The trial court found no prejudice as well reasoning that mental mitigation "would not have resulted in a life sentence." (Vol. VII 1331). The trial court noted that Dr. Turner's original diagnosis of "some type of mild traumatic brain injury" had not changed. (Vol. VII 1331).

Merits

There was no deficient performance. Defense counsel hired and presented the testimony of not one, but two, mental health experts. As a matter of ineffectiveness for not presenting mental mitigation, this ends the matter. Entertaining claims of ineffectiveness for not presenting mental mitigation when counsel presented two mental experts and the defendant refused to cooperate with one of the experts resulting in an incomplete diagnosis is simply absurd. *Zack v. Tucker*, 704 F.3d 917, 927 (11th Cir. 2013)(Carnes, J., concurring)(observing that at "the frontier of the absurd there are no border guards.").

QEEG testing

Dr. Turner acknowledged that he had not suggested or recommended qEEG testing to penalty phase counsel Rollo. (Evid H 7/25 at 85). "Defense counsel is entitled to rely on the evaluations conducted by qualified mental health experts, even if, in retrospect, those evaluations may not have been as complete as others may desire." *Stewart v. State*, 37 So.3d 243, 251-52 (Fla. 2010)(rejecting a claim of ineffectiveness for not having a PET scan performed in a case where none of the mental health experts retained by defense counsel recommended further or more extensive neuropsychological testing

quoting *Darling v. State*, 966 So.2d 366 (Fla.2007)). Postconviction counsel's position that Rollo should have been aware of qEEG testing himself is unrealistic. (Evid H 7/25 at 92). Counsel is an expert in the law, not fringe mental health testing such as qEEG testing. There was no deficient performance.

Nor was there any prejudice from not having a qEEG test performed. The qEEG results would not be admissible and even if admitted, it would not have resulted in a life sentence. The trial court accorded great weight to the four aggravators and great weight to the jury's death recommendation. The qEEG results would not have changed the weight accorded to any of these aggravators. Neither the jury nor the judge would have found the qEEG results showing brain damage to be compelling mitigation in this case. The trial court would not have changed its rejection of the mental mitigators based on esoteric science such as qEEG.

Postconviction counsel asserts that the prejudice is there was no "solid evidence" of brain damage presented at the penalty phase but there is no solid evidence of brain damage even today, after the evidentiary hearing. qEEG test results are not solid evidence of anything.

Brain damage

There was no deficient performance. The reason that the mild brain damage not be confirmed is because Hernandez refused to cooperate with the defense experts. It was the defendant's own conduct of being uncooperative with Dr. Turner's testing that resulted in the brain damage not being definitively established at the penalty phase. A

defendant may not refuse to cooperate and then claim his expert was ineffective for not properly diagnosing his condition. The only deficient performance was Hernandez's, not Rollo's.

Nor was there any prejudice. Hernandez's mild brain damage did not contribute to the murder. While mitigation does not have to directly contribute to the murder to be mitigating, the power of any mitigation is lessened when it has no connection to the crime. Both Dr. Gluck and Dr. Mash testified regarding Hernandez having a "fight or flight" reaction but neither explained what would have caused this reaction. (Evid H July 16, 2012, Vol. II at 253). The victim, Ruth Everett, certainly did not. It was two young men against one woman, who they described as an old lady. Nothing about the victim or the situation provoked Hernandez. She did not harm or threaten either one of them. This was hardly a scary situation for anyone other than the victim. Additionally, Dr. Turner admitted that Hernandez's conduct was normal when he was not taking drugs which undermines any idea that Hernandez's brain injury adversely effected his conduct. (Evid H 7/25 at 82).

The trial court would not have changed its rejection of the mental mitigators based on this additional mitigation. Dr. Bingham's original diagnosis of cocaine dependency has not changed. (Evid H 7/25 at 38). Dr. Turner's original diagnosis of "some type of mild traumatic brain injury" has not changed. (Evid H 7/25 at 54-55). Both their diagnosis remained the same at the evidentiary hearing. Dr. Turner testified that both statutory mental mitigators applied during the penalty phase and he still found both statutory mental mitigators applied at the evidentiary hearing. For there to be prejudice

sufficient to undermine confidence in the outcome, his opinion would have to have changed in a dramatic manner and it did not. There was no prejudice.¹⁹

Background information

There was no deficient performance from not conducting a more detailed background investigation. Many of the records, such as the hospitalization following the auto accident, were simply no longer available. Postconviction counsel faults penalty phase counsel Rollo for not providing more background information to Dr. Bingham and Dr. Turner resulting in the prosecutor being able to cross-examine them and fault them for their reliance on uncorroborated information. Postconviction counsel highlights that the prosecutor used the defendant's attempt to conceal the crime as evidence of lack of impairment. The prosecutor would have engaged this same cross examination regardless of the defense experts' information being corroborated or not. The State's expert, Dr. Harry McClaren, testified that while Hernandez was impaired from cocaine at the time, he was not substantially impaired and was able to engage in "goal-oriented behavior." The prosecutor was using his own expert's view as the basis for cross examination of the defense experts.

¹⁹ Postconviction counsel avers none of the experts present could "quantify" how intoxicated Hernandez was at the time of the crime or his cocaine use in the weeks leading up to the murder. But no expert could really "quantify" such matters. By the time Hernandez turned himself in, all solid evidence of the extent of his drug and alcohol use would have been dissipated, much less months later when he was examined by the mental health experts.

This is equally true of malingering. The prosecutor was using his own expert's view as the basis for his charge of malingering. The State's expert, Dr. Harry McClaren, a forensic psychologist, testified as to Hernandez's malingering during his testing. *Hernandez*, 4 So.3d at 653. Furthermore, Hernandez's lack of cooperation with the defense experts would have caused the prosecutor to cross-examine them in this area regardless of any other possible alternative explanation. Malingering was, and still is, a possible explanation for Hernandez's behavior and test results. The prosecutor's cross-examination of the defense experts would have remained largely the same as it was at the penalty phase even if they had been as prepared as they would have liked. There was no deficient performance

Moreover, there was no prejudice. Even if the mental mitigation had been corroborated by other witnesses and records, it would not have resulted in a life sentence. The trial court accorded great weight to the four aggravators and great weight to the jury's death recommendation. There is no prejudice. Penalty phase counsel was not ineffective for not presenting additional mental mitigation of brain damage.

F. Ineffectiveness for not presenting a different defense

Hernandez asserts his attorney were ineffective for not presenting a coherent defense theory during the guilt phase. IB at 91. He asserts that guilt phase counsel should have conceded to second-degree murder in his closing argument.

Evidentiary hearing testimony

At the evidentiary hearing, defense counsel Ted Stokes, who was guilt phase counsel in this case, testified. (Evid. H Vol. VI at 599). He agreed that he was appointed October 11, 2006 to represent Hernandez. (Evid. H Vol. VI at 600). So, he was counsel for four months before the trial in February of 2007. (Evid. H Vol. VI at 600). Stokes replaced prior lead counsel Richard Hill. (Evid. H Vol. VI at 602). Richard Hill advised Hernandez to enter a guilty plea and just have a penalty phase. (Evid. H Vol. VI at 602). When Hernandez refused to take Hill's advice, Hill withdrew. (Evid. H Vol. VI at 602). And Stokes was then appointed to replace Hill. (Evid. H Vol. VI at 602).

He was lead counsel in guilt phase with co-counsel Mike Rollo handling the penalty phase. (Evid. H Vol. VI at 600). He was primarily responsible for the guilt/innocence phase. (Evid. H Vol. VI at 601). Co-counsel Rollo was primarily responsible for the penalty phase. (Evid. H Vol. VI at 600). He did not do the leg work for the penalty phase although they may have discussed the penalty phase. (Evid. H Vol. VI at 601). They probably discussed penalty phase strategies. (Evid. H Vol. VI at 602). Co-counsel Rollo was involved in the case longer than he was and was already developing a mitigation case including mental health experts. (Evid. H Vol. VI at 602-603). Stokes had very little to do with the penalty phase. (Evid. H Vol. VI at 603). He talked to only one penalty phase witness, the clerk Janie. (Evid. H Vol. VI at 603). He had "very little if any participation in the penalty phase." (Evid. H Vol. VI at 605).

He and Rollo had lunch together every day during which they coordinated their guilt and penalty phase strategies. (Evid. H Vol. VI at 605).²⁰ Stokes and Rollo also "talked plenty on the phone" and met prior to the trial. (Evid. H Vol. VI at 605). But other than talking, Stokes did not have any major participation in the penalty phase. (Evid. H Vol. VI at 605).

Stokes who had had many juries come back with verdicts for lesser-included offenses, observed that you never know what a jury will do and therefore, he believed that you should not give up your right to a jury trial. (Evid. H Vol. VI at 606). Stokes agreed with Hernandez's decision not to enter a guilty plea. (Evid. H Vol. VI at 606). Stokes agreed with the hypothetical that if a witness testifies during the guilt phase who would have an impact at the penalty phase, that witness' credibility should be attacked during the guilt phase, if possible. (Evid. H Vol. VI at 607-608).

Stokes agreed that the relative culpability of Hernandez and Arnold was a "big issue." (Evid. H Vol. VI at 608). Their primary strategy was to try to rebut the State's attempt to portray Hernandez as the more culpable of the two. (Evid. H Vol. VI at 608). Stokes testified that there was a lot of testimony from Tammy Hartman and statements from both Hernandez and Arnold that provided "different takes" on what happened. (Evid. H Vol. VI at 609). Stokes argued that the victim's neck was broken from Arnold suffocating her with the pillow. (Evid. H Vol. VI at 609).

²⁰ Rollo also testified they had "routine discussion" about the guilt phase. (Evid. H Vol. VII at 776).

Guilt phase counsel Stokes preparation for the guilt phase included speaking with Hernandez and getting the discovery from prior counsel Mr. Hill. (Evid. H Vol. VI at 616). Stokes also met with co-counsel Rollo who was already appointed. (Evid. H Vol. VI at 616).

Stokes stated that the biggest problem in the case was Hernandez's taped confession in which he admitted grabbing her by the neck and hearing her neck snap. (Evid. H Vol. VI at 670-671). The taped confession was the gorilla in the room. (Evid. H Vol. VI at 670). Stokes managed to get the medical examiner, Dr. Minyard, to concede that the victim's neck could have been broken by Arnold during the pillow attack. (Evid. H Vol. VI at 671). Dr. Minyard would not agree that the victim died from the broken neck because there was a lot of blood on the floor meaning the victim's heart was still beating when she was stabbed. (Evid. H Vol. VI at 673). Stokes admitted there was never any real question who slashed the victim's throat with the knife because Hernandez admitted that in his taped confession. (Evid. H Vol. VI at 672).

One of the reasons Stokes could not recall the details of this case was he never got his file back from postconviction counsel. (Evid. H Vol. VI at 681).²¹

²¹ This Court is currently considering amending the current rule to require trial counsel retain his original trial file and only give a copy to postconviction counsel. This is a reoccurring problem. *Douglas v. State*, 2012 WL 16745, 7 (Fla. 2012)(noting that trial counsel "had no independent recollection of their preparation for the penalty phase, and during the evidentiary hearing, they noted that their files on this case were missing pertinent records."). It is not reasonable to find counsel's performance deficient based on a lack of strategy when counsel does not even have his notes to review before his testimony at the evidentiary hearing to determine what his thinking on the case was at the time.

The trial court's ruling

The trial court rejected this claim of ineffectiveness. (Vol. 7 1319-1322). The trial court found that the strategy was reasonable. (Vol. 7 1321). The trial court explained that guilt phase counsel's "primary strategy" was to rebut the State's attempt to portray Hernandez as the more culpable by arguing that the crime was Arnold's idea, not Hernandez's and Arnold was the one "running the show." (Vol. 7 1320). Stokes argued "strongly" about the possibility that Arnold actually broke the victim's neck. (Vol. 7 1322). The trial court also found no prejudice because there was no reasonable probability that the jury would have convicted of a lesser offense. (Vol. 7 1322).

Merits

There was no deficient performance. In light of the confession, a verdict of guilty was simply inevitable. The only credible defense would have been to enter a guilty plea or concede to first-degree murder. Hernandez's first attorney, Richard Hill, urged him to enter a guilty plea and just have a penalty phase. (Evid. H Vol. VI at 602). When Hernandez refused to take Hill's advice to enter a guilty plea, Hill withdrew. (Evid. H Vol. VI at 602). Stokes was then appointed as guilt phase counsel to replace Hill. (Evid. H Vol. VI at 602).

The evidentiary hearing is usually conducted years after the trial, as it was in this case. Stokes was appointed on October 11, 2006, to represent Hernandez but the evidentiary hearing was held in 2012. (Evid. H Vol. VI at 600). Counsel cannot possibly be expected to recall even major aspects of a case tried six years before, much less details, without their files. Postconviction counsel should not be permitted to cause memory lapses by failing to return counsel's files or by misplacing parts of the file and then claim a lack of strategy. This Court should adopt that rule for just this reason.

Hernandez may not reject the only truly coherent strategy and then complain that his second attorney's defense was incoherent.

Postconviction counsel argues that conceding to second-degree murder would have precluded a death sentence if successful but that is the rub because conceding to second-degree murder had virtually no chance of success. IB at 93. Hernandez confessed to murdering a defenseless, immobile woman by slashing her throat with a knife for money to buy illegal drugs on tape. The proposed alternative defense of conceding to second-degree murder is no more coherent than the defense actually presented. Neither are credible. *Bell v. State*, 965 So.2d 48, 64 (Fla. 2007)(rejecting a claim of ineffectiveness for not presenting a defense other than attacking the credibility of the state's witnesses where no alternative defense was demonstrated to have been available).

Postconviction counsel asserts that the incoherent guilt phase closing argument hurt the mitigation presentation. No, it did not. As the trial court explained, guilt phase counsel's "primary strategy" was to rebut the State's attempt to portray Hernandez as the more culpable by arguing that the crime was Arnold's idea, not Hernandez's; Arnold was the one "running the show;" and that Arnold may have been the one that broke the victim's neck. (Vol. 7 1320;1322). This helps, not hurts, the mitigation presentation. There was no deficient performance in guilt phase counsel's closing argument.

There was no prejudice either. In light of the confession, a verdict of guilty was simply inevitable. "Lawyers are not miracle workers." *Burris v. Farley*, 51 F.3d 655, 662 (7th Cir. 1995). "Most

convictions follow ineluctably from the defendants' illegal deeds, and nothing the lawyers do or omit has striking effect." *Id.* at 662.

G. The trial court's failure to consider Bar records

Hernandez asserts the trial court erred in refusing to consider guilt phase counsel, Ted Stokes' Bar disciplinary history. IB at 94.

The trial court's ruling

At the evidentiary hearing, postconviction counsel asked Stokes if he had ever been sanctioned by the Florida Bar. (Evid. H Vol. VI at 652). The prosecutor objected to the question as being improper impeachment and the trial court sustained the objection. (Evid. H Vol. VI at 653).

Merits

Counsel's disciplinary history are not relevant. Florida courts do not allow the admission of prior verdicts in civil trials. *Cf. Secada v. Weinstein*, 563 So.2d 172 (Fla. 3d DCA 1990)(reversing for a new trial and hold it was error to admit prior verdicts in other cases in which the same expert testified, citing cases). Nor does this Court allow cross-examination of experts regarding prior findings of incompetency of those experts in capital cases because it would turn "into a battle over the merits of prior opinions by those experts in previous cases, malpractice suits filed against them, and Department of Professional Regulation allegations." *Cruse v. State*, 588 So.2d 983, 988 (Fla. 1991). In *Cruse*, the State presented an expert that another trial judge had found to have rendered an

incompetent medical evaluation ten years earlier in other capital case. The trial court refused to allow cross-examination of the expert regarding that prior finding of incompetency finding it to be a "purely collateral matter." *Cruse*, 588 So.2d at 988. This Court held that the adequacy of the prior evaluations by the same expert but in a different case was "not relevant." *Id.*

Here, as in *Cruse*, the evidentiary hearing would have turned into a battle over the merits of Stoke's prior disciplinary cases. Worse, here, many of the disciplinary records concerned cases other than capital cases or even criminal cases. A great criminal trial lawyer could not be so great when handling a family law case. Here, as in *Cruse*, the Bar records were not relevant.

The ineffectiveness inquiry is case-specific. *Moore v. Chrones*, 687 F.Supp.2d 1005, 1030, n.13 (C.D. Cal. 2010)(rejecting a claim of ineffectiveness and rejecting a claim that because counsel may have been ineffective in other cases, she was ineffective in this case because "the relevant inquiry on an ineffective assistance claim is whether counsel's performance was deficient and caused prejudice in connection with the particular defendant and trial in issue, not what occurred in other cases."); *Frye v. Lee*, 235 F.3d 897, 907 (4th Cir. 2000)(holding, in a case where counsel admitted to drinking 12 ounces of rum per night that nonetheless petitioner must point to specific instances of defective performance caused by counsel's alcohol abuse citing cases including *Young v. Zant*, 727 F.2d 1489, 1492-93 (11th Cir. 1984)); *Bryan v. State*, 748 So.2d 1003, 1009 (Fla. 1999)(rejecting a claim of ineffectiveness based on an affidavit from Ted Stokes that he was an alcoholic when he represented the defendant

at trial and on appeal citing *Kelly v. United States*, 820 F.2d 1173, 1176 (11th Cir. 1987), and concluding regardless of counsel's condition, he rendered effective assistance); . Just as there is no such thing as negligence "in the air," there is no such thing as ineffectiveness "in the air." *Palsgraf v. Long Island R.R. Co.*, 162 N.E. 99 (N.Y. 1928)(Cardozo)("Proof of negligence in the air, so to speak, will not do."). Bar disciplinary record in other cases are not relevant.

Furthermore, while Stokes was guilt phase counsel and Rollo was penalty phase counsel, there were two attorneys handling this case. Stokes and Rollo had, in the trial court word's, "routine discussions" regarding the guilt phase. (Vol. VII 1320). The "presence of a second attorney during the proceedings seriously undermines appellant's claim of ineffective assistance of counsel." *Lopez-Nieves v. United States*, 917 F.2d 645, 647 (1st Cir. 1990).²²

²² While the State openly acknowledges that Ted Stokes has been disciplined by the Florida Bar repeatedly, starting in 1991 and as recently as 2013, the nature of those cases is unclear. *The Florida Bar v. Stokes*, 577 So.2d 1330 (Fla. 1991)(approving probation); *The Florida Bar v. Stokes*, 114 So.3d 938 (Fla. 2013)(suspending Stokes from the practice of law for sixty days). Furthermore, this Court has found Stokes to be ineffective in a capital case because he "failed to conduct any investigation into possible mitigation" in an override case. *Coleman v. State*, 64 So.3d 1210, 1216-1221 (Fla. 2011). But this Court has also found Stokes' performance to be an "accomplishment" in another capital case. *Bryan v. State*, 753 So.2d 1244, 1248-49 (Fla. 2000)(concluding Stokes did not provide a deficient performance where counsel had the defendant examined by seven mental health experts but did not present Dr. Larson as a witness because the doctor told counsel that testimony would not be helpful and noting that obtaining a seven-to-five recommendation "was an accomplishment given the evidence of the brutal murder"). This case is closer to *Bryan* than *Coleman*. Here, unlike *Coleman*, mental health experts were presented by the defense in mitigation. Furthermore, this was not an override case where mitigation is even

Even if there was some marginal relevance to guilt phase counsel's disciplinary history, the trial court's failure to consider these records was harmless error. The claims of ineffectiveness of guilt phase counsel are not substantial. The guilt phase was never seriously at issue. Hernandez confessed to being the actual stabber. There is no doubt about his guilt or his role in the murder or that the jury was going to convict of first-degree murder.

H. Ineffectiveness for not objecting to victim impact testimony

Hernandez asserts penalty phase counsel Rollo was ineffective for not objecting to the victim impact testimony of two friends of the victim. IB at 94. There was no basis for any objection and therefore, no deficient performance.

Penalty phase

At the penalty phase, Elaine Simpson and Judy Elizabeth Morrissey testified regarding victim impact. Elaine Simpson testified that she was a neighbor of the victim and had known her since '66 or '67. (T. Vol. 15 2006-2021). She testified the victim had a lot of "sadness" in her life including a bad marriage. (T. Vol. 15 2009). Defense counsel Rollo objected as being beyond the scope which the trial court sustained. (T. Vol. 15 2009). Elaine Simpson testified that the

more critical than it normally is. Hernandez's jury recommended death by a vote of eleven to one.

None of this changes this Court's holding in *Cruse* or the proper analysis. Stokes was not penalty phase counsel in this case, Rollo was. (Evid. H Vol. VI at 600). The trial court properly refused to consider the Bar records.

victim worked in various fields over the years including child care. (T. Vol. 15 2010). She testified that the victim had two sons one of whom died. James was 16 years old when he died. (T. Vol. 15 2012). The prosecutor asked what effect the loss the death of her son had on the victim. (T. Vol. 15 2012). Defense counsel objected and the trial court overruled the objection. (T. Vol. 15 2012). The prosecutor asked Elaine Simpson how the son died. (T. Vol. 15 2014). Defense counsel objected and the trial court sustained the objection and instructed the witness not to discuss the death of the son. (T. Vol. 15 2014).

Defense counsel asked if the victim's "small life" was due to her remaining son, David's drug dealing. (T. Vol. 15 2016). Elaine Simpson responded: "Yes, sir." (T. Vol. 15 2016). The victim was very concerned about her son's drug activities. (T. Vol. 15 2016-2017). Her son David lorded over the victim. (T. Vol. 15 2017). The prosecutor objected. (T. Vol. 15 2017-18). Elaine Simpson was uneasy about visiting the victim's house due to the son's drug activities. (T. Vol. 15 2019). The victim was concerned about her son's arrests. (T. Vol. 15 2020). The victim had never been in trouble with the law. (T. Vol. 15 2020-21). The victim did not approve of her son's arrest. (T. Vol. 15 2020-21). Defense counsel objected and the trial court overruled the objection. (T. Vol. 15 2021). The trial court instructed the jury regarding the limits of victim impact testimony. (T. Vol. 15 2022-23).

Judy Elizabeth Morrissey also testified as to victim impact. (T. Vol. 15 2023-34). She knew the victim for 26 years. (T. Vol. 15 2024). She testified as to the victim's love of gospel singing in

Church. (T. Vol. 15 2029). She also testified that the victim was concerned about the victim's son's drug activities. (T. Vol. 15 2033). She testified that the victim had "extreme concerns" about her son's drug use. (T. Vol. 15 2034). The trial court again instructed the jury regarding the limits of victim impact testimony. (T. Vol. 15 2034-35).

Evidentiary hearing testimony

Rollo filed a pretrial motion to exclude victim impact testimony which was denied. (Evid. H Vol. VII at 865-866). He did not object at the penalty phase when the victim impact testimony was admitted. (Evid. H Vol. VII at 866).

Rollo explained that victim impact testimony concerned the uniqueness of the victim and loss to the community from her death and had expanded over time to "include all kinds of things." (Evid. H Vol. VII at 867). Rollo testified that the law does not require evidence of extraordinary importance or achievement to be proper victim impact testimony. (Evid. H Vol. IX at 979). Rollo's understanding of the law is that the prosecutor is entitled to present that the victim was a good-hearted, law-abiding citizen as victim impact evidence. (Evid. H Vol. IX at 979).

Rollo thought that the victim's hard life was not evidence of loss to the community. (Evid. H Vol. VII at 867). Rollo also thought that the victim being kind to people who were long dead was not unique either. (Evid. H Vol. VII at 867-868). He also believed that the paying taxes and voting was not unique either. (Evid. H Vol. VII at

868). Nor did he consider the victim's loss of a son unique. (Evid. H Vol. VII at 868).

The trial court's ruling

The trial court rejected this claim of ineffectiveness. (Vol. 7 1306-1308). The trial court reasoned that the victim impact testimony was proper and therefore, "any additional objection would have been overruled." (Vol. 7 1307). The trial court found that counsel not objecting to the witnesses' testimony regarding the victim's son drug involvement and the damage it caused in the victim's life was a reasonable trial strategy because drug use was the main theme of the mitigation case and the son's drug dealing was a "major cause of the victim's death." (Vol. 7 1307-1308). The trial court also concluded there was no prejudice. (Vol. 7 1308).

Merits

There was no deficient performance. There was no basis for any objection. Victim impact evidence is admissible including the victim's unique characteristics, such as the prior loss of a child. *Payne v. Tennessee*, 501 U.S. 808, 823, 111 S.Ct. 2597, 2607, 115 L.Ed.2d 720 (1991)(rejecting an argument that victim impact evidence encourages an improper comparison of victims because it shows each victim's "uniqueness as an individual human being"); *McGirth v. State*, 48 So.3d 777, 790 (Fla. 2010)(rejecting a claim of "excessive and inflammatory" victim impact evidence because the "State may present victim impact evidence which shows the victim's uniqueness as an individual human being and the resultant loss to the community's

members by the victim's death" citing § 921.141(7), Fla. Stat.). Indeed, the testimony at issue in *Payne* was that of the grandmother recounting the tears of her young grandchild due to the loss of his mother and sister. And the prosecutor then used that testimony in closing argument in *Payne* telling the jury that they could help ease the child's pain when he grew up by knowing what type of justice was done. This victim impact testimony pales in comparison to that of *Payne*. Moreover, this Court has upheld the admission of much more extensive victim impact testimony than that of these two witnesses. *Farina v. State*, 801 So.2d 44, 52-53 (Fla. 2001)(finding no error in the admission of victim impact testimony of twelve witnesses); *Wheeler v. State*, 4 So.3d 599, 606-609 (Fla. 2009)(finding photographic montages mounted on four poster boards showing the victim in different settings such as with family members, holding babies, serving in the National Guard, and coaching was admissible). The limits on victim impact testimony are that the witness may not testify regarding their "opinions about the crime, the defendant, and the appropriate sentence." § 921.141(7), Fla. Stat. (providing that "the prosecution may introduce, and subsequently argue, victim impact evidence to the jury" which is "designed to demonstrate the victim's uniqueness as an individual human being and the resultant loss to the community's members by the victim's death" but prohibiting "characterizations and opinions about the crime, the defendant, and the appropriate sentence"). There is no limit on recounting the victim's life, however, including the loss of a child. When United States Supreme Court and the statute speak of the victim's "uniqueness," it does not mean that the victim or their life story must be a unicorn.

Postconviction counsel cites no Florida Supreme Court case holding that discussing details of the victim's life is improper victim impact testimony or that of any other court for that matter.

Moreover, the testimony that defense counsel elicited regarding the victim's son's drug-dealing was to establish that her own son and his drug dealing was a major cause of the victim's death. Eliciting this type of testimony was clearly a reasonable strategic decision. *Strickland*, 466 US. at 690 (strategic choices "are virtually unchallengeable."). Because any objection would be meritless, there was no deficient performance.

There was no prejudice either. Any such objection would have been overruled by the trial court based on the language of the victim impact statute and the existing caselaw from both the United States Supreme Court and the Florida Supreme Court. Such testimony is admissible. There was no ineffectiveness.²³

²³ In the trial court, this claim was raised as a claim of ineffectiveness for not preserving the issue for appeal. Counsel filed a motion to preclude victim impact evidence. Counsel did not have to renew his objection to the victim to preserve the issue for appeal once he filed the motion and obtained a ruling. § 90.104(1)(b), Fla. Stat. (amended in 2003 to provide: "If the court has made a definitive ruling on the record admitting or excluding evidence, either at or before trial, a party need not renew an objection or offer of proof to preserve a claim of error for appeal.) Because counsel obtained a definitive ruling on his pre-trial motion to exclude victim impact testimony, the issue was preserved for appeal. *Franklin v. State*, 965 So.2d 79, 89 (Fla. 2007)(concluding a capital defendant was not required to renew his objection to the penalty phase evidence in order to preserve his confrontation claim for appellate review when he filing a pretrial motion citing § 90.104(1)(b)). There was no deficient performance because the issue was preserved for appeal.

Additionally, the focus of a claim on ineffective assistance of trial counsel "must be on the trial," not on the appeal. *Carratelli v. State*, 961 So.2d 312, 322 (Fla.2007); see also *Purvis v. Crosby*, 451 F.3d 734, 740 (11th Cir. 2006)(noting generally

The trial court properly denied these claims of ineffectiveness following an evidentiary hearing.

ISSUE II

WHETHER THE TRIAL COURT PROPERLY DENIED THE *GIGLIO V. UNITED STATES*, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972), CLAIM FOLLOWING AN EVIDENTIARY HEARING?
(Restated)

Hernandez asserts that the prosecutor violated *Giglio v. United States*, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972), by presenting the inconsistent testimony of Tammy Hartman. *Giglio* is not violated when a presents a witness who is unclear about certain matters or whose testimony is inconsistent in certain areas. *Giglio* is only violated when the prosecutor knowingly presents false testimony. As the trial court explained, "mere inconsistencies" in a witness' testimony "do not establish the knowing use of false testimony." The trial court noted that the defendant had not established that Tammy Hartman's "trial testimony was actually false" as required to establish a *Giglio* violation. The trial court also found that the defendant failed to establish that the prosecutor knowingly presented false testimony because other witness could corroborate certain aspect's of her testimony. Thus, the trial court properly denied the *Giglio* claim.

prejudice is measured in terms of impact on the result of the trial rather than the appeal). The Florida Supreme Court held that a defendant alleging that counsel was ineffective for failing to object or preserve a claim of reversible error in jury selection must demonstrate prejudice at the trial, not on appeal. *Carratelli*, 961 So.2d at 323.

Trial

Davine Tamala (Tammy) Hartman testified at trial during the guilt phase. (T. Vol. VIII 1192). She testified that she went by the name of Tammy Hartman. (T. Vol. VIII 1193). She was married to Richard Hartman. Michael Hernandez is her step-son. (T. Vol. VIII 1194). Hernandez lived with them from about the age of 15 or 16 years old. (T. Vol. VIII 1194). Hernandez lived next door to them in his own trailer, in November of 2004, when the crime occurred. (T. Vol. VIII 1195). Michelle Rose is her daughter. (T. Vol. VIII 1197). Michelle Rose was engaged to Chris Arnold, the co-perpetrator. (T. Vol. VIII 1197). Rose and Arnold had a child together. (T. Vol. VIII 1197).

She testified as to the events of Thursday, November 18, 2004 and Friday, November 19, 2004. (T. Vol. VIII 1199). On Friday, November 19, 2004, she went to her daughter's house, off Parker Road. (T. Vol. VIII 1197, 1200). Her daughter asked her to come over alone. (T. Vol. VIII 1201). She talked with her daughter Michelle Rose, and then with Chris Arnold, the co-perpetrator. (T. Vol. VIII 1201). Arnold was shaking and crying hysterically and was "just out of control." (T. Vol. VIII 1202).

She went to Arnold's car and got the small pocketknife that was hidden under the front passenger seat. (T. Vol. VIII 1202). Tammy Hartman testified that she put the knife in a bag. (T. Vol. VIII 1203). The bag was from a dumpster and Arnold had pointed out the bag to her. (T. Vol. VIII 1204). The bag had a purse in it. (T. Vol. VIII 1204). She put the bag in the bed of her husband's truck. (T. Vol. VIII 1205, 1206).

She then went to get her husband and they went to Hernandez's trailer on Eastgate. (T. Vol. VIII 1196,1205-1206). Hernandez, Hernandez's wife, Stephanie and their babies were there. (T. Vol. VIII 1206). Stephanie's sister from Tennessee, Tiffany, and her husband, Humphrey Telin, were also present. (T. Vol. VIII 1206,1207,1211).

Tammy Hartman asked Hernandez about the crack party. (T. Vol. VIII 1207). Tammy Hartman asked Hernandez to tell her about the lady, the bloody knife, and the purse. (T. Vol. VIII 1208). Hernandez told his wife to pack his stuff because he was leaving. (T. Vol. VIII 1208). Hartman asked Hernandez what he had done to the lady in Skyline. (T. Vol. VIII 1209). Tammy Hartman told Hernandez he was not leaving Michelle and Arnold to go through this alone. (T. Vol. VIII 1208). Hartman told Hernandez that she was going back to Michelle's and she would wait for Hernandez there (T. Vol. VIII 1208,1209). Hartman testified that she kept hitting Hernandez in the chest. (T. Vol. VIII 1208). She told Hernandez that they had to go to the police. (T. Vol. VIII 1210).

Hartman testified that she and her husband then went to Arnold's house. (T. Vol. VIII 1211). Michelle, Arnold, and the baby were present. (T. Vol. VIII 1211). Hernandez and his wife Stephanie arrived. (T. Vol. VIII 1211). Stephanie's sister, Tiffany Telin, arrived in a different vehicle. (T. Vol. VIII 1212). Tammy Hartman could not remember if Tiffany's husband, Humphrey Telin, was present. (T. Vol. VIII 1212). Arnold and Hernandez were talking between themselves with the others present. (T. Vol. VIII 1213). Hernandez said to Arnold well you put the pillow over her face. (T. Vol. VIII 1213). Defense counsel objected on hearsay grounds. (T. Vol. VIII

1214-1217). The prosecutor then instructed Hartman to only testify as to those things that Hernandez said, not Arnold. (T. Vol. VIII 1217). Hartman testified she could not remember what else Hernandez said. (T. Vol. VIII 1217). She testified that she told Hernandez he needed to turn himself into the police. (T. Vol. VIII 1217). Hartman testified that she could not remember what Hernandez said at Shelley's house. (T. Vol. VIII 1218-1219). Hartman testified that she told Hernandez about having "the bloody knife" and "the lady's purse." (T. Vol. VIII 1219). In response, Hernandez said that he was hoping she only knew about the crack. (T. Vol. VIII 1219).

The prosecutor asked her if Hernandez said anything else about the lady and Hartman responded: "I don't think so; I don't know." (T. Vol. VIII 1219). The prosecutor then attempted to impeach Hartman with her deposition. (T. Vol. VIII 1219-1222). Tammy Hartman had given the police a taped statement and a written statement on November 19, 2004 and on August of 2005, she gave a deposition. (T. Vol. VIII 1220). Defense counsel objected to the State impeaching its own witness. (T. Vol. VIII 1221). Hartman read her prior deposition. (T. Vol. VIII 1221). Hartman then testified that Hernandez told her in response to her questions about the lady at Skyline that "she was old and it was her time to go." (T. Vol. VIII 1222). She was not sure if Hernandez accused Arnold of doing anything else beside the pillow. (T. Vol. VIII 1222). Hernandez and his wife drove off just as the police arrived. (T. Vol. VIII 1222-1223). The police arrested Arnold and took the bag with the knife and the purse. (T. Vol. VIII 1224).

After Hernandez turned himself in, Tammy Hartman went to the jail to visit him. (T. Vol. VIII 1225,1226). She talked to Hernandez

about what happened to Ruth Everett on Skyline Drive. (T. Vol. VIII 1226). Hernandez told Hartman that he went to the victim's house to get more crack. (T. Vol. VIII 1226). Hernandez told her that he grabbed the victim in a choke hold. (T. Vol. VIII 1227). Arnold went in the bedroom and came out with a pillow. (T. Vol. VIII 1228). Arnold attempted to smother the victim with the pillow but she "just wouldn't die." (T. Vol. VIII 1228). Hartman then testified that she should not say that because she was not sure whether Hernandez or Arnold told her that. (T. Vol. VIII 1228). Hernandez said Arnold was a "wuss" and a "pussy." (T. Vol. VIII 1228-1229). Hartman then testified that she didn't know what Hernandez did next. (T. Vol. VIII 1229). The prosecutor pushed her saying you don't know or you will not tell us. (T. Vol. VIII 1230). Hartman then testified that Hernandez told her he "snapped her neck." (T. Vol. VIII 1230). The victim was grabbing him and scratching him. (T. Vol. VIII 1230). Hernandez demonstrated this to Hartman. (T. Vol. VIII 1230). Hernandez then knifed her in the neck. (T. Vol. VIII 1230). Arnold had the victim's legs. (T. Vol. VIII 1231). Hernandez told her he killed the lady because she had seen their faces. (T. Vol. VIII 1231). The prosecutor again impeached her with her deposition. (T. Vol. VIII 1233-1234). Hartman then testified that Hernandez told her that he pushed Arnold back. (T. Vol. VIII 1235).

Defense counsel cross-examined her about her closer relationship to Arnold than Hernandez. (T. Vol. VIII 1235,1240,1246). Hartman testified that both Arnold and Hernandez used crack. (T. Vol. VIII 1236,1237). Hartman testified that Hernandez's "shark eyes" the next day meant he had been using crack the day before. (T. Vol. VIII 1238).

(T. Vol. VIII 1235). She and Hernandez had had a falling out earlier. (T. Vol. VIII 1247).

Defense counsel also noted that Hartman had difficulty differentiating between Hernandez and Arnold and that she was confusing them. (T. Vol. VIII 1235). Hartman admitted that they both told her different things at different times. (T. Vol. VIII 1247). She knew what Hernandez told her but she heard "so many things" in the past two years. (T. Vol. VIII 1247-1248).

On redirect, Hartman testified that Hernandez told her he snapped the victim's neck and slashed her throat. (T. Vol. VIII 1248). The falling out was over damage Hernandez did to the trailer they rented from him when he was when drunk. (T. Vol. VIII 1251-1252). She had forgiven him. (T. Vol. VIII 1252).

Tiffany Telin also testified during the guilt phase. (T. Vol. VIII 1255). She also testified as to the events of November 19, 2004. (T. Vol. VIII 1235). Hernandez was her brother-in-law. (T. Vol. VIII 1257). Hernandez is married to her sister Stephanie Hernandez. (T. Vol. VIII 1257). She was living in Tennessee and came down to Florida on Thursday November 18, 2004. (T. Vol. VIII 1259). She and her husband came down to Milton to return her two nieces. (T. Vol. VIII 1260). They stayed with her husband's family. (T. Vol. VIII 1261).

She and her husband went over to her sister's house about 1:00 the next day. (T. Vol. VIII 1261). When she arrived at the Hernandez's house, the Hartmans were present. (T. Vol. VIII 1261). Hernandez, Stephanie, Tammy Hartman and Rick Hartman were present. (T. Vol. VIII 1263,1266). When she arrived, her sister Stephanie was crying. (T. Vol. VIII 1262). She asked Stephanie what happened and Stephanie told

her that Hernandez and Arnold had killed a woman. (T. Vol. VIII 1263). She asked Hernandez what happened and Hernandez told her he had killed the woman and that she was "already almost dead." (T. Vol. VIII 1264). Hernandez told her he had stabbed her in the throat. (T. Vol. VIII 1265). Hernandez told her that he and Arnold went to the house for crack. (T. Vol. VIII 1265).

Hernandez also told her that he used the victim's ATM card to get money. (T. Vol. VIII 1268). She told him that ATMs have cameras but Hernandez said that he went to a store that had no cameras. (T. Vol. VIII 1268-1269). She asked Hernandez if he had touched the victim and Hernandez admitted that he touched her face but insisted that they could not get fingerprints off a face. (T. Vol. VIII 1269). Hernandez was "kind of cold" and emotionless during this discussion but worried. (T. Vol. VIII 1270).

They then went over to Arnold's house. (T. Vol. VIII 1266). Hernandez and Arnold were going to turn themselves in. (T. Vol. VIII 1266). She did not pay attention to what they were saying to each other. (T. Vol. VIII 1235). They had called her mother and her mother's boss had called the police. (T. Vol. VIII 1267). The police arrived but the Hernandezes drove away. (T. Vol. VIII 1267). She and her husband left to find Hernandez. (T. Vol. VIII 1268).

On cross, she admitted that she could not recall everything said that day. (T. Vol. VIII 1274). In her August 2005 deposition and in her November 19, 2004 taped statement, she had said that Hernandez told her that he stabbed the woman. (T. Vol. VIII 1276-1277). Her testimony matched her deposition and her statements. (T. Vol. VIII 1277).

Evidentiary hearing testimony

Prosecutor Elmore testified that he was aware of his due process duty not to knowingly present false testimony pursuant to *Giglio*. (Evid H 1/13 Vol. X at 1088). Tammy Hartman, the prosecutor called her to testify as to certain statements Hernandez made on the day after the murder admitting his involvement. (Evid H 1/13 Vol. X at 1100-1101). The prosecutor had no reason to believe Hartman's testimony was false. (Evid H 1/13 Vol. X at 1103). While Hartman has "great difficulty" testifying and recalling details, the prosecutor had no reason to believe her testimony was actually false. (Evid H 1/13 Vol. X at 1104). The prosecutor acknowledge that there were gaps and inconsistencies in Hartman's testimony but that is no uncommon with witnesses. (Evid H 1/13 Vol. X at 1105). The prosecutor testified that his understanding of the law was that neither *Brady* nor *Giglio* prohibited him from call a witness to testify who cannot recall details and may be inconsistent. (Evid H 1/13 Vol. X at 1105-1106). All of Tammy Hartman's prior statements, as well as her deposition, were disclosed to defense counsel prior to the trial. (Evid H 1/13 Vol. X at 1106). The prosecutor directly testified that he did not present false testimony in this case. (Evid H 1/13 Vol. X at 1107).

The trial court's ruling

The trial court denied the *Giglio* claim, following an evidentiary hearing on the matter. (Vol. VII 1341-1342). The trial court explained, that while there were inconsistencies in Tammy Hartman's testimony, "mere inconsistencies" in a witness' testimony "do not establish the knowing use of false testimony." (Vol. VII 1341 citing

Maharaj v. State, 778 So.2d 944, 956 (Fla. 2000)(stating to demonstrate perjury, Maharaj must “show more than mere inconsistencies”) and *Ferguson v. State*, 101 So.3d 895, 897 (Fla. 4th DCA 2012)(explaining that the *Giglio* claim “fails at the most basic level: mere differences in testimony found in witness statements made at different times, or between witnesses on the same subject, are not alone sufficient to show perjury” citing *Floyd v. State*, 18 So.3d 432, 450 (Fla. 2009)). The trial court noted that the defendant had not established that Tammy Hartman’s “trial testimony was actually false.” (Vol. VII 1341 citing *Maharaj v. Sec’y Dep’t. of Corr.*, 432 F.3d 1292, 1313 (11th Cir. 2005)(explaining that “the suggestion that a statement may have been false is simply insufficient; the defendant must conclusively show that the statement was actually false”) and *Rodriguez v. State*, 919 So.2d 1252, 1270 (Fla. 2005)(“Rodriguez has not shown that the testimony presented was actually false or that the prosecutor had any knowledge of allegedly false testimony” and in fact, “Fernandez’s testimony was consistent with other witnesses who testified at trial about Rodriguez’s role in the crime.”). The trial court noted that Tammy Hartman did not testify at the evidentiary hearing that her trial testimony was false rather, she testified as to her confusion over who said what but “confusion is not the equivalent of a *Giglio* violation.” (Vol. VII 1341-1342). The trial court also found that the defendant failed to establish that the prosecutor knowingly presented false testimony. (Vol. VII 1342 citing *Floyd v. State*, 18 So.3d 432, 450 (Fla. 2009)). The prosecutor knew that other witness could corroborate certain aspect’s of her testimony. (Vol. VII 1342). Hernandez’s sister-in-law Telin also

testified that Hernandez told her that he cut the victim's throat. (Vol. VII 1342).

Standard of review

This Court reviews *Giglio* claims *de novo*. This Court defers to those factual findings supported by competent, substantial evidence, but reviews *de novo* the application of the law to the facts. *Moore v. State*, - So.3d -, 2013 WL L 6223205, *4 (Fla. Nov. 27, 2013)

Merits

A prosecutor may not knowingly present false testimony. *Napue v. Illinois*, 360 U.S. 264, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959). To establish a *Giglio* violation, the defendant must show: "(1) the testimony given was false; (2) the prosecutor knew the testimony was false; and (3) the statement was material." *Guzman v. State*, 868 So.2d 498, 505 (Fla. 2003). Testimony is material if there is any reasonable probability that it could have affected the jury's verdict. *Guzman v. State*, 941 So.2d 1045, 1050 (Fla. 2006). The defendant has the burden to establish the first and second prongs.

In a *Giglio* claim, only the veracity of the witness at trial is at issue. *Riechmann v. State*, 966 So.2d 298, (Fla. 2007)(rejecting a *Giglio* claim based on a police officer's allegedly false statements in his deposition because the witness did not testify at trial); *Anderson v. Sec'y, Dep't. of Corr.*, 462 F.3d 1319, 1326 (11th Cir. 2006)(rejecting a *Giglio* claim involving false testimony to the grand

jury where the petit jury heard all of Beasley's stories and her admission that she lied to the grand jury and FDLE agents).²⁴

This is not a proper *Giglio* claim. Mere inconsistencies in a witnesses' testimony do not establish the knowing use of false testimony. As the trial court found, "mere inconsistencies" in a witness' testimony "do not establish the knowing use of false testimony." (Vol. VII 1341); *Maharaj v. State*, 778 So.2d 944, 956 (Fla. 2000)(stating to demonstrate perjury, Maharaj must "show more than mere inconsistencies"); *Ferguson v. State*, 101 So.3d 895, 897 (Fla. 4th DCA 2012)(explaining that the *Giglio* claim "fails at the most basic level: mere differences in testimony found in witness statements made at different times, or between witnesses on the same subject, are not alone sufficient to show perjury"). As one federal district court observed, inconsistencies between various statements made by the same witness are commonplace in civil and criminal trials. *United States v. Jones*, 2006 WL 1737209, *6 (E.D.Pa. June 23, 2006). Simply because a witness contradicts himself does not mean that the

²⁴ *United States v. Nelson*, 970 F.2d 439, 443 (8th Cir. 1992)(observing that "[m]ere inconsistency" between witnesses' testimony is not necessarily perjury); *Moore v. Casperson*, 345 F.3d 474, 494 (7th Cir. 2003)(rejecting a *Napue/Giglio* claim based on witness' change in her trial testimony because the prosecution did not knowingly introduce any false testimony); *United States v. North*, 86 Fed.Appx. 427, *435-436, 2004 WL 100398, **6 (1st Cir. 2004)(finding no evidence of perjury where there were some inconsistencies between the witness' grand jury and trial testimony and between his trial testimony and prior taped statement); *United States v. Martin*, 59 F.3d 767, 770 (8th Cir. 1995)(observing that prior inconsistent statements is insufficient to establish prosecutorial use of false testimony citing *United States v. Sutherland*, 656 F.2d 1181, 1203 (5th Cir. 1981)); *United States v. Lochmondy*, 890 F.2d 817, 822 (6th Cir. 1989) (citing *United States v. Griley*, 814 F.2d 967, 971 (4th Cir. 1987)).

prosecutor deliberately foisted false testimony on the court. *Jones*, 2006 WL 1737209 at *6. We have criminal jury trials for the very purposes of resolving such credibility questions, and far from being a violation of *Giglio*, "this is precisely how the trial process is supposed to work." *Id.* (quoting *United States v. Thomas*, 987 F.2d 1298, 1301 (7th Cir. 1993)). Inconsistencies in Hartman's testimony do not establish a *Giglio* violation.

As to the first prong of *Giglio*, "the suggestion that a statement may have been false is simply insufficient; the defendant must conclusively show that the statement was actually false." *Maharaj v. Sec'y Dep't. of Corr.*, 432 F.3d 1292, 1313 (11th Cir. 2005); *Byrd v. Collins*, 209 F.3d 486, 517 (6th Cir. 2000)(noting that the testimony in question must be "indisputably false"). Hernandez must conclusively prove that Tammy Hartman's trial testimony was actually false and he did not do so at the evidentiary hearing. Hartman did not testify at the evidentiary hearing that her trial testimony was false. What was established at the evidentiary hearing was that Tammy Hartman was confused over who said what. She could not remember whether Arnold made certain statements or if Hernandez made those statements. Tammy Hartman's confusion over who said what is not the equivalent of a *Giglio* violation. Inconsistencies between her testimony and her deposition or, even within her deposition, are just that - inconsistencies. And defense counsel was free to explore those inconsistencies.

Hernandez does not meet the critical second prong of *Giglio* either as the trial court properly found. He cannot establish that the prosecutor knowingly presented false testimony. *Floyd v. State*, 18

So.3d 432, 451 (Fla. 2009)(rejecting a *Giglio* claim because the defendant did not “established that Lamb's trial testimony was false or, equally significant, that the prosecutor knew it was false.”); *Davis v. Terry*, 465 F.3d 1249, 1254 (11th Cir 2006)(explaining that there was no violation of *Giglio* where no evidence was presented that the State knew that his trial testimony was false.).

While the prosecutor was aware Hartman's testimony was inconsistent in certain details (as are many witnesses' testimony), prosecutors cannot pick their fact witnesses. The prosecutor had little option but to call her as a witness because she had unique personal knowledge of the events the day after the murder including the location of the knife used as the murder weapon. *Giglio* is not meant to be a vehicle to exclude fact witnesses who cannot recall certain details.

Moreover, the prosecutor also knew that other witnesses could corroborate important aspects of Hartman's testimony. Tiffany Telin also testified to Hernandez's statement admitting to being the one who cut the victim's throat with the knife. Telin testified that Hernandez told her he killed the lady when she was “almost dead” by stabbing her in the throat. (T. Vol. VIII 1265). Telin also testified as to incriminating details that Hartman did not, such as Hernandez going to a store with no camera to use the victim's ATM card. Telin directly testified that Hernandez admitted to being the one who actually stabbed the victim to death. So, another witness corroborates critical aspects of Hartman's testimony. A prosecutor cannot possibly have any personal knowledge that Hartman's testimony was “false” on such facts. Here, as in *Floyd*, Hernandez has not

established that the prosecutor knew Tammy Hartman's testimony was false.

Hernandez has established neither of the first two prongs of *Giglio*. The trial court properly denied the *Giglio* claim.

CONCLUSION

The State respectfully requests that this Honorable Court affirm the trial court's denial of the 3.851 motion following an evidentiary hearing.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing ANSWER BRIEF has been furnished by via the e-portal to Curtis M. French, 7461 Skipper Lane, Tallahassee, FL 32317 at black56hawk@yahoo.com this 17th day of March, 2014.

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CERTIFICATE OF FONT AND TYPE SIZE

Counsel certifies that this brief was typed using Courier New 12.