

DOCKET NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2017

RONNIE KEITH WILLIAMS,
Petitioner

vs.

STATE OF FLORIDA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
APPENDIX

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- A. Florida Supreme Court opinion denying relief, reported as *Williams v. State*, 226 So. 3d 758 (Fla. June 29, 2017).
- B. Postconviction court order denying relief, referenced as *State v. Williams*, Order, Case No. 93-3005-CF10A (Fla. 11th Jud. Cir. 2013).
- C. Florida Supreme Court direct appeal opinion, reported as *Williams v. State*, 967 So. 2d 735 (Fla. 2007).
- D. Florida Supreme Court order denying rehearing, referenced as *Williams v. State*, Order, Case No. SC13-1472 (Fla. Sept. 29, 2017).
- E. Florida Statutes Annotated § 921.137.

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226 So.3d 758
Supreme Court of Florida.

Ronnie Keith WILLIAMS, Appellant,

v.

STATE of Florida, Appellee.

No. SC13-1472

|

[June 29, 2017]

Synopsis

Background: Defendant moved to vacate his conviction for first-degree murder and his death sentence, which had been affirmed on appeal after a retrial, 967 So.2d 735. The Circuit Court, Broward County, No. 061993CF003005A88810, Eileen M. O'Connor, Senior Judge, denied the motion. Defendant appealed.

Holdings: The Supreme Court held that:

[1] defendant failed to support as-applied challenge to constitutionality of statute and rule governing postconviction public records production;

[2] Department of Correction's failure to produce records did not constitute *Brady* violation;

[3] allegations of prejudice were too speculative to justify conclusion that due process rights were violated by delay between trial and retrial;

[4] physician who assisted State in penalty phase did not have conflict of interest with defendant; and

[5] evidence was sufficient to support finding that defendant did not suffer intellectual disability barring him from death penalty.

Affirmed in part; death sentence vacated and remanded.

Lawson, J., concurred specially with statement.

Canady, J., concurred in part, dissenting in part, and filed opinion in which Polston, J., joined.

West Headnotes (13)

[1] Criminal Law ⇌ Discovery and disclosure

Capital defendant failed to demonstrate how records retention policy of Department of Corrections (DOC) was unreasonable or violated his right of access to public records, as required to support as-applied challenge to constitutionality of statute and rule governing postconviction public records production; DOC's counsel reported that diligent search had been conducted, and it was more likely than not that records, some of which

were more than 25 years old, were destroyed in accordance with DOC's long-established retention schedules. Fla. Const. art. I, § 24; Fla. Stat. Ann. § 27.7081; Fla. R. Crim. P. 3.852.

Cases that cite this headnote

[2] **Criminal Law** ⇌ Test results;demonstrative and documentary evidence

Capital defendant could not demonstrate prejudice from Department of Correction's failure to produce records regarding defendant's prior incarceration and probationary period, and thus Department's failure to produce did not constitute *Brady* violation; defendant did not identify what information records contained or how information was material or exculpatory, and defendant's contention that records may have provided information in mitigation of death sentence was purely speculative.

Cases that cite this headnote

[3] **Criminal Law** ⇌ Constitutional obligations regarding disclosure

To establish a *Brady* violation, a defendant must show (1) that favorable evidence, either exculpatory or impeaching, (2) was willfully or inadvertently suppressed by the State, and (3) because the evidence was material, the defendant was prejudiced.

Cases that cite this headnote

[4] **Constitutional Law** ⇌ Undue delay;speedy trial

Criminal Law ⇌ Successive, amended, or reinstated charges;successive trials

Criminal Law ⇌ Prejudice or absence of prejudice

Capital defendant's allegations of prejudice were too speculative to justify conclusion that due process rights were violated by length of delay between initial trial and retrial, despite contention that trial court should have intervened and removed initial trial counsel because he was obviously ineffective; defendant failed to identify records or information that were lost because of delay, trial court's alleged failure to intervene was cured by receipt of new trial, and testimony of witness who had died before retrial was read into record. U.S. Const. Amends. 6, 14.

Cases that cite this headnote

[5] **Criminal Law** ⇌ Remand in General;Vacation

Where trial counsel is found to be ineffective under *Strickland*, the traditional remedy is that the defendant obtains a new guilt or penalty phase. U.S. Const. Amend. 6.

Cases that cite this headnote

[6] **Sentencing and Punishment** ⇌ Evidence

Physician who assisted State in penalty phase by acting as confidential and consulting mental health expert did not have conflict of interest with capital defendant, despite contention that conflict prejudiced defendant in murder trial; even though physician had previously testified on behalf of defendant's counsel to establish that counsel was sufficiently stable to try defendant's case, physician never worked for defendant and was not in possession of material related to defendant's case.

Cases that cite this headnote

[7] **Sentencing and Punishment** ⇌ Evidence

Postconviction court's finding that capital defendant did not suffer from concurrent deficits in adaptive behavior was supported by competent, substantial evidence, and thus defendant was not ineligible for death penalty based on intellectual disability; even though defendant had low scores on Adaptive Behavior Assessment System test, defendant was in prison when he took test, defendant's self-reported data was not reliable in light of his history of employment, driving, and managing money, and defendant's efforts to conceal his involvement and culpability in murders contradicted claim of deficient adaptive functioning. U.S. Const. Amend. 8; Fla. Stat. Ann. § 921.137(1, 4).

Cases that cite this headnote

[8] **Criminal Law** ⇌ Weighing evidence

Criminal Law ⇌ Credibility of Witnesses

The appellate court will not reweigh the evidence or second-guess the findings of the lower court with regard to the credibility of witnesses.

Cases that cite this headnote

[9] **Sentencing and Punishment** ⇌ Mentally retarded persons

To demonstrate deficits in adaptive behavior, as an element of establishing ineligibility for the death penalty based on intellectual disability, a defendant must show significant limitations in adaptive functioning in at least two of the following skill areas: communication, self-care, home living, social skills, community use, self-direction, health and safety, functional academics, leisure, and work. U.S. Const. Amend. 8; Fla. Stat. Ann. § 921.137(1).

Cases that cite this headnote

[10] **Sentencing and Punishment** ⇌ Evidence

In evaluating adaptive deficits, as an element of establishing ineligibility for the death penalty based on intellectual disability, the trial court does not weigh a defendant's strengths against his limitations in determining whether a deficit in adaptive behavior exists; rather, after it considers the findings of experts and all other evidence, it determines whether a defendant has a deficit in adaptive behavior by examining evidence of a defendant's limitations, as well as evidence that may rebut those limitations. U.S. Const. Amend. 8; Fla. Stat. Ann. § 921.137(1); Fla. R. Crim. P. 3.203(e).

Cases that cite this headnote

[11] **Sentencing and Punishment** ⇌ Evidence

Psychologist was qualified to testify in evidentiary hearing as expert in field of intellectual disability, on capital defendant's claim that intellectual disability barred imposition of death penalty, despite contention that psychologist's degree required less research than Doctorate of Philosophy, he was not affiliated with a university, and he did not publish in peer-reviewed journals; psychologist had conducted at least 2,000 intellectual disability assessments, psychologist was member of American Association on Intellectual and Developmental Disabilities, state Psychological Association, and American Psychological Association, and

psychologist had been deemed an expert many times in state courts. U.S. Const. Amend. 8; Fla. Stat. Ann. §§ 90.702, 921.137(1).

1 Cases that cite this headnote

[12] Criminal Law ⇌ Competency of witness

Criminal Law ⇌ Admissibility

The determination of the qualifications of a witness to express an expert opinion falls within the discretion of the postconviction court, and that decision will not be reversed absent clear error.

Cases that cite this headnote

[13] Sentencing and Punishment ⇌ Unanimity

Sentencing and Punishment ⇌ Harmless and reversible error

Trial court's failure to require unanimous verdict on death sentence was not harmless, where jury did not provide unanimous jury recommendation to impose a sentence of death. U.S. Const. Amend. 6.

Cases that cite this headnote

***760** An Appeal from the Circuit Court in and for Broward County, Eileen M. O'Connor, Senior Judge—Case No. 061993CF003005A88810

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Opinion

PER CURIAM.

Ronnie Keith Williams appeals an order of the circuit court denying his motion to vacate his conviction of first-degree murder and sentence of death filed pursuant to Florida Rule of Criminal Procedure 3.851. We have jurisdiction. *See* art. V, § 3(b)(1), Fla. Const. For the reasons explained below, we affirm the postconviction court's order denying all claims, with the exception of the ineffective assistance of penalty phase counsel claim, which we do not address because Williams is entitled to a new penalty phase in light of *Hurst v. State* (*Hurst*), 202 So.3d 40 (Fla. 2016), *cert. denied*, — U.S. —, 137 S.Ct. 2161, 198 L.Ed.2d 246, 2017 WL 635999 (2017), and *Mosley v. State* (*Mosley*), 209 So.3d 1248 (Fla. 2016).

FACTS AND PROCEDURAL BACKGROUND

Williams was initially convicted and sentenced to death for the first-degree murder of Lisa Dyke. *See Williams v. State* (*Williams I*), 792 So.2d 1207, 1207 (Fla. 2001).¹ However, we reversed the conviction on direct appeal due to the trial

court's error in substituting an alternate juror on the panel after the jury began its guilt-phase deliberations. *Id.* Williams was retried and again convicted of the first-degree murder of Dyke. See *Williams v. State (Williams II)*, 967 So.2d 735, 741 (Fla. 2007). The jury recommended the death penalty by a vote of ten to two. *Id.* at 746. The trial court followed the recommendation and sentenced Williams to death. *Id.* In our opinion affirming the *761 conviction and sentence after the retrial, we described the facts of the murder:

On Tuesday, January 26, 1993, at approximately 8:30 a.m., a call was made to 911 from a woman who identified herself as Lisa Dyke. Dyke stated that she had been stabbed in her heart and back, and she was more than seven months pregnant. When the operator inquired of Dyke as to who stabbed her, she responded with a name that sounded to the operator like "Rodney." Dyke then informed the operator that her attacker was a black male and, although she did not know his last name, she could provide a phone number from which that information could be obtained. Dyke provided the phone number and stated that it belonged to the girlfriend of the man who had stabbed her.

When Dyke opened her door for the police, Officer Brian Gillespie observed an eighteen-year-old black female who was nude, bloody, and wet, "as if she tried to take a shower." Dyke was holding clothing in front of herself in an attempt to cover her nudity. According to Gillespie, Dyke was upset and beginning to lose consciousness. Gillespie observed stab wounds on Dyke's upper torso and back and noticed that there was blood "pretty much everywhere." As she lay on the couch, Dyke stated repeatedly to Gillespie that she did not want to die. While the paramedics were treating Dyke, Gillespie asked who had stabbed her. Through the oxygen mask that covered Dyke's face, and over the sounds of numerous police and paramedic radios, Gillespie heard Dyke say the name "Rodney." When Gillespie asked Dyke who Rodney was, Dyke replied, "Ruth's sister's boyfriend." Dyke gave Gillespie the telephone number of "Ruth's sister." Dyke then made the unsolicited statement to Gillespie, "He raped me." Soon after, the paramedics transported Dyke to the hospital. Hospital personnel were unable to perform a rape examination or collect evidentiary samples for analysis before Dyke was rushed into surgery.

While processing the crime scene, Detective Bob Cerat noticed that there were no signs of forced entry into the apartment. In the bedroom, Cerat discovered a knife that was stained with the same reddish substance that appeared throughout the apartment....

Detective Anthony Lewis determined that Ruth Lawrence rented the apartment where the stabbing had occurred. He met with Ruth, and she stated that Lisa Dyke had been babysitting Ruth's nine-month-old son in the apartment. Dyke had been living with Ruth for approximately two weeks. Dyke was connected with Ruth because Dyke was dating Ruth's brother, Julius, and Julius was the father of Dyke's unborn baby. The detective discovered that Ruth's sister was named Stefanie Lawrence, and the name of Stefanie's boyfriend was Ronnie Williams. At the time of the attack, Stefanie and Ronnie had been dating for approximately six months. Stefanie lived with her father and Julius, and her telephone number was the number that Dyke provided to police and the 911 operator to identify her attacker. Ruth testified at trial that when she left the apartment that morning to go to school, there was no blood in the apartment where Dyke was found, and Williams had never before bled in her apartment.

Subsequent investigation revealed that on the night before the crime, Ruth had participated in a three-way telephone call with Stefanie and Williams Dyke was listening to the conversation on another extension in Ruth's apartment. During that call, Ruth prompted Stefanie to break her relationship *762 with Williams, and Stefanie proceeded to do so during the phone conversation. Stefanie then advised Williams that he was not to return to Ruth's apartment again. According to Stefanie, Williams was upset, and he repeatedly stated that they could resolve the problem. After the call ended, Stefanie did not speak to Williams again, but he paged her four or five times that night. Stefanie did not respond to the pages, and the last page from Williams was around midnight.

Stefanie Lawrence agreed to assist the police in locating where Williams lived. Officer David Jones went to the house identified by Stefanie and encountered Williams's sister, Clinita Lawrence, who informed Officer Jones that she had transported Williams to a mental health crisis facility earlier that day when she noticed that he was acting bizarrely. Officer Jones proceeded to the crisis center and located Williams. Officer Jones observed that Williams had several

fresh bandages on both of his hands. Williams was transported to the police station, and Officer Jones advised him of his Miranda rights.

When Dyke regained consciousness after her surgery, she wrote a note to a nurse indicating a desire to speak to the authorities. Detective Daniel James spoke to Dyke in the intensive care unit. Dyke agreed to respond to Detective James's questions by nodding her head for "yes" and moving her head from side-to-side for "no" because she was unable to speak with the tubes which had been placed in her mouth. Detective James produced a photographic lineup of six individuals and asked Dyke if she recognized the person who attacked her. Dyke tapped on the photo of Ronnie Williams with her finger.

At the police station, Williams admitted to Officer Jones that he knew Dyke, but stated that he had not been in Ruth's apartment at the time Dyke was stabbed. With regard to the bandages on his hands, Williams stated that he had cut his fingers on a knife as he was washing dishes. He mentioned that he was having problems with his girlfriend, and that Dyke had been "kind of the go-between person." When Williams was informed that Dyke had identified him as the person who stabbed her, Williams requested an attorney, and the interview was terminated. At that time, Williams was arrested for the attack on Dyke.

On January 28, 1993, when Detective James returned to check on Dyke's condition and to photograph her wounds, he realized that some of the wounds appeared to be bite marks. James photographed bite marks on Dyke's chest, arm, breast, and the back of her shoulder. Dyke also indicated a bite mark in her groin area, but James was unable to photograph that area because Dyke was again taken into surgery to deliver her baby by cesarean section. Dyke died on February 14, 1993, nineteen days after the stabbing.

At trial, forensic pathologist Ronald Wright noted that Dyke had sustained six stab wounds in her back, some of which penetrated her lungs, which caused bleeding into the chest cavity and collapse of the lungs. Further, one stab wound had penetrated Dyke's sternum and was at least four inches deep. Wright opined that the original stab wound would have been deeper, but it was impossible to determine the exact depth because Dyke's wounds had been healing for nineteen days before her death. The doctor noted that Dyke had defensive wounds on her hands and bite marks on her body. Dr. Wright ultimately concluded that the cause of Dyke's death was multiple stab wounds which, *763 over a period of nineteen days, produced a fatally high level of toxicity in Dyke's body. Dr. Wright further reviewed the photos of the cuts on Williams's hands, and concluded that the cuts were consistent with slippage—a phenomenon that occurs when a person hits a hard surface (such as a sternum) with a hiltless knife (such as that which was recovered from the apartment), and the hand slides down the knife, producing a cut on the hand of the person holding it.

Fingerprint analyst Fred Boyd testified that a fingerprint found in a reddish substance that was located on the bathroom door of Ruth's apartment matched the known print of Williams's left ring finger. DNA testing on blood samples taken from two pieces of clothing collected from the apartment generated DNA profiles that matched the profile of Williams at four genetic locations. According to a DNA analysis expert, the frequency of occurrence of finding the same profile in two unrelated individuals who matched at four of these points would be one in 120 million African-Americans. Finally, forensic dentist Richard Souviron compared the photographs of the bite mark on Dyke's breast with dental casts made from the mouth of Williams and concluded with reasonable certainty that the bite on Dyke's breast was made by Williams.

Id. at 741–44 (footnotes omitted). The jury found Williams guilty of first-degree murder and indicated in an interrogatory verdict that its finding was based on both premeditated and felony murder theories. Id. at 744.

In sentencing Williams to death, the trial court found that four aggravating circumstances were proven beyond a reasonable doubt: (1) Williams was previously convicted of a felony involving the use or threat of violence (the second-degree murder of Gaynel Jeffrey in 1984 and an indecent assault upon a nine-year-old girl in 1982) (great weight); (2) the murder was committed while Williams was engaged in the commission of, or an attempt to commit, or flight after committing or attempting to commit a sexual battery (great weight); (3) the murder was especially heinous, atrocious, or

cruel (HAC) (great weight); and (4) the murder was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification (CCP) (moderate weight). *Id.* at 744–46. The trial court found that two statutory mitigating circumstances were present: (1) Williams was under extreme mental or emotional disturbance at the time of the crime (little weight); and (2) the capacity of Williams to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired (little weight). *Id.* The trial court also found five nonstatutory mitigating circumstances and accorded each slight weight:

(1) while housed in the Broward County Jail, Williams was a model prisoner; (2) while housed in the Broward County Jail, Williams attended religious services; (3) Williams had a deprived childhood because he did not know his father, he lost his mother at an early age, he was raised in poverty by his sister, he did not start school until adolescence, and he had difficulty finding work after his two prior criminal convictions; (4) Williams is a loving person who never fought with his relatives, and was a good brother to his sister; and (5) Williams was slight in stature and was frequently beat up and robbed of his bus money on his way to school.

Id. at 746 & n.10.

Williams raised twenty issues on direct appeal. He argued that the trial court: (1) *764 abused its discretion when it admitted out-of-court statements made by Dyke; (2) improperly departed from a position of neutrality; (3) abused its discretion when it allowed the jury to have access to a transcript of the 911 call that was prepared by the State; (4) abused its discretion when it admitted evidence of Dyke's pregnancy; (5) erred when it submitted a felony murder case with sexual battery or attempted sexual battery as the underlying felony to the jury and when it instructed the jury on the aggravating circumstance that the murder occurred during a sexual battery or an attempted sexual battery; (6) committed fundamental error by submitting a felony murder charge to the jury that was contrary to the statute governing felony murder, which requires that the death occur during the commission of the underlying felony; (7) erred when it submitted a premeditated murder case to the jury; (8) erred when it permitted the State to proceed on a theory of felony murder where the indictment gave no indication of the theory; (9) constructively and improperly amended the indictment when it instructed the jury on felony murder; (10) committed fundamental error when it failed to instruct the jury that the presumption of innocence applied to the charge of felony murder; (11) erred when it failed to instruct that a conviction on the theory of the murder must be unanimous; (12) erroneously failed to instruct the jury that it must determine beyond a reasonable doubt that the aggravating circumstances outweighed the mitigating circumstances found before it could recommend death; (13)(a) erroneously instructed the jury that it was required to determine whether sufficient mitigating circumstances existed that outweighed the aggravating circumstances, and (b) the instruction that the jury is to consider mitigation only if it is "reasonably convinced" of its existence is unconstitutional; (14) failed to make the proper findings for imposition of the death penalty; (15) erred when it used Williams's conviction for indecent assault to support the prior violent felony aggravating circumstance; (16) erred when it found HAC as an aggravating circumstance; and (17) erred when it found CCP as an aggravating circumstance. Williams also asserted that (18) the death sentence is disproportionate; (19) imposition of the death penalty in Williams's case violates *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002); and (20) Florida's capital sentencing structure fails to narrow the category of death-eligible individuals as mandated by *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972). *Williams II*, 967 So.2d at 747–67.

We agreed with Williams that competent, substantial evidence did not exist to support the finding of CCP and struck this aggravating circumstance. *Id.* at 765. However, we concluded there was no reasonable probability that the finding of CCP affected the sentence imposed and determined that the error was harmless. *Id.* All other challenges were rejected, and we affirmed the conviction and sentence of death. *Id.* at 748–67. In 2008, the United States Supreme Court denied certiorari review. *Williams v. Florida*, 552 U.S. 1283, 128 S.Ct. 1709, 170 L.Ed.2d 519 (2008).

In 2009, Williams filed a motion for postconviction relief, raising fourteen claims. Several of the claims were subsequently amended and a fifteenth claim was added. The claims were: (1) section 119.19, Florida Statutes, and Florida Rule

of Criminal Procedure 3.852 are unconstitutional facially and as applied; (2) the one-year time limit for seeking postconviction relief in a capital case is unconstitutional; (3) Williams received ineffective assistance of counsel during his first trial and, although he was granted a new trial in Williams I, *765 he was prejudiced because the pretrial rulings became the law of the case, and more than ten years passed between the indictment and the retrial; (4) rule 4–3.5(d)(4) of the Rules Regulating the Florida Bar unconstitutionally precluded Williams from fully investigating possible juror misconduct, and retrial counsel was ineffective for failing to move for a change of venue; (5) retrial counsel was ineffective during the guilt phase; (6) newly discovered evidence renders the forensic science used to convict Williams unreliable and invalid; (7) Williams is ineligible to be executed because he is intellectually disabled, and retrial counsel was ineffective for failing to raise intellectual disability as a bar to execution; (8) Williams was denied access to a competent mental health expert as required by Ake v. Oklahoma, 470 U.S. 68, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985); (9) retrial counsel was ineffective during the penalty phase; (10) improper comments and misstatements of the law by the prosecutor deprived Williams of a fair trial; (11) Williams is innocent of first-degree murder because his mental state prevented him from forming the intent to commit premeditated murder; he is innocent of felony murder because there was insufficient evidence to support the underlying sexual battery; the instructions provided to the jury on the aggravating circumstances were inapplicable and unconstitutionally vague; and the mitigation evidence available renders the death sentence disproportionate; (12) an American Bar Association report demonstrates that Florida's death penalty system is unconstitutional; (13) cumulative error; (14) Florida's lethal injection protocol is unconstitutional on its face and as applied; and (15) the State committed violations of Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). After a case management conference, the postconviction court granted Williams an evidentiary hearing on portions of claims 7, 8, and 9. The remainder of the claims were held in abeyance pending completion of the evidentiary hearing.

During the evidentiary hearing, Williams presented multiple witnesses, including Dr. Mark Tassé, a university professor who also conducts intellectual disability evaluations; Dr. George Woods, Jr., a psychiatrist; and Dr. Thomas Oakland, a psychologist. The only witness presented by the State was Dr. Gregory Prichard, a clinical psychologist. In May 2013, the postconviction court entered a comprehensive order denying all claims. This appeal follows.

ANALYSIS

Public Records

[1] Williams alleges that section 27.7081, Florida Statutes (2008),² and Florida Rule of Criminal Procedure 3.852 are unconstitutional both facially and as applied because they prevent access to public records to which he is otherwise entitled under article I, section 24, of the Florida Constitution. We disagree.

We have previously rejected similar facial constitutional challenges that assert section 27.7081 and rule 3.852 impermissibly restrict a capital defendant's right to access public records. See, e.g., Lambrix v. State, 124 So.3d 890, 895 n.2 (Fla. 2013); Wyatt v. State, 71 So.3d 86, 110–11 (Fla. 2011). Therefore, Williams's facial challenge is without merit.

Williams's as-applied challenge also fails. During the postconviction proceedings, Williams filed voluminous public records *766 requests with multiple state and local agencies. On appeal, he focuses on the delay by the Florida Department of Corrections (DOC) in providing some records and the destruction of other records under a DOC retention policy.

In denying this portion of Williams's public records challenge, the postconviction court concluded that (1) Williams received all existing DOC records to which he was entitled; (2) the DOC did not intentionally withhold the records from Williams's prior indecent assault and second-degree murder convictions; and (3) the retention policy, which led to the destruction of those records, was reasonable. The postconviction court also noted that collateral counsel's request for

additional time to review the provided records and prepare supplemental demands for additional records was granted, and Williams was twice granted leave to amend his postconviction motion. Given that the postconviction court allowed Williams to amend his motion on more than one occasion and to seek production of additional records, we fail to see how Williams was harmed or how his constitutional rights were violated due to any delays by the DOC.

With regard to the requests for records of Williams's prior incarceration for the 1984 murder of Gaynel Jeffrey and his probationary period for the 1982 indecent assault, the record reflects counsel for the DOC reported that a diligent search had been conducted, and it was more likely than not the records were destroyed in accordance with the DOC's long-established retention schedules. The postconviction court concluded that the DOC did not willfully destroy the records of Williams's prior incarceration and probationary periods. The court noted the records related to short periods of time while Williams was on probation and while he was incarcerated at Hendry Correctional Institution, and some of the records were over twenty-five years old. The court found that the DOC retention policy "was reasonable at the time and reasonable now."

[2] [3] Williams nonetheless contends that the postconviction court's ruling constitutes an abuse of discretion. According to Williams, the DOC should have produced the records from the second-degree murder conviction during Williams's initial trial for Dyke's murder, when those records were still in existence, and the failure to do so constitutes a Brady violation. We disagree. To establish a Brady violation, a defendant must show "(1) that favorable evidence—either exculpatory or impeaching, (2) was willfully or inadvertently suppressed by the State, and (3) because the evidence was material, the defendant was prejudiced." Doorbal v. State, 983 So.2d 464, 480 (Fla. 2008). Williams has not identified what information these records contained or how the information was material or exculpatory. He therefore cannot demonstrate that he was prejudiced by the failure to obtain the records. Williams asserts that "[t]he records from the prior periods of incarceration may provide information in mitigation of the death sentence." (emphasis added). However, this purely speculative assertion fails to establish a Brady violation. Further, Williams has failed to demonstrate how the records retention policy of the DOC is unreasonable or violated his right of access to public records. We therefore affirm the denial of Williams's as-applied constitutional challenge to section 27.7081 and rule 3.852.

Ineffective Assistance of Initial Trial Counsel

[4] Williams contends that the postconviction court erred when it summarily denied his claim that the failure of the trial court to provide him with competent counsel during his first trial for Dyke's murder *767 constituted an incurable violation of due process. He asserts that the trial court and the prosecutor knew or should have known that Williams's initial court-appointed counsel was incompetent because of his erratic behavior and lack of preparedness. According to Williams, he was prejudiced during his 2004 retrial due to the passage of time because records were destroyed, witnesses died, and memories faded. This claim is without merit.

[5] Where trial counsel is found to be ineffective under Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), the traditional remedy is that the defendant obtains a new guilt or penalty phase. See, e.g., State v. Fitzpatrick, 118 So.3d 737, 741, 770 (Fla. 2013) (affirming postconviction order granting a new trial where counsel was ineffective during the guilt phase); Rose v. State, 675 So.2d 567, 574 (Fla. 1996) (vacating death sentence and remanding for a new penalty phase where counsel was ineffective during the penalty phase). Williams's initial conviction was reversed on grounds that the trial court erred when it substituted an alternate juror onto the jury panel to replace an original juror who was unable to proceed after guilt-phase deliberations commenced. Williams I, 792 So.2d at 1207. Having been granted a new trial, Williams already received the relief to which he would have been entitled had initial trial counsel been found ineffective. Just over eleven years elapsed between Dyke's murder in 1993 and the commencement of the retrial in 2004. However, part of this delay was the result of Williams's successful appeal of his initial conviction. The cases relied upon by Williams do not support the contention that if counsel is deficient, the State is forever barred from seeking the death penalty.

In Barker v. Wingo, 407 U.S. 514, 530, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972), the United States Supreme Court identified four factors that are relevant in making a determination as to whether a defendant's due process right to a speedy trial is violated: (1) the length of the delay; (2) the reason for the delay; (3) the defendant's invocation of the right to speedy trial; and (4) prejudice to the defendant. Here, the postconviction court applied these four factors and noted that initial trial counsel sought numerous continuances prior to the first trial. With regard to Williams's claim that beneficial records were lost or destroyed due to initial trial counsel's ineffectiveness and the delay caused by it, the postconviction court found that the prejudice asserted was speculative because Williams failed to identify with specificity the records or information contained therein which could not be located prior to the 2004 retrial. Williams's allegations of prejudice are too speculative to justify a conclusion that his due process rights were violated. To the extent Williams asserts the trial court should have intervened and removed his initial trial counsel, any error in failing to do so was cured by Williams's receipt of a new trial. Although one of Williams's witnesses from the initial trial died before the retrial, her prior testimony was read into the record, and Williams suffered no prejudice. We therefore affirm the summary denial of this claim.

Conflict of Interest

[6] Williams asserts that a conflict of interest occurred, described as follows:

Dr. Brannon testified at the behest of Williams's 1996 defense attorney ... to establish that [counsel] was sufficiently stable to try Williams's capital case. This alone presented conflict between the client and his lawyer. At that point, their interests were adverse, although no one informed Williams of that fact. The prosecutor was present at the 1996 hearing regarding [counsel's] mental illness and *768 stay at a mental hospital, yet the State presented no objection to Williams being tried by [counsel]. Eight years later, the same prosecutor hired Dr. Brannon as a confidential and consulting mental health expert to assist the State in the penalty phase. The fact that Dr. Brannon readily accepted the role demonstrates the prior conflict that served to prejudice Williams.

In support of this claim, Williams relies on Walton v. State, 847 So.2d 438 (Fla. 2003), and Sanders v. State, 707 So.2d 664 (Fla. 1998), but in neither case was a conflict of interest established under similar circumstances. In Walton, we concluded it was error to permit a doctor who previously assisted in the preparation of a codefendant's defense strategy to testify on behalf of the State during the defendant's postconviction evidentiary hearing. 847 So.2d at 445–46. In Sanders, we concluded the trial court erred in permitting a doctor who had previously been in possession of numerous documents and received communications about the defendant to testify on behalf of the State during the penalty phase. 707 So.2d at 668–69. However, Williams never asserted that Dr. Brannon previously worked for him or was in possession of materials related to his case. The relationship that existed was between Dr. Brannon and initial trial counsel, not Dr. Brannon and Williams. Because Williams has not established a direct conflict of interest between himself and Dr. Brannon, this claim is without merit.

Intellectual Disability

[7] [8] Williams asserts that the postconviction court erred when it denied his claim that he is intellectually disabled and therefore ineligible to be executed under the Eighth Amendment to the United States Constitution and Atkins v. Virginia, 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002). We have explained:

“Florida law includes a three-prong test for intellectual disability as a bar to imposition of the death penalty.” Snelgrove v. State, 107 So.3d 242, 252 (Fla. 2012). A defendant must establish intellectual disability by demonstrating the following three factors: (1) significantly subaverage general intellectual functioning; (2) concurrent deficits in

adaptive behavior; and (3) manifestation of the condition before age eighteen. See Hurst v. State, 147 So.3d 435, 441 (Fla. 2014) *rev'd*, Hurst v. Florida, — U.S. —, 136 S.Ct. 616, 193 L.Ed.2d 504 (2016); § 921.137(1), Fla. Stat. The defendant has the burden to prove that he is intellectually disabled by clear and convincing evidence. Franqui v. State, 59 So.3d 82, 92 (Fla. 2011); § 921.137(4), Fla. Stat. If the defendant fails to prove any one of these components, the defendant will not be found to be intellectually disabled. Nixon v. State, 2 So.3d 137, 142 (Fla. 2009). In reviewing intellectual disability determinations, this Court has employed the standard of whether competent, substantial evidence supports the trial court's determination.

Salazar v. State, 188 So.3d 799, 811–12 (Fla. 2016). We will not reweigh the evidence or second-guess the findings of the lower court with regard to the credibility of witnesses. Snelgrove v. State, 107 So.3d 242, 252 (Fla. 2012).

The postconviction court carefully considered and evaluated, under the applicable law at the time,³ each of the three *769 prongs of the intellectual disability standard. The court concluded Williams failed to establish that he met any of the three prongs by clear and convincing evidence. In this analysis, we focus on the second prong and conclude the postconviction court's finding that Williams failed to demonstrate that he suffers from concurrent deficits in adaptive behavior is supported by competent, substantial evidence. Therefore, Williams is not entitled to relief. See Salazar, 188 So.3d at 812 (“If the defendant fails to prove any one of these components, the defendant will not be found to be intellectually disabled.”).

[9] [10] The term “adaptive behavior,” as used in section 921.137(1), Fla. Stat. (2013), “means the effectiveness or degree with which an individual meets the standards of personal independence and social responsibility expected of his or her age, cultural group, and community.” To demonstrate deficits in adaptive behavior, a defendant must show significant limitations in adaptive functioning in at least two of the following skill areas: communication, self-care, home living, social skills, community use, self-direction, health and safety, functional academics, leisure, and work. See Atkins, 536 U.S. at 308 n.3, 122 S.Ct. 2242. In evaluating adaptive deficits,

the trial court does not weigh a defendant's strengths against his limitations in determining whether a deficit in adaptive behavior exists. Rather, after it considers “the findings of experts and all other evidence,” Fla. R. Crim. P. 3.203(e), it determines whether a defendant has a deficit in adaptive behavior by examining evidence of a defendant's limitations, as well as evidence that may rebut those limitations.

Dufour v. State, 69 So.3d 235, 250 (Fla. 2011).

[11] [12] As a threshold matter, Williams asserts that the postconviction court abused its discretion in allowing Dr. Gregory Prichard to testify during the evidentiary hearing as an expert in the field of intellectual disability. Williams contends that Dr. Prichard was not qualified to render an opinion regarding intellectual disability because: (1) his degree is a Doctorate of Psychology (Psy.D.), which requires less research than a Doctorate of Philosophy (Ph.D.); (2) he is not affiliated with a university; and (3) he does not conduct research and has never published an article in a peer-reviewed journal. The determination of the qualifications of a witness to express an expert opinion falls within the discretion of the postconviction court, and that decision will not be reversed absent clear error. See Floyd v. State, 913 So.2d 564, 575 (Fla. 2005).

The testimony presented at the evidentiary hearing established that Dr. Prichard has been a licensed clinical psychologist in Florida since 1996, with a subspecialty in forensic psychology and a specialization in assessing for intellectual disability. He conducts an average of two or three intellectual disability assessments per week, and has conducted at least two thousand intellectual disability assessments over the course of his career. At least a few hundred *770 of those assessments were done in capital cases. Dr. Prichard is a member of the American Association on Intellectual and Developmental Disabilities, the Florida Psychological Association, and the American Psychological Association. He has been deemed an expert many times in courts throughout Florida, and no court has ever refused to allow Dr. Prichard to render an expert opinion in the field of psychology on the issue of intellectual disability.

Section 90.702, Florida Statutes (2012), provides that a witness may be qualified as an expert based on knowledge, skill, experience, training, or education. Research, university affiliation, and publication are not prerequisites to qualification as an expert. Based upon Dr. Prichard's specialized knowledge and extensive experience in evaluating individuals for intellectual disability, we conclude that the postconviction court acted well within its discretion in qualifying Dr. Prichard as an expert in the field of psychology and intellectual disability.

As to the merits of Williams's claim, Dr. Mark Tassé, a psychology professor specializing in intellectual disability, testified during the evidentiary hearing that there are multiple standardized tests for assessing adaptive behavior. One such test is the Adaptive Behavior Assessment System (ABAS). The ABAS assesses ten skill areas: communication, community use, functional academics, home living, health and safety, leisure, self-care, self-direction, social, and work. These skill areas are incorporated into three domains: the conceptual domain, the social domain, and the practical domain. The scores taken from the three domains are then used to determine the total score.

The ABAS was developed by Dr. Thomas Oakland, another expert retained by Williams. Dr. Oakland administered the ABAS to Williams. However, when asked about the validity of ABAS testing on individuals in the prison setting, Dr. Oakland stated:

Well, one must realize that Mr. Williams is incarcerated in a setting that provides considerable confinement [There] are very few things that he is allowed to decide to do on his own. Which makes the assessment of adaptive behavior irrelevant. It's silly. Down right [sic] silly to try to acquire adaptive behavior information on persons who are incarcerated under those conditions.

Dr. Oakland further explained that because people within a prison setting are highly restricted as to the behaviors they can display, "we are not going to get an accurate assessment of adaptive behavior by ... acquiring information on prison related behaviors." Drs. Tassé, Woods, and Prichard all agreed that the ABAS is not especially useful in assessing the adaptive behavior of a person who has been incarcerated for an extended period of time.

Williams's self-reported responses on the ABAS indicated that he was deficient in nine out of the ten skill areas. In those nine skill areas, Williams received the lowest possible score. When asked about the meaning of the results, Dr. Oakland said, "Well, it tells me that [Williams's] display of adaptive behavior in a prison setting is very, very restricted. But we know that. So it merely confirms the fact statistically and through measurement of behaviors that we recognize prevail in a prison setting." Essentially, Dr. Oakland's opinion was that the results of Williams's ABAS were not an accurate assessment of his adaptive functioning.

Dr. Prichard also disputed the validity of Williams's ABAS results. Williams indicated on the ABAS that he is not capable of ordering his own meal at a restaurant, finding a restroom in a public place, or *771 looking both ways before crossing a street. According to Dr. Prichard, the extremely low scores Williams received on the ABAS would place him in the moderate-to-severe range of intellectual disability, which comprises the lowest fifteen percent of all intellectually disabled individuals. Dr. Prichard testified that a person with adaptive functioning so low as to not be able to find a restroom in a public place may have to be institutionalized.

Further, Dr. Prichard concluded that Williams's self-reported data was not reliable in light of his history. Williams held various jobs, including in the dietary department of a hospital, and at restaurants and grocery stores. Williams also obtained a driver license and informed Dr. Prichard that he would sometimes walk to work or take the bus. Although Williams indicated on the ABAS that he could not provide the correct amount of money for a purchase under ten dollars, he was able to successfully multiply 809 by 47 and subtract \$5.70 from \$62.00 during an administration of the Wide Range Achievement Test. He also informed Dr. Prichard that he managed his own money. Williams stated that he maintained a savings account and would deposit money in the bank, while keeping some for himself. Moreover, Williams obtained his

General Educational Development (GED) diploma. Dr. Prichard testified that he has not encountered an intellectually disabled person who can pass even a single section of the GED test, let alone the entire examination.

Dr. Oakland also administered the ABAS to Williams's half-sisters, Clinita and Althamease, who provided data regarding Williams's adaptive behavior prior to the age of eighteen. Under Florida law, however, adaptive deficits must be current. See *Hodges v. State*, 55 So.3d 515, 534 (Fla. 2010). Thus, the information provided by Clinita and Althamease is insufficient to satisfy the second prong of the intellectual disability test because it does not address Williams's current adaptive behavior. See *Phillips v. State*, 984 So.2d 503, 511 (Fla. 2008). Further, Dr. Oakland acknowledged on cross-examination that the information provided by Althamease, who is seven years younger than Williams, was based on observations she made over thirty years ago when she was only nine or ten years old, and therefore her ABAS results may have been even more limited in their meaning.

Even assuming the relevancy of the ABAS results provided by Clinita and Althamease, the validity of the results was disputed by Dr. Prichard. He testified that family members often give information that is not objective and not useful because they are motivated by their love for the individual and a desire for a particular outcome. On the ABAS completed by Clinita, she scored Williams as deficient in nearly every skill area assessed and placed Williams's functioning at the age of a five- to seven-year-old. These results indicated that Williams basically had no independent skills in those areas. Dr. Prichard again noted that some individuals with such extreme adaptive deficits have to be institutionalized.

Dr. Prichard found that the scores Clinita gave on the ABAS were completely inconsistent with the testimony she had given during the two trials. During Williams's first trial for Dyke's murder, Clinita testified that after her and Williams's mother died in childbirth, she and her younger half-siblings were homeless and living in an abandoned car, and it was Williams who took care of the other children while she worked. Clinita testified that Williams "became the person ... who had to help me strengthen ... he went from the person who was the youngest to the person who then became the oldest." *772 During the retrial, Clinita testified that Williams helped her sell bottles and cans to supplement the family income. According to Clinita, Williams did whatever he could to help, including searching for food and raising the other children. Based on these inconsistencies and what Dr. Prichard knew about Williams, he concluded that the information Clinita provided on the ABAS was "exaggerated to the point of being absurd." Dr. Prichard concluded that, because valid data was not provided, the results were likewise invalid.

Dr. Prichard also analyzed Williams's ability to think abstractly and rationalize his actions and their consequences. He found that Williams's conduct during and after the Jeffrey murder reflected planning and forethought, which is normally beyond the capabilities of an intellectually disabled person. Williams entered the Jeffrey house while everyone was asleep, stabbed Gaynel Jeffrey to death, used her mother's vehicle to dispose of the body at a construction site, and then returned the vehicle to the house. According to Dr. Prichard, such actions demonstrate that Williams recognized his situation and took steps to cover his actions.

Further, although most intellectually disabled people think in concrete terms, when questioned about the Jeffrey murder, Williams told police that he killed Gaynel Jeffrey in self-defense. After the Dyke murder, Williams explained the cuts on his fingers by claiming he cut himself while washing dishes. According to Dr. Prichard, Williams's ability to know what type of information the police were seeking and then fabricate explanations to cover up the truth constitute abstract thinking that is usually beyond the capabilities of a person who is intellectually disabled.

The postconviction court found Williams's ABAS results were insufficient to support his allegation that he suffers from deficits in adaptive functioning. Because Dr. Oakland concluded Williams's ABAS scores merely confirmed the fact that his adaptive behavior in prison was extremely restricted, which he said renders "the assessment of adaptive behavior irrelevant" and "silly," the postconviction court declined to "attach more meaning to the ABAS score ... than [Williams's] own expert did." The postconviction court also agreed with Dr. Prichard that Williams's history of employment, driving,

managing his money, and obtaining a GED diploma all contradicted the ABAS scores and rebutted his allegations of deficits in adaptive behavior.

Competent, substantial evidence supports the postconviction court's ruling that Williams does not suffer from deficits in adaptive functioning. Dr. Prichard explained why Williams's scores on the ABAS were not credible. Williams himself described behaviors to Dr. Prichard that were inconsistent with his responses on the ABAS, such as managing money, taking the bus, shopping for groceries, and purchasing household items and clothing for himself. Each of these abilities directly rebuts Williams's indication on the ABAS that he cannot find a restroom in a public place or provide the correct amount of money for a purchase under ten dollars. The record further reflects that Williams worked as a cook, a sandwich maker, and a server in restaurants, which rebuts Williams's report on the ABAS that he is not capable of ordering his own meal at a restaurant. Williams had a driver license and walked to work, both of which rebut his self-report on the ABAS that he is not capable of looking both ways before crossing a street.

Further, Williams's efforts to conceal his involvement and culpability in the murders of Gaynel Jeffrey and Lisa Dyke also contradict his claim of deficient adaptive functioning. *773 See Phillips, 984 So.2d at 512 (concluding that the defendant's ability to plan and cover-up the murder was inconsistent with a finding of deficient adaptive functioning). Moreover, the fact that Williams successfully obtained his GED diploma supports the conclusion that he does not suffer from adaptive deficits. See Dufour, 69 So.3d at 250.

We recently reiterated that “[i]f the defendant fails to prove any one of the [] components [delineated in section 921.137(1), Florida Statutes], the defendant will not be found to be intellectually disabled.” Salazar, 188 So.3d at 812. Because competent, substantial evidence supports the postconviction court's conclusion that Williams failed to establish the second prong of the intellectual disability standard, we affirm the determination that Williams does not qualify as intellectually disabled under Florida law.

Hurst

[13] During the pendency of Williams's appeal from the denial of his motion for postconviction relief, the United States Supreme Court issued Hurst v. Florida, in which it held that Florida's former capital sentencing scheme was unconstitutional because “[t]he Sixth Amendment requires a jury, not a judge, to find each fact necessary to impose a sentence of death.” 136 S.Ct. at 619. On remand in Hurst, we held that

before the trial judge may consider imposing a sentence of death, the jury in a capital case must unanimously and expressly find all the aggravating factors that were proven beyond a reasonable doubt, unanimously find that the aggravating factors are sufficient to impose death, unanimously find that the aggravating factors outweigh the mitigating circumstances, and unanimously recommend a sentence of death.

202 So.3d at 57. In Mosley, we concluded that Hurst applies retroactively to those defendants whose sentences became final after the Supreme Court decided Ring, 209 So.3d at 1283. In light of the non-unanimous jury recommendation to impose a sentence of death, it cannot be said that the failure to require a unanimous verdict here was harmless. See, e.g., Hodges v. State, 213 So.3d 863, 881 (Fla. 2017).

CONCLUSION

For the reasons stated above, we affirm the postconviction court's order denying Williams postconviction relief, with the exception of the ineffective assistance of penalty phase counsel claim, which we do not address. However, pursuant to Hurst and Mosley, we vacate Williams's sentence of death and remand for a new penalty phase.

It is so ordered.

LABARGA, C.J., and PARIENTE, LEWIS, and QUINCE, JJ., concur.

LAWSON, J., concurs specially with an opinion.

CANADY, J., concurs in part and dissents in part with an opinion, in which POLSTON, J., concurs.

LAWSON, J., concurring specially.

See Okafor v. State, 2017 WL 2481266, at *6 (Fla. June 8, 2017) (Lawson, J., concurring specially).

CANADY, J., concurring in part and dissenting in part.

I concur with the majority that Williams is not entitled to relief from his conviction on his constitutional challenges to section 27.7081, Florida Statutes (2008), and Florida Rule of Criminal Procedure 3.852, his claim of ineffective assistance of counsel at his first trial in 1996, his claim of a conflict *774 of interest with Dr. Brannon, or his intellectual disability claim. But I dissent from the decision to vacate Williams's death sentence and remand for a new penalty phase. I would also reject Williams's claim of ineffective assistance of counsel at the penalty phase of his 2004 retrial. Therefore, I would affirm the denial of postconviction relief.

First, I would conclude that there was no error under Hurst v. Florida, —U.S. —, 136 S.Ct. 616, 193 L.Ed.2d 504 (2016). I adhere to my view that Hurst v. Florida only requires that the jury find the existence of an aggravating circumstance that renders a defendant eligible for a death sentence. See Hurst v. State, 202 So.3d 40, 77 (Fla. 2016) (Canady, J., dissenting) (noting “the Hurst v. Florida Court's repeated identification of Florida's failure to require a jury finding of an aggravator as the flaw that renders Florida's death penalty law unconstitutional”), cert. denied, — U.S. —, 137 S.Ct. 2161, 198 L.Ed.2d 246, 2017 WL 635999 (2017); see also Hurst v. Florida, 136 S.Ct. at 624 (“Florida's sentencing scheme, which required the judge alone to find the existence of an aggravating circumstance, is therefore unconstitutional.”). But here, because Williams had twice previously been convicted of violent felonies (the second-degree murder of Gaynel Jeffrey in 1984 and an indecent assault upon a nine-year-old girl in 1982), it was not even necessary for the jury to make a unanimous finding regarding the existence of an aggravating circumstance. This Court has recently reaffirmed that it will follow the Supreme Court's precedent creating “one narrow exception to the Sixth Amendment requirement that a jury must find any fact that increases the maximum sentence: the fact of a prior conviction, as established in Almendarez-Torres v. United States, 523 U.S. 224, 118 S.Ct. 1219, 140 L.Ed.2d 350 (1998) [.]” Jackson v. State, 213 So.3d 754, 787 (Fla. 2017) (citing Ring v. Arizona, 536 U.S. 584, 597 n.4, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002); Apprendi v. New Jersey, 530 U.S. 466, 489–90, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000)). Thus, I would conclude that no Hurst v. Florida error occurred.

Second, I adhere to my view that Hurst v. Florida should not be given retroactive application. See Mosley v. State, 209 So.3d 1248, 1285–91 (Fla. 2016) (Canady, J., concurring in part and dissenting in part). Even if Hurst v. Florida error were present in this case, I would deny Williams relief.

Finally, I would conclude that the postconviction court did not err in denying Williams's claim that he received ineffective assistance of counsel during the penalty phase of his retrial.

For these reasons, I would affirm the denial of postconviction relief.

POLSTON, J., concurs.

All Citations

226 So.3d 758, 42 Fla. L. Weekly S706

Footnotes

- 1 In that decision, Williams was referred to as Ronald Keith Williams. However, in subsequent cases, Williams has been, and will continue to be, referred to as Ronnie Keith Williams.
- 2 Although Williams referred to section 119.19 in his postconviction motion, effective October 1, 2005, section 119.19 was renumbered as section 27.7081. See ch. 2005-251, § 39, Laws of Fla.
- 3 After the postconviction court entered its order holding that Williams failed to establish he is intellectually disabled, the United States Supreme Court issued Hall v. Florida, — U.S. —, 134 S.Ct. 1986, 2001, 188 L.Ed.2d 1007 (2014), which clarified that the standard error of measurement must be considered in determining whether an individual has met the “significantly subaverage general intellectual functioning” prong of the determination. Because the postconviction court concluded that Williams failed to meet all three prongs of the intellectual disability standard, and we conclude that competent, substantial evidence supports the court's conclusion that Williams failed to establish the second prong of the standard, Hall does not alter the outcome of this case. To remand this claim for reconsideration in light of Hall would not change the fact that Williams failed to establish the second and third prongs of the intellectual disability standard and is therefore not entitled to relief. Further, it would disregard the significant effort by the postconviction court in evaluating and weighing the extensive evidence presented with regard to this claim.

B

IN THE CIRCUIT COURT OF THE SEVENTEENTH JUDICIAL CIRCUIT
IN AND FOR BROWARD COUNTY, FLORIDA

STATE OF FLORIDA,

Plaintiff,

v.

RONNIE K. WILLIAMS,

Defendant.

CASE NO.: 93-003005CF10A

JUDGE: EILEEN M. O'CONNOR

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FELONY

**ORDER DENYING DEFENDANT'S MOTION TO VACATE JUDGMENT OF
CONVICTION AND SENTENCE WITH SPECIAL REQUEST FOR LEAVE TO AMEND**

THIS CAUSE came before this Court upon Defendant's Motion to Vacate Judgment of Conviction and Sentence with Special Request for Leave to Amend, brought pursuant to Florida Rule of Criminal Procedure 3.851 and filed March 12, 2009. Having considered Defendant's instant motion, Defendant's first amendment to the motion (filed April 8, 2011), Defendant's second amendment to the motion (filed February 6, 2012), the State's response to Defendant's motion and amendments, the testimony adduced at the evidentiary hearing held September 18, 2012 through September 25, 2012, the post-hearing memoranda and oral argument of the parties, and the applicable law, and being otherwise fully advised in the premises, this Court finds as follows:

I. PROCEDURAL HISTORY

On March 4, 1993, Defendant was indicted for the first-degree murder of Lisa Dyke. He was found guilty by a jury and sentenced to death. His first conviction and sentence were reversed and the case was remanded for a new trial. Williams v. State, 792 So. 2d 1207 (Fla. 2001). Retrial began November 3, 2003, but it ended in a mistrial on December 3, 2003. (ROA Supp. Vol. 19 at 1909). The third trial in Defendant's case began on January 27, 2004. Defendant was found guilty by a jury of both premeditated

murder and felony murder. (ROA Vol. 19 at 1532-34). The penalty phase was held March 1, 2004, and the jury recommended death by a vote of ten to two. (ROA Vol. 20 at 1717-19). The Spencer¹ hearing was held on April 8, 2004. On April 16, 2004, the court conducted the sentencing hearing. The court found four statutory aggravators: (1) Defendant had previously been convicted of another capital felony, or a felony involving threats of violence (Defendant was convicted of indecent assault against a nine year old child in case number 92-006172CF10A and of the second degree murder of Gaynel Jeffrey in case number 84-010364CF10A); (2) the murder was committed while Defendant was engaged in the commission of, or an attempt to commit, or in flight after committing or attempting to commit sexual battery; (3) the murder was committed in an especially heinous, atrocious, and cruel manner; and (4) the murder was cold, calculated and premeditated. (ROA Vol. 22 at 1735-47). The court found that all the aggravators were proven beyond a reasonable doubt. (ROA Vol. 22 at 1734-35). The court accorded the first, second, and third aggravators great weight. (ROA Vol. 22 at 1736; 1737; 1752). The court accorded the fourth aggravator moderate weight, explaining that the imposition of the sentence was not contingent on the finding of the statutory aggravating factor of cold, calculated, and premeditated. (ROA Vol. 22 at 1747).

The court found the following two statutory mitigators to which it accorded little weight: (1) the murder was committed while Defendant was under the influence of extreme mental or emotional disturbance, and (2) Defendant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired. (ROA Vol. 22 at 1747-49). The court further found the following

¹ Spencer v. State, 615 So. 2d 688 (Fla. 1993).

five non-statutory mitigators to which it assigned slight weight: (1) Defendant was a model prisoner while housed in the Broward County Jail; (2) Defendant attended religious services while housed in the Broward County Jail; (3) Defendant had a deprived childhood; (4) Defendant was a loving person, who never fought with his relatives, and was a good brother to his sister; (5) Defendant was slight in stature, and was frequently beaten up and robbed of his bus money on his way to school. (ROA Vol. 22 at 1750-51). After carefully considering and weighing all the aggravators and mitigators, the court found that the aggravating factors were not outweighed by the statutory and non-statutory mitigators. (ROA Vol. 1752). Therefore, the court followed the jury's recommendation and sentenced Defendant to death. (ROA Vol. 22 at 1752).

Defendant appealed his conviction and death sentence, raising twenty-two issues.² The Supreme Court of Florida concluded that the trial court's finding of the cold,

² Defendant raised the following claims on his direct appeal: (1) the trial court erred in admitting into evidence the victim's out-of-court statements; (2) the trial court's departure from neutrality deprived Defendant of his due process rights and a fair trial; (3) the trial court erred in allowing the jury to use during deliberations a transcript of the 911 tape created by the State, which had not been introduced into evidence; (4) the trial court erred in allowing evidence that the victim was pregnant; (5) it was fundamental error to submit a felony murder case to the jury where the undisputed evidence refuted the fact that the death occurred during the commission of a felony; (6) the trial court erred in instructing the jury on felony murder with sexual battery as the underlying felony and on the aggravating circumstance that the offense occurred during a sexual battery since there was insufficient evidence of sexual battery; (7) the trial court erred in admitting into evidence the conclusion that the victim had been raped; (8) the trial court erred in denying Defendant's motion for judgment of acquittal since the State had failed to prove premeditation; (9) fundamental error was committed by constructively amending the indictment contrary to the grand jury clauses of the Florida and the United States Constitutions; (10) trial court erred in allowing the prosecution to proceed based on the felony murder theory where there was no notice in the indictment of that theory; (11) the trial court committed reversible error by failing to instruct the jury on the presumption of innocence as to felony murder; (12) the trial court erred in failing to instruct the jury that it must reach a unanimous verdict of either premeditated or felony murder in order to convict of first degree murder; (13) Defendant was denied his right to a reliable capital sentencing and due process because the jury was not instructed that they must find beyond a reasonable doubt that the aggravating circumstances outweigh the mitigating circumstances; (14) the jury instruction requiring the jury to determine whether sufficient mitigating circumstances exist that outweigh the aggravating circumstances placed a higher burden of persuasion on Defendant and violated the Eighth Amendment to the United States Constitution, fundamental fairness, and due process; (15) the trial court erred in

calculated, and premeditated aggravator was not supported by competent substantial evidence. However, the Court denied relief because it found the error harmless and affirmed Defendant's conviction and death sentence. Williams v. State, 967 So. 2d 735 (Fla. 2007). On March 24, 2008, the United States Supreme Court denied Defendant's petition for certiorari. Williams v. Florida, 128 S.Ct. 1709 (2008).

On March 12, 2009, Defendant filed his initial Motion to Vacate Judgment of Convictions and Sentences with Special Request for Leave to Amend, raising fourteen (14) claims for relief. On June 19, 2009, the State filed its response to Defendant's motion. On April 8, 2011, Defendant filed his first amendment to the motion, amending claims I, III, V, VII, and XIV, and adding claim XV. The State filed its response to the first amended motion on July 19, 2011. On February 21, 2012, Defendant filed a second amendment to his initial motion, amending claims I and XIV. On February 24, 2012, the State replied to Defendant's second amended motion. On May 18, 2012, this Court held a case management conference and thereafter issued a case management order, granting an evidentiary hearing on the part of Defendant's amended claim VII that alleges Defendant is mentally retarded and ineligible for the death penalty and that trial counsel was ineffective for failing to raise Defendant's retardation as a bar to execution, claim VIII (except ¶¶ 9-10), and claim IX. The evidentiary hearing was held September 18, 2012 through September 25, 2012. During the hearing, Defendant presented the

finding the cold, calculated, and premeditated aggravator; (16) the sentence of death must be vacated and the sentence reduced to life because the trial court failed to make the findings required for the death penalty; (17) the jury instruction requiring the jury to only consider mitigation after it is reasonably convinced of its existence was improper; (18) the trial court erred in using Defendant's conviction for indecent assault as the prior violent felony aggravating circumstance; (19) the trial court erred in finding the heinous, atrocious or cruel aggravator; (20) the death penalty is not proportionally warranted; (21) Florida's death penalty statute is unconstitutional because it makes a defendant eligible for the death penalty merely for having been convicted for violating section 782.04, Florida Statutes; (22) Florida's death penalty statute is unconstitutional.

testimony of his trial counsel: Hale Schantz and Evan Baron; mental health experts: Dr. James, Dr. Tassé, Dr. Harvey, Dr. Woods, Dr. Oakland, and Dr. Caddy; handwriting expert, Charles Haywood; family members and friends: Patricia Johnson, Michael Johnson, Anthony Bowan, and Clinita Lawrence; and other witnesses who worked on the case or knew the Defendant: Janice O'Loughlin, Lisa Wiley, Sandra Sticco, Heather Barrow, Sarah Ellersick, and Alisha Hurwood. The State's only witness was Dr. Prichard. The parties filed their post-hearing memoranda on November 26, 2012. The Court heard oral argument on December 3, 2012.

II. FACTUAL BACKGROUND

The following factual background is excerpted from the Florida Supreme Court's opinion, affirming Defendant's convictions and death sentence:

On Tuesday, January 26, 1993, at approximately 8:30 a.m., a call was made to 911 from a woman who identified herself as Lisa Dyke. Dyke stated that she had been stabbed in her heart and back, and she was more than seven months pregnant. When the operator inquired of Dyke as to who stabbed her, she responded with a name that sounded to the operator like "Rodney." Dyke then informed the operator that her attacker was a black male and, although she did not know his last name, she could provide a phone number from which that information could be obtained. Dyke provided the phone number and stated that it belonged to the girlfriend of the man who had stabbed her.

When Dyke opened her door for the police, Officer Brian Gillespie observed an eighteen-year-old black female who was nude, bloody, and wet, "as if she tried to take a shower." Dyke was holding clothing in front of herself in an attempt to cover her nudity. According to Gillespie, Dyke was upset and beginning to lose consciousness. Gillespie observed stab wounds on Dyke's upper torso and back and noticed that there was blood "pretty much everywhere." As she lay on the couch, Dyke stated repeatedly to Gillespie that she did not want to die. While the paramedics were treating Dyke, Gillespie asked who had stabbed her. Through the oxygen mask that covered Dyke's face, and over the sounds of numerous police and paramedic radios, Gillespie heard Dyke say the name "Rodney." When Gillespie asked Dyke who Rodney was, Dyke replied, "Ruth's sister's boyfriend." Dyke gave Gillespie the telephone number of "Ruth's sister." Dyke then made the unsolicited statement to Gillespie, "He raped me." Soon after, the paramedics transported Dyke to the hospital.

Hospital personnel were unable to perform a rape examination or collect evidentiary samples for analysis before Dyke was rushed into surgery.

While processing the crime scene, Detective Bob Cerat noticed that there were no signs of forced entry into the apartment. In the bedroom, Cerat discovered a knife that was stained with the same reddish substance that appeared throughout the apartment. Cerat collected the knife, as well as other items from the scene that were stained with the reddish substance. Cerat and another detective lifted or photographed latent fingerprints from the scene.

Detective Anthony Lewis determined that Ruth Lawrence rented the apartment where the stabbing had occurred. He met with Ruth, and she stated that Lisa Dyke had been babysitting Ruth's nine-month-old son in the apartment. Dyke had been living with Ruth for approximately two weeks. Dyke was connected with Ruth because Dyke was dating Ruth's brother, Julius, and Julius was the father of Dyke's unborn baby. The detective discovered that Ruth's sister was named Stefanie Lawrence, and the name of Stefanie's boyfriend was Ronnie Williams. At the time of the attack, Stefanie and Ronnie had been dating for approximately six months. Stefanie lived with her father and Julius, and her telephone number was the number that Dyke provided to police and the 911 operator to identify her attacker. Ruth testified at trial that when she left the apartment that morning to go to school, there was no blood in the apartment where Dyke was found, and Williams had never before bled in her apartment.

Subsequent investigation revealed that on the night before the crime, Ruth had participated in a three-way telephone call with Stefanie and Williams during which Ruth informed Stefanie of a disagreement between Ruth and Williams. Dyke was listening to the conversation on another extension in Ruth's apartment. During that call, Ruth prompted Stefanie to break her relationship with Williams, and Stefanie proceeded to do so during the phone conversation. Stefanie then advised Williams that he was not to return to Ruth's apartment again. According to Stefanie, Williams was upset, and he repeatedly stated that they could resolve the problem. After the call ended, Stefanie did not speak to Williams again, but he paged her four or five times that night. Stefanie did not respond to the pages, and the last page from Williams was around midnight.

Stefanie Lawrence agreed to assist the police in locating where Williams lived. Officer David Jones went to the house identified by Stefanie and encountered Williams's sister, Clinita Lawrence, who informed Officer Jones that she had transported Williams to a mental health crisis facility earlier that day when she noticed that he was acting bizarrely. Officer Jones proceeded to the crisis center and located Williams. Officer Jones observed that Williams had several fresh bandages on both of his hands.

Williams was transported to the police station, and Officer Jones advised him of his Miranda³ rights.

When Dyke regained consciousness after her surgery, she wrote a note to a nurse indicating a desire to speak to the authorities. Detective Daniel James spoke to Dyke in the intensive care unit. Dyke agreed to respond to Detective James's questions by nodding her head for "yes" and moving her head from side-to-side for "no", because she was unable to speak with the tubes which had been placed in her mouth. Detective James produced a photographic lineup of six individuals and asked Dyke if she recognized the person who attacked her. Dyke tapped on the photo of Ronnie Williams with her finger.

At the police station, Williams admitted to Officer Jones that he knew Dyke, but stated that he had not been in Ruth's apartment at the time Dyke was stabbed. With regard to the bandages on his hands, Williams stated that he had cut his fingers on a knife as he was washing dishes. He mentioned that he was having problems with his girlfriend, and that Dyke had been "kind of the go-between person." When Williams was informed that Dyke had identified him as the person who stabbed her, Williams requested an attorney, and the interview was terminated. At that time, Williams was arrested for the attack on Dyke.

On January 28, 1993, when Detective James returned to check on Dyke's condition and to photograph her wounds, he realized that some of the wounds appeared to be bite marks. James photographed bite marks on Dyke's chest, arm, breast, and the back of her shoulder. Dyke also indicated a bite mark in her groin area, but James was unable to photograph that area because Dyke was again taken into surgery to deliver her baby by cesarean section. Dyke died on February 14, 1993, nineteen days after the stabbing.

At trial, forensic pathologist Ronald Wright noted that Dyke had sustained six stab wounds in her back, some of which penetrated her lungs, which caused bleeding into the chest cavity and collapse of the lungs. Further, one stab wound had penetrated Dyke's sternum and was at least four inches deep. Wright opined that the original stab wound would have been deeper, but it was impossible to determine the exact depth because Dyke's wounds had been healing for nineteen days before her death. The doctor noted that Dyke had defensive wounds on her hands and bite marks on her body. Dr. Wright ultimately concluded that the cause of Dyke's death was multiple stab wounds which, over a period of nineteen days, produced a fatally high level of toxicity in Dyke's body. Dr. Wright further reviewed the photos of the cuts on Williams's hands, and concluded that the cuts were consistent with slippage--a phenomenon that occurs when a person hits a hard surface (such as a sternum) with a

³ Miranda v. Arizona, 384 U.S. 436 (1966).

hiltless knife (such as that which was recovered from the apartment), and the hand slides down the knife, producing a cut on the hand of the person holding it.

Fingerprint analyst Fred Boyd testified that a fingerprint found in a reddish substance that was located on the bathroom door of Ruth's apartment matched the known print of Williams's left ring finger. DNA testing on blood samples taken from two pieces of clothing collected from the apartment generated DNA profiles that matched the profile of Williams at four genetic locations. According to a DNA analysis expert, the frequency of occurrence of finding the same profile in two unrelated individuals who matched at four of these points would be one in 120 million African-Americans. Finally, forensic dentist Richard Souviron compared the photographs of the bite mark on Dyke's breast with dental casts made from the mouth of Williams and concluded with reasonable certainty that the bite on Dyke's breast was made by Williams.

At trial, Williams testified that on the night before the stabbing he was upset that Stefanie had severed their relationship. This caused him to begin using drugs, specifically, crack cocaine, powder cocaine, and marijuana. He also consumed a fifth of rum that night. When he started to feel unwell, he went home and lay in bed. The next morning, Williams awoke around 7 a.m. and proceeded to consume a half of a fifth of vodka and use more crack cocaine, powder cocaine, and marijuana in his backyard. Williams testified that between the night prior to the stabbing and the morning of the stabbing, he consumed approximately fifteen rocks of crack cocaine. The last thing he remembered was walking back into his house, and then he awakened in the mental health facility. Williams remembered being brought to the police station and being questioned; however, he had no recollection of the questions asked because he was not feeling well.

Williams's sister, Clinita Lawrence, testified that on the morning of the stabbing, Williams appeared as if he was hallucinating. He was talking nonsensically and had trouble controlling his limbs. Before she went to work, Clinita took Williams to the mental health facility so that he would not hurt himself. Clinita stated that while she was driving to the facility, Williams attempted to exit the car. Clinita testified that upon arrival at the mental facility, Williams attempted to break out of the facility, and he was eventually placed in a straitjacket.

In rebuttal, the State presented the testimony of Michael Elwell, who was director of mental health services in Broward County during 1993. Elwell testified that the mental health facility to which Williams was brought never used straitjackets or anything that resembled a straitjacket. Elwell also stated that, had an individual arrived at the facility hallucinating, incapable of controlling his limbs, and attempting to break out of the facility, the guidelines in place at that time would have required that the individual be

medically cleared at a local emergency room prior to admission to the facility.

Williams, 967 So. 2d at 741-44.

III. LEGAL ANALYSIS AND CONCLUSION

Second Amended Claim I

In his second amended claim I, Defendant argues that section 119.19, Florida Statutes⁴ and Florida Rule of Criminal Procedure 3.852 are unconstitutional facially and as applied to him. He claims that both provisions impermissibly restrict his access to public records by requiring him to: (a) make his own search for records; (b) show that his requests are relevant to his postconviction proceedings; and (c) show that his requests are not overly broad and unduly burdensome.

Contrary to Defendant's argument, Section 27.7081, Florida Statutes and Florida Rule of Criminal Procedure 3.852 are not unconstitutional facially and do not deprive Defendant of his due process rights. See Wyatt v. State, 71 So. 3d 86, 110-11 (Fla. 2011) (rejecting the argument that Florida Rule of Criminal Procedure 3.852 and section 27.7081, Florida Statutes unconstitutionally restrict a capital defendant's right to public records access under the Florida and the United States Constitutions because they impermissibly mandate that the demand for public records not be "overly broad or unduly burdensome"). Both provisions regulate production of public records in capital postconviction cases. They require that upon issuance of the mandate by the Supreme Court of Florida, affirming a defendant's death sentence, records pertaining to that defendant's case be submitted to the Records Repository. Wyatt, 71 So. 3d at 111. The

⁴ Effective October 1, 2005, section 119.19 was renumbered as section 27.7081, Florida Statutes. Therefore, this Court will refer to section 119.19 under its new number throughout this order.

Supreme Court of Florida upheld as reasonable the requirement that a capital defendant make timely requests for additional public records, after a diligent search through the records already produced, and that he avoid making overly broad or unduly burdensome requests. See, e.g., Allen v. Butterworth, 756 So. 2d 52, 66 (Fla. 2000) (stating that "the Legislature has the authority to define the substantive right to public records" and "to place reasonable restrictions' on the right of public records access" (quoting Henderson v. State, 745 So. 2d 319, 326 (Fla. 1999)) and Wyatt, 71 So. 3d at 111 (concluding that the requirement that a capital "defendant make a diligent search through records already produced and narrow his or her request to provide adequate notice to the agency from which he or she seeks information is reasonable").

As to Defendant's argument that section 27.7081, Florida Statutes is unconstitutional as applied to him, he has not alleged any particular records that were sought but denied by this Court under that provision. Therefore, this Court finds Defendant's as-applied constitutional challenge to section 27.7081 without merit. See Wyatt, 71 So. 3d at 111 (rejecting defendant's argument that section 27.7081 and rule 3.852 were unconstitutional as applied to him, because he failed to "allege any particular records that were sought but denied under either provision").

With regard to Defendant's as-applied challenge to rule 3.852, he raises several issues and objections to this Court's denial of his public record requests. First, to the extent Defendant challenges the State's failure to timely notify the law enforcement agencies of their duty to submit their records to the records repository, this Court finds this contention without merit. This Court granted collateral counsel's request for extension of time to review the records and prepare supplemental demands for additional records. Defendant twice was able to amend the initial postconviction motion.

Second, Defendant objects to this Court's orders denying him access to records from the State Attorney's Office, issued September 21, 2009; January 15, 2010; January 19, 2010; February 24, 2010; and February 23, 2012. However, Defendant has not shown any basis to revisit the Court's rulings on those requests or any abuse of this Court's discretion in denying those requests. Therefore, this Court stands by its rulings.

Third, Defendant takes issue with this Court's denial of his additional requests for public records regarding the lethal injection protocol. Defendant argues that those records are relevant to his pending claim regarding the constitutionality of Florida's lethal injection protocol. This Court denied Defendant's demands finding that they were not "reasonably calculated to lead to the discovery of admissible evidence" that Florida's execution by lethal injection is unconstitutional, especially in light of Lightbourne v. McCollum, 969 So. 2d 326, 335 (Fla. 2007) and Valle v. State, 70 So. 3d 530 (Fla. 2011), which upheld the constitutionality of the lethal injection as currently administered in Florida. Defendant has not shown any abuse of discretion or any reason to revisit this Court's rulings.

Fourth, Defendant argues that the Florida Department of Corrections (the DOC) failed to comply with some of his public records requests. However, as of the date of this order, Defendant is in receipt of all the records that were ordered to be disclosed to Defendant by the DOC. Defendant takes issue with the DOC's failure to produce the records of Defendant's prior incarceration, because they were destroyed in accordance with the DOC's retention policy. Defendant argues that the DOC's failure to maintain and produce those records has hampered the presentation of his case in mitigation of the death sentence. This Court ruled on that issue and found that the DOC did not intentionally withhold Defendant's records of his prior incarceration and that the

retention policy was reasonable. Defendant has not provided any reason for this Court to revisit its prior ruling and has not shown any abuse of this Court's discretion. Therefore, this Court will not disturb its prior ruling.

For the reasons set forth above, Defendant's instant claim is summarily denied.

Claim II

In claim II, Defendant argues that the one year time limit set forth in Florida Rule of Criminal Procedure 3.851 for filing a postconviction motion violates his rights to due process and equal protection under Article I, Section 2 of the Florida Constitution, and the Fourteenth Amendment to the United States Constitution. In support of this claim, Defendant alleges that the rule singles out defendants sentenced to death and without any legitimate reasons treats them differently from other criminal defendants. He further argues that as applied, the rule deprives him of his right to access the courts.

Such claims repeatedly have been addressed and rejected by the Supreme Court of Florida and, therefore, Defendant is not entitled to any relief. See, e.g., Vining v. State, 827 So. 2d 201, 215 (Fla. 2002) (citing Arbelaez v. State, 775 So. 2d 909, 919 (Fla. 2000) and Koon v. Dugger, 619 So. 2d 246, 251 (Fla. 1993)) (noting that constitutional challenges to the one-year time limit imposed by rule 3.851 repeatedly have been considered and rejected by the Supreme Court of Florida); Gonzales v. State, 990 So. 2d 1017, 1034 (Fla. 2008) (reiterating that the rule as amended does not violate a defendant's due process or equal protection rights); and Douglas v. State, Case Nos. SC10-318, SC10-1725, 2012 WL16745 (Fla. Jan. 5, 2013) (rejecting the defendant's claim that "the one-year filing requirement for postconviction relief in capital cases is unconstitutional because it violates his rights of due process, equal protection, effective assistance of postconviction counsel, access to courts, and to petition for a writ

of habeas corpus"). For the reasons set forth above, Defendant's instant claim is summarily denied.

Amended Claim III

In amended claim III, Defendant alleges that the court and the State failed to ensure that Defendant received effective assistance of counsel during his first trial. Defendant argues that although the Supreme Court of Florida granted a new trial, he was prejudiced in his 2004 retrial due to the passage of more than ten years between the date of the indictment and his third trial. The alleged prejudice is that records were destroyed, witnesses died, and memories faded. In support of this claim, Defendant alleges that Bruce Raticoff, his counsel during the first trial, had requested numerous continuances to prepare for trial and had "mental health" issues preventing him from providing effective assistance. Notwithstanding the number of continuances granted, Mr. Raticoff allegedly failed to obtain important records which were later lost. Defendant claims that he was prejudiced by Mr. Raticoff's failure to obtain records to the extent that nobody will ever know how many records could not be located by his trial counsel for his 2004 retrial. Defendant further alleges that Dorothea Simmons, a major witness for the penalty phase, who had information regarding Defendant's drug use prior to the homicide, was deceased by the time of Defendant's 2004 retrial.

He analogizes the prejudicial effect of the delay to a due process violation based on preindictment delay and claims that he is entitled to have his conviction and sentence vacated without the possibility of retrial. Defendant has not cited any cases in support of his argument that the delay between his indictment and his third trial is equivalent to preindictment delay. However, even assuming that the case law on a defendant's right to a speedy trial process provides an appropriate framework for

analyzing the instant claim, this Court finds that Defendant has failed to show that he is entitled to relief.

The United States Supreme Court in Barker v. Wingo, 407 U.S. 514 (1972) explained that when evaluating a claim of speedy trial violation, a court must assess the following four factors: (1) the length of the delay; (2) the reason for delay; (3) the defendant's assertion of his right; and (3) the prejudice to the defendant. Id. at 530.

Although the Defendant in this case alleges a delay of more than ten years, he only addresses the delay between 1993, when he was indicted, and 1996, when his first trial took place. He blames that delay on Mr. Raticoff's unpreparedness and personal problems. A review of the docket shows that Defendant had indeed asked for numerous continuances during that timeframe, while the State only asked for two. Thus, the delay between Defendant's indictment and his first trial cannot be attributed to the State.

In addition, this Court does not consider the period of time when Defendant's case was on direct appeal as counting toward the alleged ten year delay. Where Defendant has successfully availed himself of the appellate process, obtaining a reversal of his 1996 conviction and sentence, he would bear a heavy burden of showing unreasonable delay, because

"[i]t has long been the rule that when a defendant obtains a reversal of a prior, unsatisfied conviction, he may be retried in the normal course of events... [This rule] has been thought wise because it protects the societal interest in trying people accused of crime, rather than granting them immunization because of legal error at a previous trial, and because it enhances the probability that appellate courts will be vigilant to strike down previous convictions that are tainted with reversible error.... These policies, so carefully preserved in this Court's interpretation given the Double Jeopardy Clause, would be seriously undercut by [an] interpretation given the Speedy Trial Clause [that raised a Sixth Amendment obstacle to retrial following successful attack on conviction]."

United States v. Ewell, 383 U.S. 116, 121 (1966) (emphasis added); see also United States v. Loud Hawk, 474 U.S. 302, 316 (1986).

The docket reflects that after the case was remanded for a new trial, Defendant requested numerous continuances, and there were two joint continuances granted. Thus, any delay between the time the mandate issued on September 24, 2001 and Defendant's 2004 retrial cannot be attributed to the State. Furthermore, the docket indicates that Defendant did not file a demand for speedy trial in this case.

The prejudice asserted by Defendant is merely speculative since he has not identified with specificity the medical, school, and correctional records that allegedly could not be located by his trial counsel prior to Defendant's 2004 retrial. Nor has he identified the information contained in those records. Furthermore, he has not provided any explanation regarding how the information contained in the missing records could have benefitted Defendant's case. Defendant failed to allege that those records existed at the time of his first trial. See Freeman v. State, 761 So. 2d 1055, 1061 (Fla. 2000) ("defendant bears the burden of establishing a prima facie case based upon a legally valid claim. Mere conclusory allegations are not sufficient to meet this burden").

Although Defendant identified one witness who passed away before his 2004 retrial, he did not offer any explanation as to how the testimony of that witness would have been favorable and material. See, e.g., Barber v. State, 438 So. 2d 976, 978 n.1 (Fla. 3d DCA 1983) (stating that in order to "show a due process violation with respect to missing witnesses, an accused must offer some explanation as to how their testimony would have been favorable and material... [i]t is insufficient to merely generally allege loss of witnesses and failure of memories") and State v. Hills, 467 So. 2d 845, 848 (Fla. 4th DCA 1985) ("when an accused asserts a due process violation

based on preindictment delay, he must prove actual prejudice to himself (...) general allegations that the evidence has been lost are insufficient"). Moreover, the trial transcript reflects that the testimony of Dorothea Simmons, the witness who passed away, was read into the record during Defendant's penalty phase. (ROA Vol. 20 at 1608-11).

After weighing and balancing the four Barker factors, this Court finds that Defendant failed to show any due process violation and is not entitled to relief on this claim.

Defendant's claim that the trial court and the prosecutor violated his due process rights by failing to ensure that Mr. Raticoff rendered effective assistance of counsel is procedurally barred. In support of this claim, Defendant refers to instances when the trial court granted defense counsel's motions for continuance and when Mr. Raticoff's "mental health" issues were brought to the attention of the trial court. The trial court's resolution of those issues could have and should have been raised on direct appeal and therefore this claim is procedurally barred. See Robinson v. State, 913 So. 2d 514, 524 n.9 (Fla. 2005) (stating that a claim of trial court error is procedurally barred on postconviction because it should have been raised on direct appeal). In addition, any challenge to the trial court's and prosecutor's actions stemming from Mr. Raticoff's alleged ineffectiveness, and the underlying ineffective assistance of counsel claim itself are moot because Defendant has already received the very benefit he would have been entitled to had he prevailed on an ineffective assistance of counsel claim against Mr. Raticoff, that is, a new trial with different counsel.

Finally, Defendant alleges that his counsel at the third trial, Hale Schantz and Evan Baron, provided ineffective assistance. This claim is insufficiently pled. Defendant

merely asserts that to the extent Mr. Schantz and Mr. Baron failed to preserve the due process argument for appellate review they were ineffective. Such claims were previously found legally insufficient and their summary denial was upheld on appeal. See Foster v. State, 810 So. 2d 910, 915 (Fla. 2002) (noting that the defendant devoted only one sentence to his ineffective assistance of counsel claim, stating: "To the extent trial counsel failed to discover and litigate this issue, Defendant was denied effective assistance of counsel"; and finding that the postconviction court properly denied the claim without an evidentiary hearing, because the defendant failed to allege specific facts that would demonstrate a deficiency on the part of counsel which resulted in prejudice to the defendant).

For the reasons set forth above, Defendant's amended claim III is hereby summarily denied.

Claim IV

In the instant claim, Defendant challenges the constitutionality of rule 4-3.5(d)(4) of the Rules Regulating the Florida Bar, alleging that it burdens the exercise of his fundamental constitutional rights under the First, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. Rule 4-3.5(d)(4) provides in relevant part that "after dismissal of the jury in a case with which the lawyer is connected," the lawyer may not "initiate communication with or cause another to initiate communication with any juror regarding the trial except to determine whether the verdict may be subject to legal challenge." The rule further prohibits a lawyer from interviewing jurors for purposes of determining whether the verdict may be subject to legal challenge, "unless the lawyer has reason to believe that grounds for such challenge may exist." R. Regulating Fla. Bar 4-3.5(d)(4).

Defendant's constitutional challenge to rule 4-3.5(d)(4) fails for three reasons. First, "this claim is procedurally barred because it should have been raised on direct appeal." Troy v. State, 57 So. 3d 828, 841 (Fla. 2011) (citing Reese v. State, 14 So. 3d 913, 919) (Fla. 2009)); see also Israel v. State, 985 So. 2d 510, 522 (Fla. 2008) (finding that the defendant's constitutional challenge to rule 4-3.5(d)(4) was procedurally barred in the postconviction proceeding, because it could have and should have been raised on appeal).

Second, this claim has been repeatedly analyzed and rejected by the Supreme Court of Florida. Troy, 57 So. 3d at 841; see also Barnhill v. State, 971 So. 2d 106, 117 (Fla. 2007) (finding that rule 4-3.5(d)(4) does not violate a defendant's constitutional rights).

Third, although Defendant filed a motion to interview jurors and claimed juror misconduct, he failed to show that the alleged juror misconduct would call into question the verdict. When considering claims of juror misconduct a court must determine first "whether the facts alleged are matters that inhere in the verdict and are subjective in nature, or are extrinsic to the verdict and objective." Marshall v. State, 854 So. 2d 1235, 1240 (Fla. 2003). A juror may not testify about matters that inhere in the verdict, "such as jurors' emotions, mental processes, or mistaken beliefs." Boyd v. State, 910 So. 2d 167, 178 (Fla. 2005) (citing Baptist Hosp. of Miami, Inc. v. Maler, 579 So. 2d 97, 99 (Fla. 1991)). Only if the court determines that the misconduct does not inhere in the verdict, may it make a judicial inquiry. Boyd, 910 So. 2d at 178 (citing Marshall, 854 So. 2d at 1244). The policy behind this rule is to prevent extending the litigation needlessly by questioning the motives of jurors, and to prevent litigants and the public from invading the privacy of the jury room. Baptist Hosp. of Miami, Inc., 579 So. 2d at 99.

In this case, the alleged misconduct is that the jurors improperly considered Defendant's lack of remorse and future dangerousness when recommending the death penalty. In support of this allegation, Defendant relies on two articles published on March 2, 2004, in the Miami Herald and the Fort Lauderdale Sun Sentinel, which presented statements made by two jurors after the verdict was rendered in Defendant's case. Juror Lorraine Johnson was quoted as saying that Defendant's demeanor in court, showing no remorse, was a big issue. The foreperson, Katina Davis, was quoted as making comments regarding Defendant's future dangerousness. However, these comments concern matters that inhere in the verdict because they express some of the jurors' thought processes, impressions, reasoning, and rationale for their verdict. Jones, 928 So. 2d at 1192. The fact that the thoughts and beliefs of the two jurors "were incorrect or reflect a misunderstanding or misapplication of the facts or the law" is irrelevant because "[s]uch mistakes are beyond inquiry." Id.

Defendant further argues that his trial counsel was ineffective for failing to move for a change of venue. In support of this claim he refers to an article that was published on March 1, 2004, the day when the penalty phase was held. Defendant argues that the article was emotionally charged, containing graphic details regarding his prior conviction for second degree murder, and it referenced the victim's surviving child. He also points out that although trial counsel intended to question the jurors about the article after the lunch break, the record reflects that there was no inquiry. Defendant argues that had trial counsel moved for a change of venue he could have met the standard of showing that the setting of the trial was inherently prejudicial.

This ineffective assistance of counsel claim is legally insufficient. Defendant merely alleges in a conclusory fashion that his trial and sentencing proceeding were

fundamentally and irreparably tainted by pervasive pretrial media coverage. However, he does not allege that the news coverage reached the jury and that there is a probability that the news coverage affected the outcome of his trial. Therefore, he is not entitled to relief. See Freeman, 761 So. 2d at 1061 ("defendant bears the burden of establishing a prima facie case based upon an legally valid claim" and "mere conclusory allegations are not sufficient to meet this burden").

In addition, this claim is also without merit. The Supreme Court of Florida adopted the following test for determining whether a change of venue is necessary:

Knowledge of the incident because of its notoriety is not, in and of itself, grounds for a change of venue. The test for determining a change of venue is whether the general state of mind of the inhabitants of a community is so infected by knowledge of the incident and accompanying prejudice, bias, and preconceived opinions that jurors could not possibly put these matters out of their minds and try the case solely upon the evidence presented in the courtroom.

McCaskill v. State, 344 So. 2d 1276, 1278 (Fla. 1977).

In this case, the trial court and the parties did not encounter any difficulty in empaneling an impartial jury from two venire panels. The record reflects that the defense was concerned about an article published in the Sun Sentinel on January 26, 2004, containing information about Defendant's case that was inadmissible at trial. (ROA Vol. 7 at 2-11). Upon defense counsel's request, the jury selection process was postponed for a day so that the venire panel would not be inadvertently exposed to the newspaper article. The record further shows that the prospective jurors were questioned extensively about their exposure to pretrial publicity regarding the case. None of the potential jurors in the first panel ("panel A") were exposed to any form of pretrial publicity. (ROA Vol. 9 at 187; Vol. 10 at 264-68; 335-39). Two of the potential jurors in the second panel ("panel B"), Greta Jackson and Janice Dougherty, had read about the

case, and thus, they were excused for cause. (ROA Vol. 11 at 458-63; 472-74). Arthur Perlin, one of the alternates who had worked for the Sun Sentinel prior to June 2004, used to read the paper when he was in the press room but had no recollection of reading anything regarding the instant case. (ROA Vol. 11 at 464-67). Moreover, he did not participate in deliberations.

Thus, the transcript of the voir dire proceedings shows that most of the venire had never been exposed to any information about the case. Under these circumstances it cannot be said that the members of Defendant's venire were so infected by knowledge of the case and accompanying prejudice as to require a change of venue. See, e.g., Serrano v. State, 64 So. 3d 93, 112 (Fla. 2011) (finding that where the voir dire proceedings indicated that a large number of the venire had never heard any details of the case, a number of the potential jurors who were familiar with the case were struck for cause, others who had heard something about the case could be fair and impartial, it could not be said that the venire members possessed "such prejudice or extensive knowledge of the case as to require a change of venue" (quoting Henyard v. State, 689 So. 2d 239, 246 (Fla. 1996))). Therefore, counsel cannot be deemed ineffective for failing to request a change of venue when there were no grounds for such a request. See Schoenwetter v. State, 46 So. 3d 535, 546 (Fla. 2010) (stating that "counsel cannot be deemed ineffective for failing to make a meritless argument").

The fact that the judge neglected to inquire of the jurors whether they had read the newspaper article on the morning when the penalty phase began, does not provide a basis for a change of venue, especially since by then the jurors repeatedly had been instructed not to read and listen to the news. (ROA Vol. 9 at 241; Vol. 10 at 355-56; Vol. 11 at 501-02; Vol. 12 at 657-58; Vol. 13 at 812-13; Vol. 14 at 984; Vol. 15 at 1121; Vol.

16 at 1258; Vol. 17 at 1353; Vol. 18 at 1483; Vol. 19; 1536). Generally, the jury is presumed to abide by the trial court's instructions. See, e.g., Crain v. State, 894 So. 2d 59, 70 (Fla. 2004) (citing Burnette v. State, 157 So. 2d 65, 70 (Fla. 1963) for the proposition that a court must assume that a juror, if properly instructed, will comply with the obligations of the oath and render a true verdict according to the law and the evidence).

Therefore, for the reasons set forth above, Defendant's claim IV for relief is hereby summarily denied.

Amended Claim V

In amended claim V, Defendant makes various allegations of ineffective assistance of guilt phase counsel, which are either insufficiently pled, procedurally barred and/or without merit. The requirements for a successful claim of ineffective assistance of counsel were established in the two-pronged Strickland⁵ test, which requires a defendant to prove both deficient performance and prejudice. To prove deficient performance, a defendant must identify specific acts or omissions by counsel that are so serious "that counsel was not functioning as the counsel guaranteed the defendant by the Sixth Amendment." Strickland, 466 U.S. at 687. The prejudice prong requires a showing that "there is a reasonable probability that but for counsel's unprofessional errors," the outcome of the proceedings would have been different. Id. at 694. Unless a defendant proves both prongs, "it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable." Id. at 687.

⁵ Strickland v. Washington, 466 U.S. 668 (1984).

In assessing an attorney's performance, a court must be highly deferential and make every effort "to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." Id. at 689; see also Cherry v. State, 659 So. 2d 1069, 1073 (Fla. 1995) (explaining that the standard for assessing trial counsel's performance "is not how present counsel would have proceeded, in hindsight"). Due to the difficulties inherent in evaluating counsel's performance, "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance," which means that the defendant has to overcome the presumption that the challenged action was sound trial strategy. Strickland, 466 U.S. at 689. With these principles in mind, this Court will assess the merits of Defendant's claims of ineffective assistance of guilt phase counsel.

(A) First, Defendant claims that his guilt phase counsel was ineffective because he failed to fully explore on cross-examination the victim's activities on the day of the attack. This claim is insufficiently pled because it does not identify whose cross-examination Defendant is referring to. The context seems to suggest that Defendant is referring to the cross-examination of Stephanie Lawrence. The Defendant claims she testified that the victim called Julius Lawrence (Stephanie's brother and the victim's boyfriend) on the morning of the stabbing to tell him that she had been attacked. Defendant alleges that Julius did not call the police or go to the apartment to check on the victim, although he does not explain how that is relevant to his case.

The flaw in this argument is that it relies on the transcript of Defendant's 2003 mistrial to claim ineffective assistance in the 2004 retrial. In addition, Defendant misapprehends the testimony presented during the 2003 mistrial. The transcript of the

mistrial reflects that the jury did not learn from Stephanie's testimony that the victim told Julius she had been attacked, because the prosecutor withdrew the question after an objection from defense counsel. (ROA Supp. Vol. 12 at 1417-19). The transcript of the 2004 retrial shows that the direct examination of Stephanie Lawrence did not include any such testimony, therefore guilt phase counsel cannot be deemed ineffective for not eliciting on cross-examination information regarding the victim's contact with Julius after the attack. (ROA Vol 14 at 876-85); see Steinhorst v. State, 412 So. 2d 332, 337 (Fla. 1982) (holding that "questions on cross-examination must either relate to credibility or be germane to matters brought out on direct examination" and explaining that a "defendant may not use cross-examination as a vehicle for presenting defensive evidence"). Finally, Defendant did not allege any prejudice. Therefore, he failed to meet both prongs of the Strickland test.

(B) Defendant next argues that trial counsel was ineffective for failing to fully investigate the witnesses who were interviewed by the police, specifically, Julius Lawrence. He claims that trial counsel would have discovered a domestic battery charge against Julius, which allegedly was the reason why the victim lived with Ruth Lawrence. Defendant implies that this information would have pointed to Julius as a suspect. As correctly argued by the State, this is a conclusory claim. Defendant did not allege that Julius was involved in the attack leading to the victim's death. The testimony presented at trial established that the victim lived with Ruth Lawrence and that she would babysit Ruth's nine-month-old son. (ROA Vol. 14 at 824-26).

Furthermore, Defendant did not plead and could not prove any prejudice resulting from trial counsel's alleged failure to discover the domestic battery charge against Julius. The State presented at trial overwhelming evidence of guilt; the victim

died as a result of multiple stab wounds inflicted by Defendant. (ROA Vol. 16 at 1172-74). The victim identified Defendant as her attacker to the 911 operator, to law enforcement interviewing her, and identified his photograph in a photo lineup. (ROA Vol. 13 at 720-23; 871-75; 910; 917-20). Defendant's blood and his fingerprint in blood were found in the apartment where the victim was stabbed. (ROA Vol. 14 at 830-33; Vol. 15 at 1033-34; 1100; 1103; Vol. 16 at 1207-08). Defendant had never before bled in that apartment. (ROA Vol. IV at 827-28). The victim's wounds were consistent with the knife retrieved from the crime scene. The cuts Defendant had on his hands were consistent with slippage caused by a hiltless knife (like the one recovered from the crime scene) when it hits a hard surface like the sternum or the ribs. (ROA Vol. 15 at 1059-60; 1063; Vol. 16 at 1145-56; 1167-72). The bite marks on the victim's body were identified as having been made by Defendant. (ROA Vol. 16 at 1226-30; 1244-45; 1251). The night prior to the incident, the victim participated in a three-way conversation with Ruth, Stephanie and Defendant. (ROA Vol. 14 at 881-82). It was the victim who had informed Stephanie of a disagreement between Ruth and Defendant that caused Stephanie to break up with him that night. (ROA Vol. 14 at 880-84; 844-45).

Thus, Defendant could not meet either of the Strickland prongs.

(C) Defendant alleges that trial counsel should have called Stephanie and Julius Lawrence to testify at the hearing on his motion in limine as to the victim's state of mind after the attack. As correctly argued by the State, this claim is insufficiently pled because Defendant did not allege what testimony they could have provided to call into question the admissibility of the victim's statements. Furthermore, Defendant did not show how he was prejudiced by counsel's alleged failure. See Freeman, 761 So. 2d at 1061.

To the extent Defendant is attempting to relitigate the issue of the admissibility of the victim's out-of-court statements, this Court finds that he is procedurally barred from doing so, as that issue was fully considered by the trial court and reviewed on appeal. Williams, 967 So. 2d at 747-49; see also Medina v. State, 573 So. 2d 293, 295 (Fla. 1990) (holding that ineffective assistance of counsel claims "cannot be used to circumvent the rule that postconviction proceedings cannot serve as a second appeal").

(D) Defendant next argues that his guilt phase counsel was ineffective for failing to preserve for appellate review his challenge to the trial court's prematurely prepared order denying the defense motion to suppress the victim's statements. The Supreme Court of Florida addressed the underlying issue whether the trial court had departed from its position of neutrality by preparing an order denying the defense motion to suppress the victim's statements prior to listening to arguments on the motion. The Court concluded that

even if the claim were meritorious, which it is not, Williams waived his challenge to the prematurely prepared order. The trial court specifically informed the parties that, despite drafting the order earlier, he would listen to the oral presentations and, if he was persuaded he would be "more than happy" to change the order. Thus, by the judge's own words, he afforded Williams an opportunity to be heard, and the contention that he was denied such an opportunity is without merit.

Williams, 967 So. 2d 735 at 750 (emphasis added). Therefore, Defendant cannot meet the prejudice prong of the Strickland test in light of the Florida Supreme Court's determination that the underlying issue was meritless. See Teffeteller v. Dugger, 734 So. 2d 1009, 1019 (Fla. 1999) (finding that the defendant could not "satisfy the Strickland prejudice prong in light of [the Court's] determination that the merits of the issues did not even warrant discussion). Therefore, Defendant cannot meet the Strickland test. Strickland, 466 U.S. at 697.

(E) Defendant also contends that trial counsel was ineffective for failing to exclude the victim's statements to the 911 operator, and to law enforcement officers Gillespie and James. This claim is equally without merit, as all the statements were found admissible by the Supreme Court of Florida on direct appeal, as either excited utterances or as dying declarations. Williams, 967 So. 2d at 747-49. In light of this determination that the substantive issues were without merit, counsel cannot be deemed ineffective for failing to object to meritless issues. Teffeteller, 734 So. 2d at 1019.

(F) Another meritless and procedurally barred ineffective assistance of counsel claim raised by Defendant is that guilt phase counsel failed to preserve for appellate review the issue that the admission of the victim's out-of-court statements violated his Sixth Amendment right to confrontation under Crawford v. Washington, 541 U.S. 36 (2004). The Supreme Court of Florida explained that even if the Crawford issue had been preserved, Defendant would not be entitled to a new trial.⁶ Therefore, trial counsel

⁶ "In Davis v. Washington, 547 U.S. 813 (2006), the High Court held that a victim's statements in response to a 911 operator's questions were not testimonial because they were made to enable police assistance in an ongoing emergency rather than in anticipation of trial. See id. at 2276-79. Similarly, Dyke's responses to the 911 operator's questions were not testimonial because Dyke was seeking emergency medical assistance for her life-threatening injuries. Further, even if the Gillespie statements and the hospital statements were testimonial to the extent that Dyke identified Williams as her attacker, there was abundant nontestimonial evidence offered at trial identifying Williams as the assailant. Specifically, during the 911 call, Dyke informed the operator that her attacker was a black man whose name was either "Rodney" or "Ronnie." She told the operator that she had the phone number of the attacker's girlfriend, and then proceeded to give the operator Stefanie Lawrence's phone number. The bite mark on Dyke's breast was matched to the dental cast of Williams. Williams's fingerprint was found in a stain of blood that had not been in the apartment when Ruth Lawrence left that morning to attend school. Williams's blood was found in Ruth's apartment after the attack, and both Ruth and Stefanie Lawrence testified that Williams had not previously bled in the apartment. Finally, when taken into custody, Williams had fresh wounds on his hands that were consistent with slippage, and one of the stab wounds to Dyke penetrated her sternum, the second most dense bone in the body. Given this overwhelming nontestimonial evidence that the jury could have relied upon in concluding that Williams was the individual who attacked Dyke, we conclude that any possible error by the trial court in admitting these statements was harmless. See Rodgers, 948 So. 2d at 665 (holding that Crawford violation constituted harmless error where the erroneously admitted

cannot be deemed ineffective for failing to raise a claim that had no reasonable probability of affecting the outcome of the proceeding. Teffeteller, 734 So. 2d at 1023.

(G) Defendant further argues that trial counsel was ineffective for not requesting an expert in eyewitness identification to show that eyewitness identifications, especially those obtained under violent circumstances are utterly unreliable. This argument lacks merit. As the Supreme Court of Florida explained, "[e]xpert testimony should be excluded when the facts testified to are of such nature as not to require any special knowledge or experience in order for the jury to form its conclusions." Johnson v. State, 438 So. 2d 774, 777 (Fla. 1983). In this case, the victim knew the Defendant and they used to socialize together. (ROA Vol. 14 at 879). Defendant did not allege any motive for the victim to falsely identify him that could undermine the reliability of the identification. See Pierre v. State, 990 So. 2d 565, 571 (Fla. 3d DCA 2008). No specialized knowledge was required in this case to aid the jury in forming its conclusion.

Furthermore, Defendant did not allege that the expert could have provided testimony regarding the reliability of the victim's identification as opposed to merely general comments about how violent events could affect the reliability of eyewitness identifications in general. See Lewis v. State, 572 So. 2d 908, 911 (Fla. 1990) (finding no abuse of discretion in trial court's exclusion of expert "opinion regarding the eyewitness-identification process, the effects of drugs on memory, and the unwarranted reliance of jurors on eyewitness testimony" where the expert admitted that he could not offer an opinion about the reliability of any specific witness, but "only general comment about how a witness arrives at his conclusions"). Thus, Defendant cannot show any

testimonial statement was merely cumulative to and corroborative of the defendant's own admissions)." Williams, 967 So. 2d at 748 n.11.

deficient performance. Moreover, he cannot show prejudice, since as already discussed above⁷ there was overwhelming evidence of guilt in this case.

(H) Defendant contends that his counsel was ineffective for failing to challenge the admissibility of DNA, bite mark, and fingerprint evidence pursuant to Frye,⁸ and failed to adequately cross-examine the State's experts. Defendant's argument is without merit. As explained by the Supreme Court of Florida, a Frye hearing is used "in Florida only when the science at issue is new or novel." Overton v. State, 976 So. 2d 536, 550 (Fla. 2007) (quoting Branch v. State, 952 So. 2d 470, 483 (Fla. 2006)). Defendant acknowledges that RFLP DNA testing was generally accepted by the scientific community at the time of Defendant's trial. Similarly, bite mark evidence was not new or novel scientific evidence at the time of Defendant's trial, requiring a Frye hearing for purposes of establishing admissibility. See, e.g., Bundy v. State, 455 So. 2d 330 (Fla. 1984) and Mitchell v. State, 527 So. 2d 179 (Fla. 1988). Defendant further acknowledges that fingerprint analysis is routinely admitted by courts. Indeed, fingerprint comparison was deemed admissible by Florida courts long before Defendant's trial, thus no Frye hearing was required. See, e.g., Coco v. State, 62 So. 2d 892 (Fla. 1953) and Roberts v. State, 268 So. 2d 578 (Fla. 3d DCA 1972).

This Court finds that trial counsel cannot be deemed ineffective for failing to request a Frye hearing to challenge the admissibility of DNA testing, bite mark evidence, and fingerprint comparison, given that these forensic sciences were generally accepted within the scientific community at the time of Defendant's 2004 retrial. See, e.g., McDonald v. State, 952 So. 2d 484, 495-96 (Fla. 2006) (holding that counsel was

⁷ See *supra* at 24-25.

⁸ Frye v. U.S., 293 F. 1013 (D.C. Cir. 1923).

not ineffective for failing to request a Frye hearing to challenge the forensic science relied on by the State because there was general acceptance in the scientific community of that particular science at the time of defendant's 1995 trial).

In support of his argument that defense counsel should have requested a Frye hearing on the admissibility of DNA evidence, Defendant alleges that the State's population geneticist, Marty Tracey, made a fundamental error in his calculations regarding the probability that another person shared the same profile as the Defendant, which resulted in an exaggerated number. Defendant claims that expert testimony to explain Mr. Tracey's mistake would have been available at the time of his 2004 retrial. In addition, Defendant avers that during public records litigation he has discovered several documents showing that the State's analyst, Kevin Noppinger, who received and prepared the DNA samples for the RFLP testing, had some concerns regarding the procedures employed by the BSO lab and quality control. Defendant alleges that Mr. Noppinger's concerns were set forth in a memorandum presented to his superiors and they were so significant that he decided to step down from his position as the manager of the DNA/serology department. Defendant argues that this information was suppressed by the State in violation of Brady.⁹ These claims are insufficiently pled and speculative. Defendant does not plead with specificity when the memorandum was written, what information it contained and how it relates to Defendant's case. Similarly, he does not specify what error Mr. Tracey had committed and how such error impacted Defendant's case. Defendant's Brady claim is equally speculative, since there is no indication that the memorandum was in existence at Defendant's trial or that its content was material to Defendant's case.

⁹ Brady v. Maryland, 373 U.S. 83 (1963).

Even if Defendant could establish deficient performance for counsel's failure to request a Frye hearing, he could not prove prejudice under Strickland, because there is no reasonable probability that the outcome of the proceedings would have been different. In this case, even without the forensic evidence there was ample evidence to support Defendant's conviction. The victim knew the Defendant and she identified him as the attacker. There was testimony presented at trial that the Defendant, the victim, Stephanie and Ruth Lawrence had a telephone conversation the night before the stabbing of the victim, during which Stephanie broke up with Defendant. Defendant admitted that he was upset because of the break-up. In addition, Defendant had cuts to his hands consistent with "slippage" that is caused when a person hits a hard surface with a hiltless knife (like the one recovered from the crime scene), and the hand slides down the knife.

(I) Defendant next claims that his guilt phase counsel was ineffective for failing to utilize a mental health professional who could have explained that he did not have the intellectual capacity to knowingly and voluntarily waive his rights. Defendant claims that had such expert been utilized the trial court would have likely granted the defense motion to suppress the inculpatory statements made in violation of his Fifth Amendment right. Defendant alleges that Dr. Philip Harvey or any other neuropsychologist would have been available to testify at his 2004 retrial.

This claim is insufficiently pled, since Defendant does not allege what Dr. Harvey's testimony would have been. The fact that subsequent to the trial Defendant was able to secure a favorable expert does not render trial counsel ineffective. Gaskin v. State, 822 So. 2d 1243, 1250 (Fla. 2002) (finding that counsel's performance cannot be deemed deficient merely because the defendant was able to secure the testimony of

a more favorable mental health expert at the postconviction stage). Moreover, defense counsel challenged the admissibility of Defendant's statements based on his admission to a mental health clinic immediately after the murder and on his inability to understand the Miranda warnings. (Supp. ROA Vol. 1 at 160-62).

However, even if Defendant could prove deficient performance he could not establish prejudice. Assuming that Defendant's statements were suppressed, there is no reasonable probability that the outcome would have been different. The trial transcript reflects that Defendant told Officer David Jones that he knew the victim, but he had not been over at the apartment on the day of the stabbing. (ROA Vol. 15 at 1063). He admitted to having problems with his girlfriend and that the victim had previously been a mediator between them. (ROA Vol. 15 at 1063). In addition, when asked about the Band-Aids on his hands, Defendant explained that he had cut his fingers with a knife under the water, while he was doing the dishes. (ROA Vol. 15 at 1063). These statements are intended to be exculpatory and even if they had been suppressed, there was overwhelming evidence of guilt in this case.¹⁰

(J) Finally, Defendant alleges that his guilt phase counsel was ineffective for failing to hire a mental health expert to explain how Defendant's intoxication at the time of the offense affected his ability to form specific intent. In addition, he claims that trial counsel was ineffective for failing to present documents to corroborate Defendant's drug use and to prepare defense witnesses, including Defendant, for cross-examination.

This claim is insufficiently pled because Defendant did not allege that such an expert would have been available at trial and did not provide any specific information that would have been included in the expert's testimony to show that Defendant could

¹⁰ See supra at 24-25.

not form the specific intent to commit the crime. The fact that Defendant allegedly has subaverage general intellectual functioning and could not understand the complex difference between general and specific intent crimes does not mean that he could not form specific intent to commit the crime. In addition, Defendant did not specify what type of documents guilt phase counsel should have introduced into evidence to corroborate Defendant's drug use. Defendant did not plead with specificity how trial counsel should have prepared him for cross-examination. Thus, Defendant's instant allegation of ineffective assistance of counsel is merely conclusory. See Freeman, 761 So. 2d at 1061.

For the reasons set forth above, Defendant's numerous allegations of ineffective assistance of guilt phase counsel raised within this claim are hereby summarily denied as either insufficiently pled, procedurally barred, and/or without merit.

Claim VI

In the instant claim, Defendant argues that newly discovered evidence renders unreliable and invalid the forensic science used to convict him, thus violating his rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. He relies on a report published by the National Academy of Sciences ("the NAS Report") on July 30, 2009, which details problems inherent in various forensic sciences, and provides specific recommendations for improving various deficiencies within the forensic science community as a whole.

When a defendant seeks a new trial based on newly discovered evidence, he must meet the following two requirements: (1) the evidence must not have been known by the trial court, the party, or counsel at the time of trial, and the defendant or the defense counsel could not have known of it by the use of diligence; and (2) the newly

discovered evidence must be such that it would produce an acquittal on retrial. Schwab v. State, 969 So. 2d 318, 325 (Fla. 2007) (citing Jones v. State, 709 So. 2d 512, 521 (Fla. 1998)). When a defendant seeks to vacate a death sentence based on newly discovered evidence, the second prong requires that the newly discovered evidence be of such nature that it would probably lead to a less severe sentence. Id.

Defendant seeks to vacate both his conviction and death sentence. However, he cannot meet the first prong for obtaining a new trial or for vacating his death sentence based on newly discovered evidence. Generally, "new opinions" or "new research studies" are not recognized as newly discovered evidence. Schwab, 969 So. 2d at 325. In Johnston v. State, 27 So. 3d 11, 21 (Fla. 2010), the Supreme Court of Florida found that the same 2009 NAS Report relied on by Defendant in this case does not meet the test for newly discovered evidence. The Court noted that the report cites to existing publications, some of which were published even prior to November 5, 1983, when the murder in the Johnston case had occurred, and the majority of which were published while Johnston was pursuing postconviction relief. Id. at 21. The Court declined to consider the report newly discovered evidence. In addition, it found that even if the report were newly discovered evidence, it lacked "the specificity that would justify a conclusion that it provides a basis to find the forensic evidence admitted at trial to be infirm or faulty." Id. (quoting the following statement from the report: "the committee decided early in its work that it would not be feasible to develop a detailed evaluation of each discipline in terms of its scientific underpinning, level of development, and ability to provide evidence to address the major types of questions raised in criminal prosecutions and civil litigation").

In this case, Defendant cites to several sections of the NAS Report as undermining the forensic science used to convict him, including: the Summary¹¹; Section 4: The Principles of Science and Interpreting Scientific Data¹²; and Section 6: Improving Methods, Practice, and Performance in Forensic Science.¹³ These sections rely on articles published in 1988, 1990, 1993, 1996, 1997, 1999, 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007, and 2008, either before the murder in this case was committed, or while Defendant's case was at the trial stage or on appeal. A few of the articles referred to in these sections were published while Defendant's case was at the postconviction stage. Thus, this Court declines to consider the report newly discovered evidence and finds that Defendant is not entitled to relief on this claim. Johnston, 27 So. 3d at 23 (stating that "[t]he fact that existing data has now been consolidated into a report does not render the report newly discovered evidence" and finding that the postconviction court properly concluded that the 2009 NAS Report was not newly discovered evidence); see also Dennis v. State, SC09-1089, 2012 WL 6619282 (Fla. Dec. 20, 2012) (finding that the trial court properly denied relief on a claim of newly discovered evidence where the claim was premised on the 2009 NAS Report). Therefore, for the reasons set forth above, Defendant's claim VI is summarily denied.

Amended Claim VII

In amended claim VII, Defendant argues that he is ineligible to be executed

¹¹ See Nat'l Research Council, Strengthening Forensic Science in the United States: A Path Forward (2009), available at http://www.nap.edu/catalog.php?record_id=12589 (follow "Summary (1-34)" hyperlink).

¹² See Nat'l Research Council, Strengthening Forensic Science in the United States: A Path Forward (2009), available at http://www.nap.edu/catalog.php?record_id=12589 (follow "4 The Principles of Science and Interpreting Scientific Data (111-126)" hyperlink).

¹³ See Nat'l Research Council, Strengthening Forensic Science in the United States: A Path Forward (2009), available at http://www.nap.edu/catalog.php?record_id=12589 (follow "6 Improving Methods, Practice, and Performance in Forensic Science (183-192)" hyperlink).

under the Eighth Amendment to the United States Constitution and Atkins v. Virginia, 536 U.S. 304 (2002), because he is mentally retarded. He also challenges the constitutionality of section 921.137, Florida Statutes and Florida Rule of Criminal Procedure 3.203, on the basis that they: (a) impose a bright line cut-off intelligence-quotient ("IQ") score of 70 or below; (b) require that the adaptive functioning prong of the mental retardation definition be assessed based on an individual's current adaptive functioning; (c) put the burden of proof on the defendant; and (d) require a capital defendant to prove mental retardation by clear and convincing evidence, contrary to Ring v. Arizona, 536 U.S. 584 (2002). In addition, he alleges that his penalty phase counsel, Mr. Schantz, rendered ineffective assistance by failing to raise mental retardation as a bar to execution.

This Court finds without merit Defendant's constitutional challenges to section 921.137, Florida Statutes and Florida Rule of Criminal Procedure 3.203, as such challenges have been repeatedly addressed and rejected by the Supreme Court of Florida. See, e.g., Franqui v. State, 59 So. 3d 82, 92-94 (Fla. 2011) (noting that the proper interpretation of section 921.137(1) was established in Cherry v. State, 959 So. 2d 702 (Fla. 2007) and pointing to the plain language of the statute and the rule to reiterate that the cut-off IQ score under the law is 70 or below); Dufour v. State, 69 So. 3d 235, 247 (Fla. 2011) (rejecting the defendant's request to recede from the Court's previous decisions and factor in the standard error of measurement, and stating that "this Court has consistently interpreted the plain language of section 921.137(1) to require the defendant to establish that he or she has an IQ of 70 or below"); Jones v. State, 966 So. 2d 319, 325-26 (Fla. 2007) (rejecting defendant's argument that "the second prong of the mental retardation definition requires a 'retrospective' determination

of his adapting functioning before age eighteen, instead of an assessment of [the defendant's] adaptive functioning as an adult," and finding that the plain meaning of the statute requires a determination whether the intellectual functioning component exists "concurrently with" the deficient adaptive behavior); and Nixon v. State, 2 So. 3d 137, 145 (Fla. 2009) (stating that the Court has "consistently held that it is the defendant who must establish the three prongs for mental retardation" and rejecting the defendant's argument that under Ring, due process requires that a jury find beyond a reasonable doubt whether he is mentally retarded).

For the reasons set forth above, Defendant's constitutional challenges to Florida's statute and rule defining mental retardation and establishing the procedure a defendant must follow in order to prove that he or she is retarded are summarily denied.

(A) Defendant has not proven by clear and convincing evidence that he is mentally retarded and ineligible for execution.

Under Florida law, to establish mental retardation as a bar to the imposition of the death penalty, a defendant must prove each of the criteria of the following three-prong test: (1) significantly subaverage general intellectual functioning; (2) concurrent deficits in adaptive behavior; and (3) manifestation of the condition during the period from conception to age eighteen. § 921.137(1), Fla. Stat.; Fla. R. Crim. P. 3.203(b); see also State v. Herring, 76 So. 3d 891, 895 (Fla. 2011); Jones, 966 So. 2d at 325; and Burns v. State, 944 So. 2d 234, 245 (Fla. 2006). The Supreme Court of Florida explained that the failure to establish any one prong will end the inquiry. Cherry, 959 So. 2d at 714. A defendant must prove each of the three prongs by clear and convincing evidence. § 921.137(4), Fla. Stat.; Franqui, 59 So. 3d at 92. Clear and convincing evidence has been defined as evidence "that is precise, explicit, lacking in confusion,

and of such weight that it produces a firm belief, without hesitation, about the matter in issue.” Dufour, 69 So. 3d at 245.

(1) Intellectual functioning

Section 921.137(1), Florida Statutes and rule 3.203(b) define “significantly subaverage general intellectual functioning” as “performance that is two or more standard deviations from the mean score on a standardized intelligence test” as specified by the Department of Children and Family Services. The Department has designated the Stanford-Binet Intelligence Scale and the Wechsler Intelligence Scale as the approved standardized intelligence tests. Fla. Admin. Code Ann. R. 65G-4.011. The proper interpretation of the statute and the rule was raised in Cherry, where the Supreme Court of Florida held that a defendant seeking exemption from execution must establish that he has an IQ of 70 or below. Cherry, 959 So. 2d at 711. The Court specifically rejected the contention that the standard error of measurement (“SEM”) must be factored into the IQ score. Id. at 713.

During the evidentiary hearing on Defendant’s instant claim, Dr. Philip D. Harvey testified that he first met the Defendant on June 12, 2008, when he performed the assessment of his cognitive function by administering the Wechsler Adult Intelligence Scale III (WAIS-III) and a neurological screening methodology called the Repeatable Battery for the Assessment of Neuropsychological Status (RBANS) and by conducting a brief interview. (EH¹⁴ Vol. 2 at 215). The full scale IQ score reported by Dr. Harvey on the WAIS-III was 74. (EH Vol. 2 at 216-17). However, during the evidentiary hearing he testified that there was an error in the calculation and the correct IQ score is 75. (EH Vol. 2 at 217). Dr. Harvey acknowledged that the first time he went to evaluate

¹⁴ Transcript of the rule 3.851 evidentiary hearing held September 18, 2012 through September 25, 2012, hereinafter designated as “EH.”

Defendant, there was no discussion that Defendant might be mentally retarded, and to his knowledge, nobody had previously administered a formal full scale IQ test to Defendant. (EH Vol. 2 at 219).

Dr. Harvey testified that on July 13, 2009, he went to see the Defendant again because he was asked to reevaluate him with the most updated assessment materials. (EH Vol. 2 at 216). He administered the WAIS-IV on which Defendant obtained a full scale IQ score of 65. (EH Vol. 2 at 220). When asked whether he had formed any conclusions or opinions as to whether Defendant was mentally retarded, Dr. Harvey responded that his opinion is limited to the performance based measurement only, because he was not provided with any records that would allow him to assess adaptive functioning and he is not an expert in assessing adaptive functioning. (EH Vol. 2 at 219-20). In addition, he did not have enough information about Defendant's early life history to make a determination regarding the onset age. (EH Vol. 2 at 220-21). His opinion that Defendant meets the psychometric criteria for mild mental retardation was based solely on the full scale IQ score of 65 obtained on the WAIS-IV. (EH Vol. 2 at 220).

Dr. Harvey further testified that the scores obtained by Defendant on the RBANS were consistent with the full scale IQ score of 65 obtained on the WAIS-IV. (EH Vol. 2 at 248). However, during cross-examination, Dr. Harvey admitted to having made quite a few errors in the reported RBANS scores that were submitted to, and relied on, by the other experts who evaluated Defendant and who did not have his raw data. (EH Vol. 2 at 269-70; 279-80; 282-87). Thus, Dr. Harvey's reported scaled score for Immediate Memory was 65, whereas the raw data indicated a score of 78. (EH Vol. 2 at 287). His reported scaled score for Language was 74, whereas the raw data indicated a score of 95. (EH Vol. 2 at 287). His reported scaled score for Attention was 68, whereas the raw

data indicated a score of 79. (EH Vol. 2 at 287-88). His reported scaled score for Delayed Memory was 68, whereas the raw data indicated a score of 75. (EH Vol. 2 at 288). The total score listed on the report was 59, and the total score in the raw data was 72. (EH Vol. 2 at 288). On redirect examination, Dr. Harvey testified that none of these errors changed in any way the full scale IQ score of 65 on the WAIS-IV. (EH. Vol. 2 at 292).

Although Dr. Harvey testified on redirect examination that he did not apply the Flynn effect in order to obtain the full scale IQ score of 65 on the WAIS-IV, on direct examination he stated that "the IQ score of 65 on the WAIS-IV is a result possibly of the Flynn effect," which he defined as "a description of the fact that the population becomes more intelligent over time." (EH Vol. 2 at 243-44; 292). He further explained that the difference between the full scale IQ score of 75 on the WAIS-III and the full scale IQ score of 65 on the WAIS-IV is not implausible taking into account the fact that the WAIS-III was at the very end of its lifespan when administered to Defendant. (EH Vol. 2 at 245).

Finally, Dr. Harvey testified that he did not administer a stand alone "test of effort" for two reasons. First, because such a test yields a 40% false positive rate in people with intellectual deficiencies, and second, because Defendant showed variation on his performance on the WAIS-III, RBANS, and the WAIS-IV. (EH Vol. 2 at 236-37). In his view, if Defendant were intentionally trying to perform poorly, he would not have scored high on easy tests, as he did. (EH Vol. 2 at 237). According to Dr. Harvey's observations, Defendant also exerted effort throughout the test, did not generate any unusual responses, and was mildly talkative. (EH Vol. 2 at 238-39). On cross-examination, Dr. Harvey explained that effort and malingering are not the same, but

there are tests of effort, such as the Test of Memory Malinger (TOMM), that could be interpreted to reflect malingering. (EH Vol. 2 at 264-65). However, he testified that TOMM has a 40% false positive rate in people with mental retardation. (EH Vol. 2 at 265).

Dr. Thomas Oakland was hired by the defense to render an opinion regarding whether Defendant is mentally retarded. (EH Vol. 7 at 839). He testified that based on Dr. Harvey's report, Defendant meets the first prong of Florida's definition for mental retardation, because his full scale IQ score on the WAIS-IV was 65, without the Flynn effect and without applying the SEM. (EH Vol. 7 at 843-44; 924). He further testified that his own assessment was consistent with that score. (EH Vol. 7 at 843). He administered the Woodcock-Johnson Achievement Test, which is designed to identify academic potential as a measure of intelligence. (EH Vol. 7 at 880). Although the test includes forty-two subtests, Dr. Oakland tested only the following skill areas: letter word identification; reading fluency; story recall; calculation; math fluency; spelling; reading comprehension; applied math problems; story recall delayed; word attack; picture vocabulary; reading vocabulary; quantitative concepts; and academic knowledge. (EH Vol. 7 at 881). Dr. Oakland testified that Defendant's lowest performance was on the delayed story recall, and was similar to that of a six and a half year old child. Defendant's highest performance was on calculation, and was similar to someone who is fourteen years and ten months old. The scores for all the other skills ranged from ten and a half years old through thirteen and eleven months old. (EH Vol. 7 at 882). In Dr. Oakland's opinion, these scores are consistent with someone who is mildly mentally retarded and they are also consistent with Defendant's performance in school. (EH Vol. 7 at 883).

Neither Dr. Joette James nor Dr. George Woods were hired to evaluate Defendant for mental retardation. (EH Vol. 1 at 34; Vol. 4 at 563). Dr. Marc Tassé did not evaluate Defendant, but testified generally about mental retardation and the three prongs that must be met in order to prove mental retardation under Florida law. (EH Vol. 1 at 148-93).

The State's expert, Dr. Gregory Prichard, testified that he does not think the proper way to do an assessment is by splitting the work between experts, because that makes it difficult to answer the question whether someone is mentally retarded. (EH Vol. 11 at 1411). He further testified that he met with Defendant on July 11, 2012, but did not conduct any intellectual or adaptive behavior testing, because such tests had been recently administered to him by the defense experts. (EH Vol. 11 at 1412; 1428; 1439). He explained that when a person is exposed to a second administration of an intellectual testing within a year, the "practice effect" might artificially inflate the score of the second administration. (EH Vol. 11 at 1440). He conducted instead a fairly comprehensive interview with Defendant. (EH Vol. 11 at 1440; Defense Exhibit 52).

Dr. Prichard testified that although the WAIS-III was at the end of its lifespan when administered to Defendant, he would never ignore the result of an IQ measure without a sound reason. (EH Vol. 11 at 1414-15). He explained that an individual cannot score higher than he is capable of scoring. (EH Vol. 11 at 1495-96). Thus, if a person obtains a full scale IQ score of 85 and then an IQ score of 65, the assumption is that the 85 is representative of optimal intellectual functioning, since one cannot "fake smart." (EH Vol. 11 at 1495-96). However, there can be a number of variables that could contribute to producing a less optimal score, such as anxiety, depression, lack of sleep, medication, and motivation. (EH Vol. 11 at 1496).

Dr. Prichard testified that there is a high correlation between academics and intellect, and he found that Defendant's scores when Dr. James administered the WRAT-IV (80 on reading, 84 on spelling, and 88 on math) counter-indicated mental retardation. (EH Vol. 11 at 1498-99). Dr. Prichard admitted that he is not familiar with some of the neuropsychological tests administered by Dr. James but he could interpret the percentile. (EH Vol. 11 at 1488-89). He acknowledged that although mentally retarded people are in the lowest two percentile, some mentally retarded individuals could score above the second percentile in some areas. (EH Vol. 11 at 1499). However, in Defendant's case, the bulk of the data indicated that he functions above the second percentile, demonstrating skills that show he is not in the deficient mentally retarded range. (EH Vol. 11 at 1499). Dr. James also admitted that Defendant's performance on the achievement test "was in the low-average range across the board" and she found that to be "a relative strength for him." (EH Vol. 1 at 79).

In Dr. Prichard's opinion, the fact that Defendant obtained a General Educational Development ("GED") degree indicates that he is not mentally retarded, because he has demonstrated a proficiency at the twelfth grade level, when the lowest two percentile of people attain a maximum sixth grade level, although typically a third or fourth grade level. (EH Vol. 11 at 1500). In Dr. Prichard's experience with thousands of mentally retarded individuals he has never met a legitimately mentally retarded person who passed one section of the GED, let alone the entire GED. (EH Vol. 11 at 1500-01).

Based on the totality of the testimony presented during the evidentiary hearing, this Court finds that Defendant has not established by clear and convincing evidence that he meets the first prong of the mental retardation definition pursuant to Florida law. First, this Court finds unpersuasive the reasons offered by Dr. Harvey in support of the

fact that the IQ score of 65 is the valid score and the only one that should be considered when determining whether Defendant meets the first prong. Dr. Harvey's explanation that the WAIS-III was at the end of its lifespan when administered to Defendant, which implies that the WAIS-IV is more reliable, is not particularly persuasive. Dr. Harvey was aware that the WAIS-III was at the end of its lifespan when he decided to administer the test to Defendant on June 12, 2008. Although the release date of the WAIS-IV was unknown at that point in time, the WAIS-IV was being advertised. (EH Vol. 11 at 267). Clearly, the implication was that the WAIS-III was nearing the end of its lifespan. If Dr. Harvey had any concerns regarding the validity of the WAIS-III score he had the option under Florida law to evaluate Defendant by using the Stanford-Binet Intelligence Scale. In addition, Dr. Harvey's testimony that the results of the RBANS were consistent with the IQ score of 65 was greatly undermined on cross-examination when it was revealed that he had made several errors when reporting Defendant's scores, the majority of which were lower scores than reflected in the raw data. Although Dr. Harvey testified that the errors would not change the IQ score of 65, he did not specify whether the correct, higher scores on the RBANS would still be consistent with an IQ score of 65, or whether they would support the higher IQ score of 75.

Second, there are several reasons that support a finding by this Court that the IQ score of 75 obtained on the WAIS-III is more credible. When Dr. Harvey first went to evaluate Defendant there was no discussion of mental retardation. However, when Dr. Harvey was asked to reevaluate him, Defendant had already filed a motion to determine mental retardation, yet the reported IQ score on the WAIS-III was above the 70 cut-off score required under the Florida law. This Court finds the 75 score more indicative of Defendant's real abilities, since he could not achieve a higher score than his abilities

would allow, but there are several reasons why he could have scored lower on the WAIS-IV. As explained by Dr. Prichard, Defendant's performance on the WAIS-IV could have been impacted by anxiety, depression, lack of sleep, medication, and motivation.

Dr. Harvey's explanation as to why he did not administer any malingering tests is not entirely persuasive. If his major concern was that such tests yield a 40% false positive rate when administered to mentally retarded individuals then there was no reason not to administer such a test when he first evaluated Defendant and mental retardation was not yet an issue. Although Dr. Harvey testified that Defendant exerted effort throughout the test, thus implying that he was not motivated to underperform, he did not address any other causes that might have affected Defendant's performance on the WAIS-IV such as depression, medication, and/or lack of sleep. Finally, the fact that Defendant got a GED, and scored in the low average range on the achievement test administered by Dr. James, also supports a finding that the 75 IQ score is the more credible one.

(2) Adaptive behavior

Section 921.137(1), Florida Statutes defines "adaptive behavior" as "the effectiveness or degree with which an individual meets the standards of personal independence and social responsibility expected of his or her age, cultural group, and community." To meet this second prong, a defendant "must show significant limitations" in adaptive functioning in at least two of the following skill areas: communication, self-care, home living, social skills, community use, self-direction, health and safety, functional academics, and work." Hodges v. State, 55 So. 3d 515, 534 (Fla. 2010). Furthermore, subaverage intellectual functioning must exist concurrently with adaptive deficits and there must be current adaptive deficits. Id.; see also Jones, 966 So. 2d at

325-27 (rejecting the defendant's argument that the second prong of mental retardation is concerned only with an individual's adaptive behavior as a child under age eighteen, and interpreting the plain meaning of the statute to require that the deficient adaptive behavior exist at the same time with subaverage intellectual functioning).

During the evidentiary hearing, Dr. Tassé testified that there are standardized tests to determine adaptive behavior and one such test is the Adaptive Behavior Assessment System (the ABAS), which was administered by Dr. Oakland in this case. (EH Vol. 1 at 174). In his opinion, the use of self-reports in making a diagnosis of mental retardation is not very reliable, because a lot of people with mental retardation have a tendency "to mitigate or under-report their deficits" and to exaggerate their skills, thus hiding under a "cloak of competence." (EH Vol. 1 at 175). Dr. Tassé also described the challenges of assessing the adaptive behavior of someone who has been in prison for a long time. Because prison is not a community, but a restrictive environment, the tests designed to assess adaptive behavior are not "normed" on people who live in that environment, but on people who live in the community. (EH Vol. 1 at 177). He opined that a possible solution to this problem is a retrospective evaluation of the prisoner, by asking people who were familiar with the prisoner about his adaptive behavior prior to being incarcerated. (EH Vol. 1 at 177-78). Dr. Tassé admitted that the major problem with a retrospective evaluation is the accuracy of the recollection. (EH Vol. 1 at 178). When asked whether he would use prison guards as respondents for assessing adaptive behavior, he stated that he would not because their range of observation is limited to the prison setting, in which the prisoner does not have many choices in terms of his activities. (EH Vol. 1 at 180).

Dr. Oakland testified that he had reached the conclusion with a reasonable degree of scientific certainty that Defendant meets the Florida statutory definition of mental retardation. (EH Vol. 7 at 841). He based that decision on Defendant's IQ score of 65 obtained on the WAIS-IV and on his own assessment of Defendant's deficits in adaptive behavior, which were consistent with Dr. Harvey's report. (EH Vol. 7 at 843; 859). Dr. Oakland testified that after all the testing and the documents he reviewed, his ultimate conclusion is that Defendant meets both the diagnostic and statutory criteria for mental retardation. (EH Vol. 892).

Dr. Oakland, who designed the ABAS together with Patti Harrison, explained that the test was not "normed" on people in prison, because in a prison setting people are highly restricted as to the behavior they can display. Thus, acquiring information on prison related behavior is not conducive to an accurate assessment of adaptive behavior. (EH Vol. 7 at 846; 849). The ABAS assesses ten skills which are incorporated in one of three domains. (EH Vol. 7 at 851-52). Communication, community use, and self-direction are incorporated in the conceptual domain; social and leisure are incorporated in the social domain; and community use, home living, health and safety, and self-care are included in the practical domain. (EH Vol. 7 at 851-52). The scores from the three domains are used to determine the total score. (EH Vol. 7 at 852). There is a four scale system: zero, one, two, or three. A score of zero is assigned when the evaluated person does not display a particular behavior at all. A score of "one" reflects that the evaluated person has the capacity to display that behavior but doesn't. A score of "two" is assigned when the behavior is displayed sometimes when needed, and a score of "three" reflects that the behavior is displayed almost always when needed. (EH Vol. 7 at 857-58).

Dr. Oakland further explained that the respondents selected to complete the ABAS must know well the person being evaluated, and must have a comprehensive understanding of that person's behavior. (EH Vol. 7 at 856). A clinician assesses the respondent's reliability by weighing the information provided against information obtained from other sources, looking for consistency in information from various sources. (EH Vol. 7 at 856-57).

In this case, Dr. Oakland administered the test to three respondents: Defendant and his two sisters, Clinita and Althamease. (EH Vol. 7 at 860). Dr. Oakland's administration of the ABAS test to Defendant's two sisters was limited to eliciting information regarding Defendant's adaptive behavior prior to the age of eighteen. (EH Vol. 7 at 867; 873). However, under Florida law, the adaptive deficits must be current and they must exist concurrently with subaverage intellectual functioning. See Hodges, 55 So. 3d at 534, and Jones, 966 So. 2d 319, 325-27 (Fla. 2007). While the information provided by the two sisters might be relevant to establishing the third prong of the statutory definition of mental retardation, it is not relevant to the second prong because it does not address Defendant's current adaptive behavior.

Defendant's self-report is the only part of the ABAS test administered by Dr. Oakland that assessed Defendant's current adaptive behavior. However, as pointed out by Dr. Tassé, self-reports are not very reliable. In addition, Dr. Oakland testified that it is "[d]ownright silly to try to acquire adaptive behavior information on persons who are incarcerated." Nevertheless, he stated that he had to administer the ABAS to Defendant in prison, because "the Florida Supreme Court requires it." (EH Vol. 7 at 876). He assessed all ten skill areas and based on Defendant's self-report, he was deficient in nine out of ten, obtaining the lowest possible score. (EH Vol. 7 at 876). In Dr. Oakland's

opinion, the score merely confirms the fact that Defendant's adaptive behavior in prison is extremely restricted, which renders "the assessment of adaptive behavior irrelevant" and "downright silly." (EH Vol. 7 at 876). This Court cannot attach more meaning to the ABAS score obtained based on Defendant's self-report, than Defendant's own expert did.

Dr. Prichard pointed out that Defendant scored himself in the fifteenth percentile of the entire two percent of mentally retarded people, which would place him in the moderate to severe rate of mental retardation. (EH Vol. 11 at 1491-92). Defendant indicated in his responses to the ABAS test that he could not order his own meal when eating out, he cannot find a restroom in a public place, he cannot look both ways before crossing a street or a parking lot. Yet, as Dr. Prichard pointed out, in the past Defendant worked at Publix, Winn-Dixie, and at a hospital; could drive a car; take a bus; cook; could buy his own clothes and manage his own money. (EH Vol. 11 at 1492-93). Defendant also obtained a GED.

This Court finds that the evidence presented at the evidentiary hearing rebuts Defendant's alleged limitations and therefore, those limitations may not serve as a justification for finding that Defendant has a deficit in adaptive behavior. See Dufour, 69 So. 3d at 250 (citing Phillips v. State, 984 So. 2d 503, 511-12 (Fla. 2008)) (stating that a "trial court does not weigh a defendant's strengths against his limitations in determining whether a deficit in adaptive behavior exists" but rather, after considering the experts' findings and all other evidence, determines whether a defendant has deficits in adaptive behavior by examining evidence of defendant's limitations and evidence that may rebut those limitations).

Dr. Prichard testified that it is difficult to assess the adaptive behavior of someone who has spent almost his entire adult life in prison, like Defendant, because of the restrictions imposed on the person's behavior. (EH Vol. 11 at 1456-57). The assessment should be of how that person functions in prison relative to other inmates. (EH Vol. 11 at 1457). According to Dr. Prichard, the behavior displayed by Defendant in prison, such as submitting requests for a medical visit and seeking help for an ingrown toenail and eye problems, indicates that Defendant is capable of recognizing a medical issue and going through the proper procedure to get it addressed. (EH Vol. 11 at 1457-58). In addition, Dr. Oakland, Dr. Woods, and Dr. James testified that when they met with Defendant in prison he was clean, well groomed, well mannered, polite, and cooperative. (EH Vol. 1 at 133; Vol. 6 at 751; Vol. 7 at 873-74). The behavior displayed by Defendant in prison reflects positively on his abilities in the area of self-care and health, which is one of the adaptive behavior domains. (EH Vol. 7 at 1457; 1459).

In Dr. Prichard's opinion, the fact that Defendant expressed a desire to have pen pals and an interest in correspondence courses, indicates a capacity for independent functioning and adaptive proficiency that is not present in someone with mental retardation. (EH Vol. 7 at 1458). During Dr. Prichard's interview, Defendant mentioned that he reads the Bible, and his favorite part is the Book of Ephesians. Defendant also mentioned that he likes reading spiritual books by Smith Riddlesworth and Randall Kendall, which according to Dr. Prichard are too advanced for mentally retarded individuals. (EH Vol. 11 at 1482-84). Dr. Prichard testified that he had mentally retarded people tell him that they read the Bible, but when asked to perform the task they were not able to do it. (EH Vol. 11 at 1484). Dr. Prichard did not ask Defendant to read from the Bible. However, judging by how well Defendant could read a letter addressed to

Judge Seay in 1987, written in cursive, and signed by him, Dr. Prichard was sure Defendant could read the Bible as well. (EH. Vol. 11 at 1484). Dr. Prichard asked Defendant to read the letter which was purportedly written by him to Judge Seay, to assess his reading ability. (EH Vol. 11 at 1467; 1481). In his opinion, mentally retarded people cannot read fluently cursive writing. (EH Vol. 11 at 1468). However, Defendant was able to read the letter well and pronounce difficult words and phrases such as "incarceration," "presently," "mitigation," "enmity," "glorious light," and "no longer walking in darkness." (EH Vol. 11 at 1481-82). This Court had the opportunity to review that portion of Dr. Prichard's interview with Defendant and finds that his observations that Defendant could read the letter well were accurate. (Defense Exhibit 52).

The court finds that these strengths in the area of self-care and health and his ability for independent functioning undermine Defendant's self-reported limitations on the ABAS. See Jones, 966 So. 2d at 327-28 (finding defendant's behavior in prison relevant to the assessment of his adaptive functioning, and concluding that he understood and managed his own life when he followed a daily exercise regimen of his own devising, using improvised equipment to attain stress relief and health; understood his health problems, the related medication and self-administered it on schedule; wrote requests to see doctors specifically identifying medical problems; managed the finances of his inmate account, following up on money transfers from foreign countries; kept himself and his cell clean and orderly; visited the prison library twice a week).

Dr. Prichard also analyzed Defendant's ability to think abstractly and rationalize his actions and their consequences. He found that Defendant displayed such behavior when he offered self-defense as a justification for killing Gaynell Jeffrey and when he told the police that he had cut himself while washing dishes in an attempt to cover-up

the stabbing of the victim in the instant case. (EH Vol. 11 at 1443-44). Dr. Prichard found this conduct relevant because it showed that Defendant was capable of recognizing what type of information the police were seeking and he could make up a story to protect himself. (EH Vol. 11 at 1444).

Dr. Oakland attempted to disregard Defendant's criminal behavior as having no place in the assessment of adaptive functioning, because it is maladaptive behavior. (EH Vol. 7 at 877). However, this Court finds the conduct relevant because it shows not only that Defendant had the ability to orchestrate and carry out his crimes, but also that through his acts of self-preservation he had the ability to adapt to his surroundings. Phillips, 984 So. 2d at 511-12 (finding that defendant's "planning of the murder and cover-up" and "his ability to orchestrate and carry out his crimes, his foresight, and his acts of self-preservation" indicated that defendant had the ability to adapt to his surroundings and were inconsistent with a finding that defendant suffered from mental retardation).

Dr. Prichard found the fact that Defendant obtained a GED to be one of the most compelling factors in his assessment that Defendant is not mentally retarded. (EH Vol. 11 at 1500). He explained that the GED has five (5) sections: math, reading skills, English, writing, and science and social studies. The candidate has to score a minimum of 40 for each section and obtain an aggregate score of 225. (EH Vol. 11 at 1501). When Defendant took the test the first time in 1988, he obtained the minimum score of 40 in each section, but he did not obtain the necessary aggregate score to pass the test. When he retook the test in 1994, he scored 55 in reading, 40 in writing, 47 in math, 45 in English, 46 in science and social studies. His aggregate score was 233, which was above the aggregate score of 225 required in order to pass the GED test. (EH Vol.

11 at 1501). Although Dr. Oakland testified that a mentally retarded person can get a GED, Dr. Tassé's response to the question whether a mildly mentally retarded person could graduate from regular high school and could get a GED, was evasive: "I want to say those who are graduating from high school in that 30 to 35 percent, the Department of Education puts out I would imagine most of them have mild mental retardation. The likelihood of graduating from high school diminishes substantially as your IQ drops." (EH Vol. 1 at 164-65; Vol. 7 at 862).

This Court finds that the fact that Defendant persevered and obtained a GED diploma further rebuts his alleged limitations in academic achievement and adaptive behavior. See Dufour, 69 So. 3d at 250-52 (noting that "[s]uccessfully passing a GED exam has traditionally been no simple matter" and finding that defendant's successful mastering of the rigorous test revealed individual cognitive strengths that rebutted his asserted limitations of poor academic performance, and constituted direct proof that defendant did not have deficits in adaptive behavior).

For the reasons set forth above, this Court finds that Defendant has failed to establish by clear and convincing evidence the second prong of the statutory definition of mental retardation, which requires a showing that Defendant's adaptive deficits are current and concurrent with subaverage intellectual functioning.

(3) Onset prior to age eighteen

The final factor in determining mental retardation is onset of the condition before age eighteen. Fla. R. Crim. P. 3.203(b). Since Defendant was not formally diagnosed with mental retardation prior to the age eighteen, a retrospective assessment was conducted by Dr. Oakland. He administered the ABAS test to Defendant's two sisters,

focusing on information regarding Defendant's adaptive behavior between the age of sixteen and seventeen. (EH Vol. 7 at 867; 873).

Dr. Oakland testified that he looked at Clinita as a valuable source of information in reference to Defendant's adaptive behavior because she probably has "a more intimate knowledge of Defendant than any other person in the world." (EH Vol. 7 at 862-63). He measured nine skills out of ten: communication, community use, functional academics, home living, health and safety, leisure, self-direction, and social. Defendant had deficiencies in all of the tested skills, scoring zero on numerous of the sub areas of these skills. (EH. Vol. 7 at 863-64; 866-67). Examples of deficiencies claimed by Clinita in the communication skill area include that Defendant cannot take turns during conversations with people; does not talk about realistic future educational or career goals; cannot answer complex questions; is unable to wait for a pause in conversation before expressing his own ideas; is incapable of repeating stories or jokes; and cannot use up-to-date information to discuss current events. The score on all of these was zero, indicating that he did not display any of these behaviors. (EH Vol. 7 864-65). Examples of deficiencies in the community use skill on which Defendant received a score of zero include: asking a store clerk for product information before buying an item; using a local library to check out books; walking or bicycling alone within one mile of a five block radius of the house; shopping for a friend or family member who is unable to shop; asking others for advice as to where to shop; taking a child or family member to a park; calling a repairman if the air conditioner or heater is not working; calling a doctor or hospital if hurt. (EH Vol. 7 at 865-66). According to Clinita's responses on the ABAS, Defendant scored in the first percentile, meaning that ninety-nine percent of the people

of his age have higher scores. (EH Vol. 7 at 863). In Dr. Oakland's opinion, such low scores are not inconsistent with mild mental retardation. (EH Vol. 7 at 868).

Dr. Oakland testified that his concern with choosing Althamease as a respondent was that she might not remember enough information about Defendant since she is four years younger. (EH Vol. 7 at 868-69). However, he found her to be very bright and thought that other than Clinita, she was probably the most knowledgeable person regarding Defendant's childhood development. Althamease's ABAS score also ranked Defendant in the first percentile. (EH Vol. 7 at 868). According to her responses, Defendant displayed deficiencies in three out of the nine skills assessed: functional academics, health and safety, and leisure. (EH Vol. 7 at 869). In terms of functional academics, Defendant scored zero on the following skills: reasons and follows instructions to assemble purchases; follows an interest or current event by reading newspapers, books, or other materials; finds names and phone numbers in a phonebook for repair services or businesses; locates important dates on a calendar; states time of day and favorite television shows; balances his check book; reads classified adds for purchases and services. (EH Vol. 7 at 870). In the health and safety category, Defendant scored zero on the following skills: plans meals in order to get necessary nutrition; takes temperature with a thermometer when he feels sick; helps children cross the street by taking their hands; stores poisonous substances or dangerous objects out of reach of children; buys over-the-counter medication; buckles his seat belt in the car; and takes prescription medicines by himself. (EH Vol. 7 at 870-71). Some of the deficiencies in the leisure area include: looks at pictures or reads books or magazines; attends activities at another person's home; attends fun community activities with others; plans ahead fun activities; invites others to his home

for fun activities; has a hobby or creative activity that requires making or building something. (EH Vol. 7 at 872). Dr. Oakland testified that in the other six skill areas Defendant did not display deficiencies sufficiently low to qualify him as someone who is mentally retarded. (EH Vol. 7 at 873).

This Court has serious concerns regarding the validity of Dr. Oakland's retrospective analysis of Defendant's adaptive deficits prior to age eighteen. His testimony did not reveal that he used his clinical judgment to weigh the information provided by the respondents against information from other sources to determine their consistency and reliability. As Dr. Prichard noticed after reviewing some of the records in this case, Clinita is not the most accurate or reliable respondent, especially since she had a history of misrepresenting facts about Defendant. (EH Vol. 11 at 1486). One example provided by Dr. Prichard was that she previously testified that Defendant started school as an adolescent, which is inaccurate. Although there is some uncertainty as to Defendant's birth date, he started school when he was six or seven years old. (EH Vol. 11 at 1486). In addition, Clinita's reporting on the ABAS was inconsistent with her prior testimony at trial that Defendant was pivotal in helping her raise the other siblings, looking for food, and doing other things that children his age should not have to do. (EH Vol. 11 at 1486). Dr. Prichard also found the results of Clinita's ABAS exaggerated to the point of being absurd. (EH Vol. 11 at 1509). She rated Defendant one, in seven out of the nine skill areas assessed, indicating that he has major adaptive deficits that would require him to be institutionalized because he would have no independent skills. (EH Vol. 11 at 1487). Dr. Prichard explained that Defendant's significant drug issues may have impacted his adaptive functioning at that age. (EH Vol. 11 at 1489). This Court also questions the reliability of Althamease's

reporting, since she was significantly younger than Defendant, and had less of an opportunity to interact with him and observe his behavior.

The evidence presented during the evidentiary hearing established that in his early years of school Defendant did not do very well academically. Dr. James testified that in his first year, Defendant got "N" in his core academic subjects like reading, writing, spelling, social studies, which indicated that he needed improvement. (EH Vol. 1 at 87). Defendant was retained in the second grade, which according to Dr. James was an indication that he had learning problems. (EH Vol. 1 at 89-90). When he repeated the second grade Defendant had satisfactory grades across the board. (EH Vol. 1 at 90). In the fourth and fifth grade, the majority of his grades were D's and C's. (EH Vol. 1 at 90). In 1973, Defendant was administered the Peabody picture and vocabulary test, and the score placed him lower than the first percentile. (EH Vol. 1 at 91).

Dr. Prichard admitted that Defendant did not do very well academically in his first years of school, but then he started improving. In the fourth grade, when the Wide Range Achievement Test (WRAT) was administered to Defendant, he performed at grade level, obtaining a reading score of 4.1 and an arithmetic score of 3.9. (EH Vol. 11 at 1505). Dr. Prichard also noted that Defendant achieved into the twelfth grade, passing some areas but not others, and more significantly, that he was not placed in any special education classes. (EH Vol. 11 at 1505-06). Defendant offered the testimony of one of his math teachers, Janice O'Loughlin, to show that special education classes did not exist when he was enrolled in school. However, Ms. O'Loughlin's testimony was vague, she merely stated that she did not remember if they had special education classes when Defendant was in school, and she believed those types of classes were offered later. (EH Vol. 2 at 322).

This Court finds that Defendant failed to establish by clear and convincing evidence the last prong of the statutory mental retardation definition. See Jones, 966 So. 2d at 329 (finding that defendant failed to meet the third prong of mental retardation where the expert's findings on this prong were based on statements of a witness that contradicted her trial testimony; on information obtained from defendant's cousin and sister, which were found not credible by the trial court; and on information selectively picked from defendant's record).

Because Defendant failed to meet all three prongs of the statutory definition of mental retardation, this Court finds that he did not establish by clear and convincing evidence that he is mentally retarded and thus he is not entitled to any relief.

(B) Defendant did not establish that his penalty phase counsel rendered ineffective assistance of counsel in failing to raise mental retardation as a bar to execution.

In assessing Mr. Schantz's performance, this Court must eliminate the distorting effects of hindsight, reconstruct the circumstances of his challenged conduct and evaluate the conduct from his perspective at the time rather than from present counsel's perspective. Strickland, 466 U.S. at 689; see also Cherry, 659 So. 2d at 1073. During the evidentiary hearing, Mr. Schantz testified that in preparation for the penalty phase he thought it was important to work with a forensic mitigation expert. (EH Vol. 3 at 420). Thus, Dr. Michael Walczak was appointed by the court for the penalty phase on December 17, 2001. (EH Vol. 3 at 416; 421). He chose Dr. Walczak because he was a very good doctor, not just a regular forensic expert but had additional training in neuropsychology. He also chose him because they had worked together on other murder cases before. (EH Vol. 4 at 521-22). Mr. Schantz testified that he sent to Dr. Walczak the arrest records, the school records, some background information after

meeting with the family, and everything else the doctor requested. (EH Vol. 2 at 368-70; 376; 380; Vol. 3 at 421-22). He also talked to Dr. Walczak about the school records and the case multiple times. (EH Vol. 2 at 370; 377-78; Vol. 3 at 416; 422). Mr. Schantz worked together with the investigator and Dr. Walczak to develop a social history by meeting with Defendant, family and friends, and obtaining records. (EH Vol. 2 at 358; 365-67; 378; 379; Vol. 3 at 438; 440; 475-77; 478-79; Vol. 4 at 510-11).

Although Mr. Schantz sent the school records to Dr. Walczak to review them and analyze them, he had no indication from Dr. Walczak that Defendant might be mentally retarded, or that he might have any intellectual deficits. (EH Vol. 2 at 380; Vol. 3 at 424; 426-27; 430-31; 435-36; Vol. 4 at 527; 529). In addition, in his numerous conversations and meetings with Defendant, Mr. Schantz did not notice any indicia of mental retardation. In fact, Defendant was always responsive to specific questions asked of him and there was no indication that he had difficulty understanding counsel. (EH Vol. 2 at 364-67; Vol. 4 at 528). Neither Clinita nor any other family members indicated that Defendant might be mentally retarded or that he had mental deficiencies. (EH Vol. 4 at 527). The prison guards with whom Mr. Schantz spoke about Defendant, did not indicate that they had any problems with Defendant dressing or cleaning himself, or keeping his cell tidy. (EH Vol. 4 at 527-28).

Thus, Mr. Schantz testified that based on his experience with death penalty cases, he had no concern about Defendant being mentally retarded. Had he noticed any major deficiencies, he would have followed up and would have had additional testing done. (EH Vol. 4 at 528). The fact that Mr. Schantz hired a mental health expert, provided him with access to Defendant, family members, and records, and relied on him to interpret the school records in developing mitigation shows reasonable professional

conduct. See, e.g., Reese v. State, 14 So. 3d 913, 918 (Fla. 2009) (finding that where trial counsel relied on his mental health expert and his interactions with the defendant were normal and did not suggest any reason for additional testing, he could not be deemed ineffective merely because in hindsight the mental health expert believed that additional testing was needed) and Darling v. State, 966 So. 2d 366, 377 (Fla. 2007) (counsel could not be deemed ineffective for relying on qualified expert's evaluation).

However, even if Defendant could prove deficient performance he could not prove prejudice. As already discussed in Defendant's amended claim VII.A., Defendant did not show that he is mentally retarded, and therefore, there is no reasonable probability that he would have received a different sentence. For the reasons set forth above, Defendant's instant claim of ineffective assistance of counsel is denied.

Claim VIII

In claim VIII, Defendant alleges that he was denied his right to a competent mental health expert under Ake v. Oklahoma, 470 U.S. 68, 83 (1985) (holding that due process requires the state to provide an indigent defendant access to a competent psychiatrist when the defendant demonstrates that "his sanity at the time of the offense is to be a significant factor at trial"). Defendant was granted an evidentiary hearing on this claim, except for paragraphs 9 and 10, which are insufficiently pled and without merit.

In ¶ 9, Defendant alleges that the trial court never heard crucial information about Defendant's mental health which would have demonstrated he did not understand the Miranda rights. However, Defendant does not specify what that crucial information would have been. He also alleges in a conclusory fashion that due to his mental state, he was susceptible to the coercive tactics used by the police officers who interrogated

him and therefore, his statements to the police should have been suppressed. However, he does not specify what his state of mind was or what coercive tactics were used. This claim is not only insufficiently pled but also without merit. As previously discussed under amended claim V,¹⁵ even if Defendant's statements were suppressed, there is no reasonable probability that the outcome would have been different.

In ¶ 10, Defendant states that during the guilt phase no evidence was presented regarding his intoxication or mental state at the time he committed the crime. As a result, the State could effectively challenge Defendant's statements that he did not remember going to the apartment on the day of the stabbing, but remembered the amount of drugs and alcohol ingested. Defendant alleges in a conclusory fashion that had mental health expert known of "this evidence" Defendant would have had a compelling case that he was not guilty of first-degree murder due to his intoxication and mental deficits. However, Defendant does not specify what "this evidence" refers to, and therefore this Court finds that Defendant has not established a prima facie case either of incompetent mental health expert or of ineffective assistance of counsel. See Freeman, 761 So. 2d at 1061.

In the remainder of this claim, Defendant alleges that Mr. Schantz failed to obtain necessary funds that would have allowed a competent mental health expert to conduct a proper evaluation of Defendant. In addition, Defendant makes a number of allegations regarding trial counsel's failure to provide Dr. Walczak with records (including school records), the investigator's report, history of head trauma. Defendant also alleged that Mr. Schantz specifically instructed Dr. Walczak not to conduct neuropsychological testing because there were no funds available. He claims Dr. Walczak believed that IQ

¹⁵ See supra at 32.

testing should have been conducted and guessed that Defendant's IQ would be borderline. Defendant argues that had Dr. Walczak been afforded the opportunity to conduct a proper assessment of Defendant, the jury would have had a better understanding of the mitigation presented and the trial court would not have had a basis to find the cold, calculated, and premeditated aggravator.

As explained by the Supreme Court of Florida, generally "a postconviction claim based on Ake is procedurally barred because it could have been raised on direct appeal." Stewart v. State, 37 So. 3d 243, 255 (Fla. 2010). However, a defendant is entitled to raise on postconviction a claim that his "mental health expert's examination was so 'grossly inefficient' that the expert 'ignore[d] clear indications of either mental retardation or organic brain damage.'" Id. (quoting Raleigh v. State, 932 So. 2d 1054, 1060 (Fla. 2006)). In this case, Defendant failed to show such gross inefficiency. None of the allegations in the motion were established during the evidentiary hearing. Dr. Walczak was not called to testify as to what documents and information he received from trial counsel, whether he indeed believed an IQ testing should have been done, and whether he could not do any neuropsychological testing because of lack of funds. In addition, none of the defense experts testified that Defendant had organic brain damage. In fact, Dr. Oakland testified that he could not discover any evidence of organic brain damage. (EH Vol. 7 at 915). Thus, Defendant's Ake claim fails. See Pooler v. State, 980 So. 2d 460, 469 (Fla. 2008) (finding that where defendant failed to call his trial experts to testify during the postconviction proceedings, "he failed to demonstrate that they would have changed their opinions had they conducted more in-depth psychological evaluations or been provided with his records" and therefore a new sentencing was not required).

As the State correctly argues, the gist of Defendant's argument is in fact an ineffectiveness claim for failure to supply adequate funds and sufficient information and records for a proper evaluation by the mental health expert, and should be analyzed using the Strickland test. However, as already discussed in amended claim VII.B., Mr. Schantz testified that he had provided Dr. Walczak with all the records, including school records, all the information he obtained from the family, and everything else Dr. Walczak wanted to review in addition to meeting with Defendant and interviewing family members. There was no testimony elicited from Mr. Schantz regarding his failure to obtain funds. Defendant failed to show any deficient performance by counsel and thus he cannot meet the Strickland test.

Accordingly, for the reasons set forth above, Defendant's instant claim is denied.

Claim IX

In claim IX, Defendant argues that he was denied adversarial testing at the penalty phase of his trial in violation of the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. More specifically, he alleges that Mr. Schantz failed to complete a comprehensive investigation into Defendant's social history and to present adequate mental health mitigation to the jury.

In a claim of ineffective assistance of penalty phase counsel, to prove prejudice a defendant "must show that but for his counsel's deficiency, there is a reasonable probability he would have received a different sentence." Porter v. McCollum, 13 S.Ct. 447, 453 (2009). The reasonable probability is assessed by considering the totality of available mitigation evidence adduced at trial and during the habeas proceeding and reweighing it against the aggravators. Id. at 453-54 (quoting Williams v. Taylor, 529 U.S. 362, 397-98 (2000)).

During the evidentiary hearing, Mr. Schantz testified that his mitigation strategy was to do everything he could to show that Defendant was a nice person who was worthy of a life sentence. He "strategized saving a life the whole time". (EH Vol. 2 at 358-59). He spent hours with the family trying to develop Defendant's social history. He hired an investigator and a neuropsychologist. (EH Vol. 2 at 359; Vol. 3 at 409-10; 416; 421). Mr. Schantz recounted that he called Arthur Lewis during the penalty phase to testify that he had known Defendant all his life and Defendant had trouble in school and in the neighborhood, and was beaten by other children. (EH Vol. 3 at 493-94, 503). The trial record also reflects that Mr. Lewis testified that Defendant was "the punching bag of the neighborhood" and that "he was always picked on, always beat up." (ROA Vol. 20 at 1601). In addition, he described Defendant as a "very quiet, low key, likes to laugh... guy." (ROA Vol. 20 at 1600).

Mr. Schantz recalled that during the penalty phase, Mr. Baron read into the record a deposition by Carter Powell, a corrections deputy who knew Defendant from the Broward County Jail. Deputy Powell had known Defendant for two years and had no problems with him. Deputy Powell also mentioned the fact that Defendant was religious. (EH Vol. 3 at 493-94). The trial record further reflects that Deputy Powell testified that Defendant was a model prisoner, and to his knowledge he did not have any disciplinary reports. (ROA Vol. 20 at 1606).

Mr. Schantz testified that the prior testimony of Dorothea Simmons was also read into the record during the penalty phase as she was deceased. (EH Vol. 3 at 494). She was a neighbor who lived next door to Defendant and had known him for twenty years. Mr. Schantz remembered that she testified about Defendant's drug use. (EH Vol. 3 at 494). The trial record reflects that she also testified that on one particular occasion in

1993 when she was counseling Defendant, she noticed that he was laughing and grinning and that she could not get his attention. She thought he was on drugs. (ROA Vol. 20 at 1610). She further testified that she spoke to Defendant after he got out of prison and prior to committing the instant murder, and he was doing worse. However, she noticed that he was trying to help himself and find work, but he had no steady job. (ROA Vol. 20 at 1610-11).

Mr. Schantz recounted that Clinita Lawrence was also called to testify that she raised Defendant as if he were her son. (EH Vol. 3 at 494; 501). She also testified about the deplorable living conditions and his extensive drug use. (EH Vol. 3 at 494, 502). At trial Clinita's testimony was more extensive. For example, she testified that Defendant's father was never involved in his life and the mother died in child birth when Defendant was seven years old. (ROA Vol. 20 at 1613-14). After that, Defendant and his other siblings moved to Fort Lauderdale to live with Clinita, who was nineteen at that time and had her own child to raise. (ROA Vol. 20 at 1613-15). She had an hourly income of \$2.00 and she was not able to get welfare benefits because their birth certificates and other documentation they needed had been stolen after their mother's death. (ROA Vol. 20 at 1615-19). For approximately three months, they had to live in an abandoned convertible car. (ROA Vol. 20 at 1615-16). When it rained they would get wet. (ROA Vol. 20 at 1615). Defendant was so afraid of lightening that he used to holler and scream. (ROA Vol. 20 at 1616). To supplement her hourly income, they would sell bottles and cans collected by Clinita and Defendant. (ROA Vol. 20 at 1617). The family could not afford the things they needed and they would shop for clothes at thrift stores or pick some from the trash. (ROA Vol. 20 at 1617-18). Clinita testified that Defendant started school when he was ten, he did not do very well in school, and he was constantly

picked on, and beaten because he was the oldest and shortest one in his class. (ROA Vol. 20 at 1617-19). She further recounted that he did not finish high school. (ROA Vol. 20 at 1619). All in all, Defendant had a "very, very hard life." (ROA Vol. 20 at 1619). He started using drugs, like crack cocaine, and she took him to private and public clinics to help him get off drugs, but it did not help. (ROA Vol. 20 at 1619-20). She testified that she loved Defendant and she depended on him a lot to raise the other children and search for food. (ROA Vol. 20 at 1620-21).

During the penalty phase, Mr. Schantz presented Herman Ruise, a correctional officer with the Department of Corrections, who testified that he had known Defendant for three years and he had no problems with him. (EH Vol. 3 at 494). The trial record reflects that Officer Ruise told the jury that Defendant got along just fine with other inmates, played basketball and cards. (ROA Vol. 20 at 1630). He had only three disciplinary reports and stayed out of trouble when Officer Ruise supervised him. (ROA Vol. 20 at 1630).

The last witness called during the penalty phase was Dr. Walczak, who testified that he spoke to the investigator in this case, with Clinita, and her husband, Beamon. (EH Vol. 3 at 494-95). The trial record reflects that Dr. Walczak was a doctor of psychology with a degree in neuropsychology who had testified numerous times as an expert. (ROA Vol. 20 at 1632). He testified that Defendant had a troubled background: his mother died in childbirth when Defendant was only five; he was taken in by his nineteen year old pregnant sister; they lived in a car for approximately three and a half months because they did not have the necessary paperwork to apply for government assistance. (ROA Vol. 20 at 1634). When asked how these conditions impacted Defendant, Dr. Walczak opined that the most important thing was the fact that he did

not have the guidance of a mother and a father to teach him good from bad, right from wrong, and thus he was deprived of role models. (ROA Vol. 20 at 1635). He further testified that Defendant was constantly abused in school, because he was very small in stature, and he was known as a punching bag, which explained Defendant's anger and hostility. (ROA Vol. 20 at 1634-35). Defendant started skipping school because he was repeatedly beaten by other children on the bus and in school. (ROA Vol. 20 at 1635). Defendant started consuming alcohol around age eighteen, and got into cocaine and crack cocaine around age twenty. (ROA Vol. 20 at 1635). Regarding Defendant's employment history, Dr. Walczak recounted that Defendant had a series of jobs: at Winn Dixie for one and a half years, at Florida medical center for two years, at Publix for eight months, at Subway for eight months, and at Pantry Pride for a year. He would lose his jobs for stealing in order to get money for purchasing drugs. (ROA Vol. 20 at 1636).

Dr. Walczak opined that the quantity of drugs and alcohol ingested by Defendant prior to committing the instant murder, that is, fifteen cocaine rocks and a fifth of a rum bottle, would create in most people a mind altering experience and possibly could lead to blackouts. He testified that he based his opinion that Defendant had a blackout on the reports from the 19th Street Facility where he was admitted after stabbing the victim. The reports indicated that when brought into the facility, Defendant was acting unusual, and had hallucinations. (ROA Vol. 20 at 1636-37; 1648-49). He also opined that because Defendant was under the influence of a significant amount of alcohol and cocaine, which in combination can enhance the effects, Defendant was not functioning normally and his capacity to appreciate the criminality of his conduct was also impacted. (ROA Vol. 20 at 1638). He explained that Defendant was religious and subscribed to

some of the beliefs he learned in church, but simply could not remember committing the crime, which does not mean he did not do it. (ROA Vol. 20 at 1638-39).

Based on the evidence presented during the penalty phase, the trial court found two statutory mitigators: the capital felony was committed while Defendant was under the influence of extreme mental or emotional disturbance, and Defendant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law were substantially impaired. The court found that both of these statutory mitigators were entitled to little weight. (ROA Vol. 22 at 1747-50). The trial court also found five non-statutory mitigators assigning them slight weight: Defendant was a model prisoner while awaiting trial in the Broward County Jail; Defendant attended religious services while housed in the Broward County Jail; Defendant had a deprived childhood, because he did not know his father, his mother died when he was young, and he was raised in poverty by his sister, he did not start school until he reached adolescence, and had difficulty finding work; Defendant was a loving person, who never fought with his relatives, and was a good brother to his sister Clinita; and Defendant was slight in stature, and was frequently beaten and robbed of his bus money on his way to school. (ROA Vol. 22 at 1750-51).

During the evidentiary hearing, Defendant presented the testimony of Dr. Woods, who was hired by the defense team to address the issue of mitigation in connection with possible cognitive impairment. (EH Vol. 4 at 563). According to Dr. Woods, Defendant met the extreme mental or emotional disturbance mitigator and the inability to conform his conduct to the requirements of the law mitigator. It was his opinion that Defendant also met a few non-statutory mitigators, such as the poverty he grew up in, his special

needs as a child, and cognitive deficits which were consistent with his physical impairments. (EH Vol. 4 at 565-66; 663-65).

Dr. Woods attributed the existence of the two statutory mitigators to Defendant's cognitive deficits and frontal lobe impairment. He testified that he administered the Montreal Cognitive Assessment to Defendant, which is a screening instrument looking at different types of brain functions. (EH Vol. 4 at 594-98). First, he looked at language and tried to see if he could corroborate problems with language. Then he looked at academics and memory to get some understanding of when the impairments he noticed have occurred. (EH Vol. 4 at 599-600). He also conducted a neurological exam because there were physical signs that could lead one to conclude that Defendant might have some brain impairments. (EH Vol. 4 at 601). However, his testimony did not establish such a connection. He testified that the DOC records he reviewed confirmed Defendant's self-report and Clinita's report that Defendant had a parasternal heart murmur. (EH Vol. 4 at 574). He explained that it is difficult to tell the impact of heart murmur on the cognitive functioning, and that it takes "a significant heart murmur before it starts to impair your brain." (EH Vol. 4 at 605). He never rendered an opinion as to whether Defendant's heart murmur had an impact on his cognitive functioning. He only noted that the heart murmur had an impact on his stamina, and prevented him from playing sports. (EH Vol. 4 at 573; 603). Furthermore, he could not make any determination as to whether his small stature had any impact neurologically speaking. (EH Vol. 4 at 608).

Dr. Woods testified that one of the tests he administered assessed the communication between the right and the left side of the brain, the midline area called corpus callosum. The test consists of writing a number on a person's hand while their

eyes are closed and having them recognize the number. When he tested Defendant, he did well with his right hand, but it was Dr. Wood's recollection that Defendant did poorly with his left hand. Before he administered the test to Defendant, he tested Defendant's hand with a pin and put a coin in it to make sure that he could feel. (EH Vol. 4 at 603-04). Based on that test, Dr. Woods found that "somewhere around that midline area [Defendant] has some difficulty in terms of that communication." (EH Vol. 4 at 604). He concluded that Defendant had "impairment of language, impairment of academics, impairment of memory, impairment of midline neurological function." (EH Vol. 4 at 604).

When asked to express the conclusion of his evaluation, Dr. Woods stated that the important part for him is that it was consistent with the social history of Defendant having difficulty in school, consistent with the additional testing conducted by Dr. James, consistent with the DOC Beta IQ score of 76,¹⁶ and consistent with someone who is mentally retarded. (EH Vol. 4 at 608-13). Although Dr. Woods testified generally about the subtests of the Montreal Cognitive Assessment, he did not specify how Defendant performed on those subtests. He supported his conclusion that Defendant had impairment of language by reference to a comment made by one of Defendant's teachers who thought that English was Defendant's second language and by reference to the way Defendant read the letter to Judge Seay when interviewed by Dr. Prichard. According to Dr. Oakland, when reading that letter Defendant exhibited the same sort of "paraphrasic error" (that is, adding or taking away words from a sentence) he did on the Montreal Cognitive Assessment. He also found that Defendant exhibited "expressive aphasia," which he explained as being inability to express language. He offered as an

¹⁶ According to Dr. Woods, the Beta test is a non-standardized IQ test that assesses non-verbal functioning. (EH Vol. 4 at 610-11).

example of "expressive aphasia" Defendant's response to the question whether he wrote the letter to Judge Seay: "I don't know, but I am absolutely sure." (EH Vol. 4 at 598-600; 682-84).

The trial court in this case had already found and gave little weight to the two statutory mitigators found by Dr. Woods. Although an argument could be made that the trial court might have given more weight to those mitigators had additional reasons been provided to support them, this Court finds that this is not the case here. Dr. Woods explained that Defendant's impairments appeared early in his life and they would lead to extreme mental disturbances, which are always present, and therefore they would have been there at the time of the offense as well. (EH Vol. 4 at 664). This explanation is highly implausible, since it suggests that Defendant is always under some sort of extreme mental disturbance because of his impairments. Dr. Woods further explained that the frontal lobe impairments that Defendant allegedly has, account for his inability to conform his conduct to the requirements of the law because they impact his ability to control his impulses. (EH Vol. 4 at 665-66). However, Dr. Woods's finding that Defendant is significantly unable to inhibit his impulses was based on Defendant's self-description as impulsive. (EH Vol. 4 at 662-63). Dr. Woods opined that Defendant's impulsivity, his inability to stop and solve a problem, and his desire "to jump from one attempt to another" are also noticeable in Dr. James's evaluation. (EH Vol. 4 at 663). To the contrary, Dr. James testified that Defendant was able to sustain his attention throughout the testing period, for two and a half hours of testing prior to lunch, and for two and a half hour of testing after lunch. She described him as eager, willing, and cooperative, persisting on tasks that were challenging for him. (EH Vol. 1 at 38). Thus, this Court does not find Dr. Woods's opinion regarding Defendant's inability to control

his impulses very reliable. This Court concludes that there is no reasonable probability that the sentence would have been different had these additional reasons been provided in support of the two statutory mitigators already found by the trial court.

Defendant also relied on Dr. James's testimony to show that he has cognitive deficits that could have been used by penalty phase counsel to establish an additional non-statutory mitigator. Dr. James was asked to conduct a neuropsychological evaluation of Defendant and assess his functioning in different neurocognitive domains including language, memory, executive functioning, and academic skills. (EH Vol. 1 at 34). She testified that she reviewed Dr. Harvey's report, which included the IQ scores on the WAIS-III and the WAIS-IV, and the RBANS results, and found a high degree of consistency with her findings, especially in the language and the working memory areas. (EH Vol. 1 at 35-37; 99-100). However, as already discussed in Defendant's amended claim VII.A., the RBANS scores reflected in Dr. Harvey's raw data were higher than the ones in his report. According to Dr. James, Defendant had a highly variable neurological profile, with weaknesses and strengths in various areas. She explained that Defendant did not have any areas that fall above the norm for his age, but had a number of significant deficits, meaning that his performance falls between the fiftieth percentile and the ninth percentile of his age. (EH Vol. 1 at 37-38). Based on the results of the tests she administered, Defendant showed difficulties in the area of working memory, language, and planning and organization. (EH. Vol 1 at 100).

The fact that Defendant was able to find new experts who could identify cognitive deficits at the postconviction stage is not grounds for finding trial counsel ineffective. See Wyatt v. State, 78 So. 3d 512, 533 (Fla. 2011) (underlining the fact that "a defendant cannot establish that trial counsel was ineffective in obtaining and presenting

mental mitigation merely by presenting a new expert who has a more favorable report") and Asay v. State, 769 So. 2d 974, 986 (Fla. 2000) (stating that "merely because the defendant has now secured the testimony of a more favorable mental health expert, counsel's mental health investigation and presentation of evidence is not rendered incompetent).

Even assuming that Defendant has established he has some cognitive deficits in the area of language, work memory, and planning and organization, the finding of such a non-statutory mitigator would not alter the balance of the aggravators and the mitigators. The Supreme Court of Florida found that the evidence in this case supported three aggravators: prior violent felony, felony murder, and HAC. The Court struck the CCP aggravator, but determined that there was no reasonable probability that the finding of that aggravator affected the death sentence in this case. Williams, 967 So. 2d at 762-65. In addition, the trial court found two statutory mitigators and accorded them little weight, and five non-statutory mitigators, assigning them slight weight. (ROA Vol. 22 at 1747-49; 1750-51). The death penalty was upheld in cases where the trial court found two aggravators (prior violent felony and HAC), two statutory mitigators (extreme mental or emotional disturbance and impaired capacity to appreciate the criminality of conduct or to conform conduct to the requirements of law) and six non-statutory mitigators. See, e.g., Spencer v. State, 691 So. 2d 1062, 1063-66 (Fla. 1996). Furthermore, the HAC aggravator is considered one of the most serious aggravators in the statutory sentencing scheme. Larkin v. State, 739 So. 2d 90, 95 (Fla. 1999) (explaining that both the HAC and CCP aggravators are "two of the most serious aggravators set out in the statutory sentencing scheme").

This Court finds that there is no reasonable probability that Defendant would have received a different sentence, especially given the similarities between the murder in the instant case and the murder of Gaynel Jeffrey in case number 84-010364CF10A. Gaynel Jeffrey was the sister of Robin Jeffrey who had a relationship with Defendant. Defendant stabbed Gaynel Jeffrey to death several days after Robin Jeffrey had broken up with him. Moreover, Defendant committed the murder in the instant case approximately eight months after he had been released from the Florida Department of Corrections for the murder of Gaynel Jeffrey. (ROA Vol. 20 at 22-33; 40-51).

Based on this Court's discussion of Defendant's amended claim VII.A., this Court finds that Defendant could not establish mental retardation as a mitigator under the catch all provision. In addition, this Court finds that contrary to Defendant's allegations in the initial motion for postconviction relief, he could not establish that he has organic brain damage. In fact, Dr. Oakland testified that during his involvement in this case he could not discover any evidence of organic brain damage. (EH Vol. 7 at 915).

During the evidentiary hearing, Defendant presented testimony through his brother Anthony Bowan and his sister Clinita that pesticides were used in the fields where the two of them worked with their mother when they lived in Pahokee. (EH Vol. 8 at 1023-24; Vol. 9 at 1122). However, there was no testimony that Defendant himself was exposed to pesticides or that such exposure impacted his development in any way. Anthony testified that Defendant did not work in the fields because he was too young. (EH Vol. 8 at 1023). Although Clinita testified that her mother worked in the fields while pregnant, she did not specify whether the mother was pregnant with Defendant or with Althamease when she did that. (EH Vol. 9 at 1122). Thus, Defendant could not show

that he was exposed to toxins during fetal development, which was one of the prenatal risk factors for mental retardation mentioned by Dr. Tassé. (EH Vol. 1 at 165).

Through Clinita's testimony during the evidentiary hearing, Defendant presented part of the documentary Harvest of Shame, by Edward R. Morrow, documenting the living and working conditions of the migrant workers in the Pahokee and Belle Glade areas, where Defendant and his family used to live. (EH Vol. 9 at 1128-1142; 1148-56). The documentary and the testimony were offered to show that Mr. Schantz could have easily obtained such mitigation material to present to the jury the poverty in which Defendant grew up. (EH Vol. 9 at 1153). However, even if this information were added to the testimony already presented at trial, this Court finds that there is no reasonable probability that he would have received a different sentence, because the trial court found and weighed the non-statutory mitigator that Defendant had a deprived childhood, being raised in poverty. (ROA Vol. 22 at 1750-51).

Defendant further claims that Mr. Schantz was ineffective for failing to present to the jury, or to the trial court during the Spencer hearing, information about Defendant's sexual abuse as a child. Defendant argues that this information would have been important to explain to the jury that many defendants who commit sexual assault are victims of sexual abuse, as testified by Dr. Woods. (EH Vol. 4 at 578-79). During the evidentiary hearing, Sandra Sticco, the investigator hired to conduct the investigation in this case, testified that Defendant told her that when he was eight or nine years old, he was sexually abused twice by an aunt who was babysitting him. He appeared shameful and withdrawn when he was recounting the incident. (EH Vol. 8 at 1060). Ms. Sticco tried to corroborate this information, but from her conversation with Clinita she learned that the family was no longer in contact with the aunt. She attempted to locate the aunt

but could not find her. (EH Vol. 8 at 1061). Mr. Schantz could not remember any details regarding the allegations of sexual abuse and whether he discussed them with Dr. Walczak. (EH Vol. 3 at 446-47). Without further explanation, he opined that presenting such information to the jury could have hurt Defendant's case. He offered no reason why he could not have presented that evidence during the Spencer hearing. (EH Vol. 3 at 448). Assuming counsel's performance was deficient for not presenting this information to the jury, or to the trial court during the Spencer hearing, this Court finds that Defendant did not show any prejudice, because in light of the strong aggravators and the weak and uncorroborated evidence of sexual abuse, there is no reasonable probability that the sentence would have been different.¹⁷

Defendant also argues that trial counsel was ineffective for failing to present to the jury information regarding his physical abuse by Clinita's husband, Beamon Lawrence. During the evidentiary hearing, Ms. Sticco testified that Defendant told her he was abused by Beamon, who was an alcoholic. (EH Vol. 8 at 1057-58). In her attempt to corroborate that information she spoke to Beamon, who admitted he had a bad temper, but stated that he had stopped drinking years ago. (EH Vol. 8 at 1058). Ms. Sticco recounted that when she interviewed Arthur Lewis, he had mentioned that as a child Defendant was physically abused by Beamon, but he was very apprehensive about it and very vague. (EH Vol. 8 at 1062).

Mr. Schantz testified that he was aware of the allegation that Beamon physically abused Defendant. (EH Vol. 3 at 446). He discussed that issue with the family, but they did not want to present that information during trial. Beamon had health problems and he did not want to testify. In addition, Defendant and the family were directing him not to

¹⁷ See supra at 73-74.

call Beamon as a witness. (EH Vol. 3 at 446; 481). This did not deter Mr. Schantz from issuing a subpoena. However, eventually they all decided as a group not to call Beamon to testify. (EH Vol. 3 at 480-81). This was clearly a reasonable strategic decision and this Court cannot second guess trial counsel's strategy. See Occhicone v. State, 768 So. 2d 1037, 1048 (Fla. 2000) (stating that "strategic decisions do not constitute ineffective assistance of counsel if alternative courses have been considered and rejected and counsel's decision was reasonable under the norms of professional conduct"). Furthermore, Defendant was part of that decision.

Defendant argues that Mr. Schantz was ineffective for failing to call Defendant's brother, Anthony Bowan, to testify at trial. During the evidentiary hearing, Anthony testified about their living conditions in Pahokee and about his struggle with drug addiction. (EH Vol. 1018-40). As already discussed above, the fact that Defendant had a deprived childhood and grew up in poverty was established as a mitigator and given weight by the trial court. Thus, there is no reasonable likelihood that Anthony's testimony regarding their living conditions would have changed the sentence. Defendant argues that had Mr. Schantz presented information at trial about Anthony's drug addiction, the trial court could have compared Defendant with Anthony, who struggled with addiction, rather than with Clinita who had managed to obtain a college education and become a productive member of the society. Even assuming that this argument has some merit, and the trial court would have given the non-statutory mitigators more weight, this Court's confidence in the sentence is not undermined.¹⁸ The death penalty was upheld even in cases with fewer statutory aggravators, and more statutory and non-statutory mitigators than in the instant case. See, e.g., Singleton v. State, 783 So.

¹⁸ See supra at 73-74.

2d 970 (Fla. 2001) (the death penalty was upheld where the trial court found two aggravating factors (prior violent felony and HAC), three statutory mitigating factors (extreme emotional disturbance, impaired capacity to appreciate criminality of conduct or to conform conduct to the requirements of the law, and age) and nine non-statutory mitigators).

Defendant argues that Mr. Schantz was ineffective for not obtaining the deposition of Dr. Glenn Caddy, who assessed Defendant's competency to stand trial for the murder of Gaynell Jeffrey, and had allegedly recommended neurological testing. Dr. Caddy testified during the evidentiary hearing that he did a mental status examination of Defendant, and it was clear to him "that [Defendant] was dull." During the course of that mental status examination he would have also taken some family background history and would have ended his work by reporting his findings to Defendant's attorney at the time. (EH Vol. 9 at 1194). Even assuming that Mr. Schantz rendered deficient performance by not obtaining Dr. Caddy's deposition, Defendant cannot show any prejudice. As already discussed throughout this order, the neurological testing performed during postconviction proceedings shows that such testing would not have changed the balance of the aggravators and mitigators in this case, therefore confidence in the sentence was not undermined.

For the reasons set forth above, this Court finds that Defendant is not entitled to relief on this claim.

Claim X

In claim X for relief, Defendant alleges that he was denied a fair trial and a fair and individualized capital sentencing determination in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, when the

prosecutor made improper and inflammatory comments, and misstated the law during the guilt and penalty phases of Defendant's trial. Specifically, Defendant takes issue with the following statement made by the prosecutor during the closing statement: "And lo and behold, what I submit, ladies and gentleman, [Defendant] won the DNA lottery, he was that person. ... But lo and behold, lo and behold, he won the lottery on that one also. It was his blood. ... And that was the knife that was used in this case, and it was used by the lottery winner, [Defendant]." (ROA Vol. 18 at 1440-41). He argues that by referring to him as lottery winner, the prosecutor was mocking and ridiculing the defense. Defendant also claims that the prosecutor's argument¹⁹ that his childhood did not cause him to commit the crime was in violation of the basic premise in Tennard v. Dretke, 542 U.S. 274 (2004). He contends that during the penalty phase proceedings the prosecutor overemphasized his prior felony convictions to the point where they became a feature of the penalty phase. To the extent trial counsel failed to preserve this issue for appellate review, Defendant alleges ineffective assistance of counsel. Finally, he argues that the prosecutor improperly asked the jury to conclude that he committed sexual battery based on bite marks on the victim's body, which were made by Defendant.

Defendant's one-sentence ineffective assistance of counsel claim on pages 64-65 of his initial postconviction motion is insufficiently pled and without merit. See Foster, 810 So. 2d at 915. In addition, the record reflects that defense counsel objected to the

¹⁹ "You hear life is not a bowl of cherries. You hear, nobody has promised us a rose garden. You hear, when the going gets tough, the tough get going. And you see people pick themselves up by the bootstraps, from the many trials and tribulations that they go through." (ROA Vol. 20 at 1682).

State's attempt to introduce extensive evidence regarding the murder of Gaynel Jeffrey and the prior indecent assault felony. (ROA Vol. 20 at 1544-48; 1566-68). Thus, counsel cannot be deemed ineffective.

Defendant's claims of improper argument by the prosecutor could have and should have been raised on appeal. Trial counsel objected to the State "retrying" the previous cases during Defendant's penalty phase and to the prosecutor's comment that "life is not a bowl of cherries," thus all these arguments are procedurally barred. (ROA Vol. 20 at 1544-48; 1566-68; 1682); see Knight v. State, 923 So. 2d 387, 393 n.6 (Fla. 2005) (rejecting claim of improper prosecutorial comments made during closing arguments as procedurally barred in a postconviction motion for failure to raise it on direct appeal) and Muhammad v. State, 603 So. 2d 488, 489 (Fla. 1983) (citing Smith v. State, 445 So. 2d 323, 325 (Fla. 1983)) (stating that "[i]ssues which either were or could have been litigated at trial and upon direct appeal are not cognizable through collateral attack"). In addition, the Supreme Court of Florida has addressed the issue of sexual battery or attempted sexual battery as the underlying felony for a first-degree felony murder charge and found that there was sufficient evidence, in addition to the bite mark evidence, to submit the charge to the jury. Williams, 967 So. 2d at 754-57. Thus, the bite mark evidence was relevant and the prosecutor was allowed to make reference to the forensic evidence introduced at trial to present the case to the jury.

Finally, as to the prosecutor's derogatory statement that Defendant had won the lottery, this Court finds that even if this issue were not procedurally barred, the comment was harmless error as there is no reasonable possibility that it affected the verdict. Hitchcock v. State, 755 So. 2d 638, 643 (Fla. 2000) (citing King v. State, 623 So. 2d 486, 487 (Fla. 1993)) (stating that "[a]ny error in prosecutorial comments is harmless if

there is no reasonable probability that those comments affected the verdict). Accordingly, for the reasons set forth above, Defendant's claim X is summarily denied.

Claim XI

In the instant claim, Defendant argues that he can show innocence of first-degree murder because his mental state, including his alleged mental retardation, low I.Q., intoxication, brain damage, and mental illness, prevented him from forming the intent to commit premeditated murder. In addition, Defendant claims that there was insufficient evidence to support the underlying felony charge of sexual battery, and therefore he is also innocent of felony murder. Defendant argues that he is innocent of the death penalty because the Eighth Amendment prohibits the execution of mentally retarded individuals. He contends that the lack of aggravating circumstances coupled with the mitigating evidence render his sentence disproportionate. Finally, Defendant claims that to the extent trial counsel failed to preserve or raise this issue, he was denied effective assistance of counsel.

Defendant's claim that he is innocent of first-degree murder and felony murder is predicated on issues which have already been adversely decided to Defendant on direct appeal, and are procedurally barred in this postconviction proceeding. Williams, 967 So. 2d at 754-58 (addressing the issues of felony murder, attempted sexual battery, and premeditation); see also Thompson v. State, 759 So. 2d 650, 657 (Fla. 2000) (finding some of the issues raised in postconviction proceeding procedurally barred because they have already been raised and considered by the Court in prior proceedings). Furthermore, as already discussed in Defendant's amended claim VII.A., Defendant has not shown that he is mentally retarded.

In order to establish that he is innocent of the death penalty, a defendant must "show constitutional error invalidating all of the aggravating circumstances upon which the sentence was based." Vining, 827 So. 2d at 216 (quoting In re Medina, 109 F.3d 1556, 1566 (11th Cir. 1997)). In this case, Defendant did not plead any such error. His contention regarding the insufficiency of aggravating circumstances was decided adversely to Defendant by the Supreme Court of Florida and is not cognizable in the instant postconviction proceeding. Williams, 967 So. 2d at 762-65; see also Hannon v. State, 941 So. 2d 1109, 1147 (Fla. 2006) (finding that the defendant could not prevail on a claim of innocence of the death sentence where he had not shown any constitutional error and where his contention regarding the sufficiency of aggravation was decided adversely on direct appeal and was not a cognizable postconviction claim); Sochor v. State, 883 So. 2d 766, 788 (Fla. 2004) (rejecting a claim of innocence of the death penalty, where the Court had determined on direct appeal that the evidence supported three aggravators) and Allen v. State, 854 So. 2d 1255, 1258 n.5 (Fla. 2003) (finding without merit a claim of innocence of the death penalty where the defendant failed to allege that all the aggravating circumstances in his case were invalid, and where the Court had already conducted a proportionality review on direct appeal).

Finally, Defendant's one-sentence ineffective assistance of counsel claim on page 67 of his initial postconviction motion is insufficiently pled and without merit. See Foster, 810 So. 2d at 915.

Accordingly, for the reasons set forth above, Defendant's claim XI for relief is hereby denied.

Claim XII

In the instant claim, Defendant argues that he has newly discovered empirical evidence which allegedly demonstrates that his conviction and sentence of death constitute cruel and unusual punishment in violation of the Eighth and the Fourteenth Amendments to the United States Constitution. In support of this argument, Defendant relies on the American Bar Association Report (the ABA Report), Evaluating Fairness and Accuracy in the State Death Penalty System: The Florida Death Penalty Assessment Report, issued in September 2006. Defendant claims that the ABA Report identifies several flaws in Florida's capital sentencing scheme that make it highly arbitrary and unreliable.

This argument is without merit. The Supreme Court of Florida has rejected a similar argument premised on the same ABA Report, finding that it did not constitute newly discovered evidence. See, e.g., Tomkins v. State, 994 So. 2d 1072, 1082-83 (Fla. 2008) (affirming the trial court's summary denial of the defendant's claim of newly discovered evidence, and noting that the Court has repeatedly rejected the claim that the 2006 ABA Report was newly discovered evidence) and Power v. State, 992 So. 2d 218, 222-23 (Fla. 2008) (pointing out that the Court had previously found that the ABA Report was not newly discovered evidence and that nothing in the report justifies overturning the Court's prior decisions upholding the facial constitutionality of the death penalty). Furthermore, as in Power, Defendant in the instant case does not explain how the conclusions of the ABA Report render his particular sentence unconstitutional. Id. Therefore, for the reasons set forth above, Defendant's claim XII is summarily denied.

Claim XIII

In his thirteenth claim for relief, Defendant raises a legally insufficient cumulative error argument, alleging in a conclusory fashion that his trial was fundamentally unfair due to a number of errors. However, Defendant does not specifically identify any errors, nor does he present any argument as to how his constitutional rights were violated. Therefore, Defendant is not entitled to relief based on this legally insufficient claim. See, e.g., Farina v. State, 937 So. 2d 612, 617 (Fla. 2006) (finding that defendant's argument that cumulative errors deprived him of a fair trial was a conclusory argument insufficient to state an issue); Duest v. Dugger, 555 So. 2d 849, 852 (Fla. 1990) (stating that "[m]erely making reference to arguments below without further elucidation does not suffice to preserve issues, and these claims are deemed to have been waived") and Floyd v. State, 18 So. 3d 432, 459 (Fla. 2009) (stating that "general references to other pleadings are not sufficient to preserve a challenge in a collateral proceeding").

Even if Defendant's claim were not legally insufficient, it would be procedurally barred, since claims of cumulative trial error should be raised on direct appeal. See, Occhicone, 768 So. 2d at 1040 n.3 (citing Torres-Arboleda v. Dugger, 636 So. 2d 1321, 1323-24 (Fla. 1994)) (finding that defendant's claim that the cumulative impact of judicial error at trial violated his right to a fair trial was procedurally barred because claims of cumulative errors committed at trial must be raised on direct appeal).

The individual claims of error raised in Defendant's postconviction pleadings are either procedurally barred, legally insufficient and/or without merit. Therefore, Defendant's cumulative error argument also fails as to the errors raised in the instant motion. See, e.g., Griffin v. State, 866 So. 2d 1, 22 (Fla. 2003) (stating that "where individual claims of error alleged are either procedurally barred or without merit, the

claim of cumulative error must fail") and Schoenwetter, 46 So. 3d at 562 (stating that a defendant is not entitled to relief on a claim of cumulative error where each alleged error is "either meritless, procedurally barred, or [does] not meet the Strickland standard for ineffective assistance of counsel" (quoting Israel, 985 So. 2d at 520)). For the reasons set forth above, Defendant's cumulative error claim is summarily denied.

Second Amended Claim XIV

In the instant claim for relief, Defendant argues that the lethal injection protocol in Florida violates, facially and as applied, Article II, section 3 and Article I, sections 9 and 17 of the Florida Constitution, and the Eighth Amendment to the United States Constitution. The gist of Defendant's argument is that the substitution of pentobarbital for sodium thiopental as the first of the three drugs used in the lethal injection cocktail in the June 2011 lethal injection protocol creates a substantial risk of harm.

Defendant points out that the use of pentobarbital as an anesthetic is contrary to the manufacturer's recommended administration of the drug and objections against its use in the lethal injection cocktail. He further relies on a report prepared by Dr. David Waisel, pediatric anesthesiologist and Associate Professor of Anesthesia at Harvard Medical School, which discusses the difference between the use of pentobarbital and sodium thiopental as anesthetics, and some safety concerns regarding pentobarbital. The same grounds for challenging the constitutionality of the lethal injection protocol were rejected by the Supreme Court of Florida in Valle, 70 So. 3d at 538-45.

In addition to these concerns about the safety and efficacy of pentobarbital used as an anesthetic, Defendant argues that the lethal injection protocol is procedurally inadequate in its administration of the drugs and assessment of the inmate's consciousness throughout the procedure. However, the only difference between the

June 2011 protocol and the August 2007 protocol is the replacement of sodium thiopental with pentobarbital. The August 2007 protocol was upheld in Lightbourne, 969 So. 2d at 335. See Valle, 70 So. 3d at 545 (finding that the circuit court properly denied Valle's claim that Florida's lethal injection protocol was procedurally inadequate, since the sole difference between the 2011 and 2007 protocols was the replacement of sodium thiopental with pentobarbital, and the Lightbourne Court had upheld the 2007 lethal injection protocol).

This Court finds that Defendant's procedural challenges to the protocol are without merit, since Defendant does not raise any new arguments nor does he cite any new evidence in support of his claim that Florida's lethal injection protocol is unconstitutional. All of the challenges raised by him were previously raised by other capital defendants and rejected by the Supreme Court of Florida. See, e.g., Valle; Mosley v. State, 46 So. 3d 510 (Fla. 2009); Ventura v. State, 2 So. 3d 194 (Fla. 2009); Tompkins v. State, 944 So. 2d 1072 (Fla. 2008); and Lightbourne. Therefore, for the reasons set forth above, Defendant's claim XIV is summarily denied.

Claim XV

Defendant's instant claim was added in the 2011 amendment to his initial postconviction motion. Defendant argues that the State committed a Brady violation by failing to disclose the 1993 employment termination of Joseph Roberts, an officer involved in the investigation of Defendant's 1986 conviction for the murder of Gaynell Jeffrey. That conviction was used as an aggravator in this case. Defendant also argues that the State committed a second Brady violation by failing to maintain records from Defendant's prior periods of incarceration when the State allegedly should have known that his prior convictions would be used to support the statutory aggravators in the

instant case and the records could have provided mitigation. The last Brady violation raised by Defendant is that the State failed to disclose a conflict of interest concerning Dr. Michael Brannon, the State's consulting psychologist during the penalty phase of Defendant's 2004 retrial. The alleged conflict was that Dr. Brannon had testified in 1996 that Mr. Raticoff, Defendant's counsel during his first trial, was sufficiently stable to try Defendant's case. Defendant argues that he was prejudiced because absent these alleged errors there is a reasonable probability that the balance of the aggravating and mitigating circumstances would have been different, especially since on direct appeal the Supreme Court of Florida struck the CCP aggravator.

To prove a Brady violation, a defendant must establish the following three elements: "(1) that the evidence at issue is favorable to him, either because it is exculpatory or because it is impeaching; (2) that the evidence was suppressed by the State, either willfully or inadvertently; and (3) that the suppression resulted in prejudice." Johnson v. State, 921 So. 2d 490, 507 (Fla. 2005). To establish prejudice under Brady, a defendant must show that there is "a reasonable probability that the jury verdict would have been different had the suppressed information been used at trial." Strickler v. Greene, 527 U.S. 263 (1999) (quoting United States v. Bagley, 473 U.S. 667, 683 (1985)). A claim that fails to allege each prong of the Brady test is insufficiently pled. See Overton v. State, 976 So. 2d 536, 563 (Fla. 2007) (finding insufficiently pled a Brady claim as to missing pages from police reports because the defendant did not present any information as to what those pages included and how they could have been exculpatory).

As to the first alleged Brady violation, Defendant has failed to show that the 1993 termination of Officer Roberts is favorable to him either because it is exculpatory or

because it is impeaching. He merely claims in a conclusory fashion that this information could have been used by defense counsel during the 2004 retrial to call into question Defendant's 1986 conviction for the murder of Gaynell Jeffrey. Defendant does not explain how Officer Roberts's termination is material in the instant case. There is no showing that the termination was in any way related to the officer's work on Defendant's 1986 case and that it could have subjected that conviction to collateral attack. However, even without that conviction, there is no reasonable probability that Defendant's sentence would have been different since the prior violent felony aggravator was also supported by an indecent assault conviction upon a nine year old child. (ROA Vol. 22 at 1735-36). The trial court's reliance on that conviction to support the aggravator was upheld on appeal. Williams, 967 So. 2d at 762.

Defendant's second alleged Brady violation is insufficiently pled. He does not describe what jail and medical records were destroyed by the State and what prior periods of incarceration he is referring to. He does not explain how such records could have exculpatory or impeachment value for the instant case. Moreover, he does not specify how he was prejudiced. See Gore v. State, 846 So. 2d 461, 466-67 (Fla. 2003) (holding that the defendant's Brady claim was insufficiently pled where he presented no factual basis in support of the allegation that the State improperly withheld a phone book and made no showing of prejudice).

As to Defendant's third Brady claim, this Court notes that he has not shown good cause to add it in his 2011 amendment, since the information that supports this claim is contained in the record and it was easily discoverable. See Fla. R. Crim. P. 3.851 (specifying that a 3.851 motion "may be amended up to 30 days prior to the evidentiary hearing upon motion and good cause shown"). In fact, Defendant referred to Dr.

Brannon's testimony on behalf of Mr. Raticoff in claim III of his initial postconviction motion. Even if Defendant could show good cause for adding the third Brady claim, he could not prove any violation because the facts pled in support of the alleged undisclosed conflict were part of the record and Defendant knew of Dr. Brannon's testimony on behalf of Mr. Raticoff. See Ponticelli v. State, 941 So. 2d 1073, 1088 (Fla. 2006) (stating that "[a] defendant cannot show a Brady violation has occurred if the defendant knew of the existence of the evidence or in fact had the evidence" (quoting Knight, 923 So. 2d at 406)). In addition, nothing supports the existence of a conflict in this case. Defendant does not allege that Dr. Brannon worked for, or had information about him. Therefore, for the reasons set forth above, Defendant's instant claim is hereby summarily denied. Accordingly, it is

ORDERED AND ADJUDGED that Defendant's Motion to Vacate Judgment of Conviction and Sentence is hereby **DENIED**.

The Defendant has thirty (30) days from the date of this order to file an appeal.

DONE AND ORDERED on this 10th day of May, 2013, in Chambers, Fort Lauderdale, Broward County, Florida.


EILEEN M. O'CONNOR
CIRCUIT COURT JUDGE

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Called into Doubt by State v. Mason, Ohio App. 3 Dist., December 27, 2016

967 So.2d 735

Supreme Court of Florida.

Ronnie Keith WILLIAMS, Appellant,

v.

STATE of Florida, Appellee.

No. SC04-857.

|

June 21, 2007.

|

As Revised on Denial of Rehearing Oct. 18, 2007.

Synopsis

Background: Defendant was convicted in the Circuit Court, Broward County, Sheldon Shapiro, J., of first-degree murder and sentenced to death. Defendant appealed. The Supreme Court, 792 So.2d 1207, reversed and remanded for new trial. Following new trial, defendant was again convicted of capital murder and sentenced to death. Defendant appealed.

Holdings: The Supreme Court held that:

[1] statements made by victim to officer at crime scene and to detective while victim was in intensive care unit of hospital, in which victim identified defendant as her assailant, were admissible under dying declaration exception to hearsay rule;

[2] trial court did not abuse its discretion by allowing the jury access to a transcript of victim's 911 call that was prepared by the state;

[3] evidence of victim's pregnancy was sufficiently relevant to be admissible;

[4] evidence was sufficient to support first-degree felony murder charge based on underlying felony of attempted sexual battery;

[5] trial court properly considered defendant's prior conviction for indecent assault as a prior violent felony aggravator during penalty phase;

[6] competent and substantial evidence supported finding of heinous, atrocious, or cruel (HAC) aggravating factor in penalty phase; and

[7] death sentence was not disproportionate.

Affirmed.

Pariente, J., concurred and filed a separate opinion in which Quince, J., concurred.

Anstead, J., concurred in result only.

West Headnotes (45)

[1] **Criminal Law** ⇌ Reception of evidence

Defendant failed to preserve for appellate review his claim that admission of victim's out-of-court statements violated his Sixth Amendment right to confrontation in capital murder trial, where defendant failed to allege a confrontation violation in objecting to the admission of victim's statements at trial. U.S.C.A. Const.Amend. 6.

5 Cases that cite this headnote

[2] **Criminal Law** ⇌ Out-of-court statements and hearsay in general

Statements made by victim during 911 call, in which victim identified her assailant, were not testimonial and, therefore, were not subject to Confrontation Clause in capital murder trial; in making the call, victim was seeking emergency medical assistance for her life-threatening injuries. U.S.C.A. Const.Amend. 6.

2 Cases that cite this headnote

[3] **Criminal Law** ⇌ Reception of evidence

Even if statements made by victim to officer at crime scene and to detective while victim was in intensive care unit of hospital, in which victim identified defendant as her assailant, were testimonial, any error in admitting such statements in violation of defendant's confrontation rights was harmless in capital murder trial; abundant nontestimonial evidence was offered during trial identifying defendant as the assailant. U.S.C.A. Const.Amend. 6.

Cases that cite this headnote

[4] **Criminal Law** ⇌ Reception and Admissibility of Evidence

Generally, a trial court's ruling on the admissibility of evidence will be upheld absent an abuse of discretion.

9 Cases that cite this headnote

[5] **Criminal Law** ⇌ Res Gestae; Excited Utterances

Generally, to be admissible under the excited utterance exception to the hearsay rule, the out-of-court statement must be made while the declarant is under the stress of the startling event and without time for reflective thought. West's F.S.A. § 90.803(2).

3 Cases that cite this headnote

[6] **Criminal Law** ⇌ Res Gestae; Excited Utterances

If sufficient time passed for reflective thought, the proponent for admission of a declarant's statement under excited utterance exception to the hearsay rule must show that reflective thought did not occur. West's F.S.A. § 90.803(2).

1 Cases that cite this headnote

[7] **Criminal Law** ⇌ Length of time elapsed as affecting admissibility

Statements made by victim during 911 call, in which victim identified her assailant, were admissible under the excited utterance exception to hearsay rule in capital murder trial, even though victim told 911 operator that twenty minutes had elapsed after victim was stabbed and before the call, and may have attempted to shower during such time period; record showed that victim did not engage in reflective thought during time period between the stabbing and the 911 call, as during entire time, victim was crying and in obvious pain, which was consistent with the severe injuries she had suffered. West's F.S.A. § 90.803(2).

1 Cases that cite this headnote

[8] **Criminal Law** ⇌ Length of time elapsed as affecting admissibility

Statements made by victim to officer at crime scene, in which victim identified defendant as her assailant, were admissible under excited utterance exception to hearsay rule; victim made the statements only minutes after she made 911 call, and victim, who had been stabbed multiple times, was still seriously injured, upset, and fading in and out of consciousness at time she made the statements. West's F.S.A. § 90.803(2).

Cases that cite this headnote

[9] **Homicide** ⇌ Hopes and expectation of recovery by deceased

Homicide ⇌ Belief as to imminence of death

For a statement to be admissible under dying declaration exception to hearsay rule, the declarant must believe death is imminent and inevitable with no hope of recovery. West's F.S.A. § 90.804(2)(b).

1 Cases that cite this headnote

[10] **Homicide** ⇌ Sufficiency of showing in general

Homicide ⇌ Belief as to imminence of death

Statements made by victim to officer at crime scene, in which victim identified defendant as her assailant, were admissible under dying declaration exception to hearsay rule in capital murder trial; officer arrived minutes after victim made 911 call, during which she told operator that she had been stabbed in the heart and back and that she was "dying" and could not breathe, and by the time the paramedics and officer arrived, condition of victim, who had been stabbed multiple times, had not improved and continued to deteriorate. West's F.S.A. § 90.804(2)(b).

3 Cases that cite this headnote

[11] **Homicide** ⇌ Hopes and expectation of recovery by deceased

Statements made by victim to detective while victim was in intensive care unit of hospital, in which victim identified defendant as her assailant, were admissible under dying declaration exception to hearsay rule; victim, who had been stabbed multiple times, was very anxious about whether she would survive when she made the statements, and at the time the statements were made, victim was attached to medical machinery, including a respirator, a heart monitor, and two chest tubes, of which she was clearly aware. West's F.S.A. § 90.804(2)(b).

3 Cases that cite this headnote

[12] **Criminal Law** ⇌ Hearsay

Capital murder defendant waived for appellate review his challenge to trial court's prematurely prepared order denying defendant's motion to exclude victim's out-of-court statements, where defendant did not object to such order at trial.

1 Cases that cite this headnote

[13] **Criminal Law** ⇌ Hearing, ruling, and objections

Capital murder defendant was not denied opportunity to be heard on his motion to exclude victim's out-of-court statements, where while trial judge had prematurely drafted an order denying the motion without hearing from the parties, judge subsequently stated would listen to oral presentations from the parties and, if he was persuaded, he would be "more than happy" to change the order.

Cases that cite this headnote

[14] **Criminal Law** ⇌ Remarks on ruling on admissibility of evidence

Trial court did not depart from a stance of neutrality and assume the role of prosecutor in capital murder trial when it determined that statements made by victim at hospital were admissible as excited utterances and dying declarations even though state had only asserted that such statements were admissible as dying declarations; trial court did not interject itself into the suppression proceedings, but rather read the documents submitted by each party, observed testimony, listened to argument, and ultimately determined that the evidence supported the admission of the hospital statements under two hearsay exceptions. West's F.S.A. § 90.803(2).

1 Cases that cite this headnote

[15] **Criminal Law** ⇌ Hearing, ruling, and objections

If an appellate court can affirm an evidentiary ruling on a basis that was never presented by the parties or relied upon by the trial court, a trial court may base an evidentiary ruling on an alternate basis that was not suggested by the parties.

2 Cases that cite this headnote

[16] **Sentencing and Punishment** ⇌ Findings and Statement of Reasons

A trial court can consider and find an aggravating factor in imposing death sentence for murder even though it was not presented to or found by the jury.

4 Cases that cite this headnote

[17] **Criminal Law** ⇌ Sound recordings

Trial court did not abuse its discretion in capital murder trial by allowing the jury access to a transcript of victim's 911 call that was prepared by the state, even though defendant claimed the transcript improperly editorialized and emphasized portions of the call; 911 operator who received the call from victim testified at trial that she had compared the tape with the transcript, and concluded that the transcript was a fair and accurate transcription of the recording, and because the parties did not stipulate to the accuracy of the transcript, the trial judge provided cautionary instruction to the jury that if there was a conflict between the transcript that was not in evidence, and the tape that was in evidence, it was to rely on the tape.

1 Cases that cite this headnote

[18] **Criminal Law** ⇌ Demonstrative evidence

The standard of review for the use of a demonstrative aid at trial is abuse of discretion.

2 Cases that cite this headnote

[19] **Criminal Law** ⇌ Admission of evidence

Defendant was precluded from challenging on appeal of capital murder conviction that he was prejudiced by admission of victim's pregnancy into evidence, where defense counsel requested instruction on a lesser offense of third-degree felony murder, of which element was that victim was pregnant. West's F.S.A. §§ 782.04(4), 784.045(1)(b).

1 Cases that cite this headnote

[20] **Homicide** ⇌ Physical condition of parties

Evidence of victim's pregnancy was sufficiently relevant in first-degree felony murder trial to totality of the circumstances and to specifically proving the underlying felony, attempted sexual battery; defendant was not the father of victim's child, and thus evidence of victim's pregnancy was probative to demonstrate victim's lack of consent to any type of sexual conduct with, or sexual advance by, defendant. West's F.S.A. §§ 90.402, 794.011(3).

Cases that cite this headnote

[21] **Sex Offenses** ⇌ Consent

Under the sexual battery statute, the state must prove the victim's lack of consent as an element of the crime. West's F.S.A. § 794.011(3).

Cases that cite this headnote

[22] **Criminal Law** ⇌ Evidence calculated to create prejudice against or sympathy for accused

Admission of evidence of victim's pregnancy was not such that it would have inflamed the jury or appealed to its emotions, and, thus the probative value of such evidence was not substantially outweighed by the danger of unfair prejudice in capital murder trial; victim's pregnancy was only mentioned six times during the course of the entire trial, all evidence regarding the ultimate fate of victim's child was kept from the jury, and jury did not view any photographs of victim that revealed her advanced state of pregnancy or any scars that resulted from the cesarean section. West's F.S.A. § 90.403.

2 Cases that cite this headnote

[23] **Homicide** ⇌ Predicate offenses or conduct

Evidence was sufficient to support first-degree felony murder charge based on underlying felony of attempted sexual battery; evidence showed that victim voluntarily opened the door for the attacker, and given her advanced state of pregnancy, was likely clothed when she did so, yet when police arrived, victim appeared at the door completely nude and was attempting to cover her nudity, police discovered at the crime scene victim's blood-stained shorts and panties on the bed under some bloody sheets in a condition that indicated they were removed either during or in close proximity to the attack, victim had bite marks on her bare breast and back, and in the general area of her groin, and victim had made an unsolicited statement to officer that she had been "raped." West's F.S.A. § 782.04(1)(a).

Cases that cite this headnote

[24] **Criminal Law** ⇌ Insufficiency of Evidence

A motion for judgment of acquittal should not be granted unless there is no view of the evidence which the jury might take favorable to the opposite party that can be sustained under the law.

8 Cases that cite this headnote

[25] **Criminal Law** ⇌ Insufficiency of Evidence

The fact that the evidence is contradictory does not warrant a judgment of acquittal because the weight of the evidence and the witnesses' credibility are questions solely for the jury.

4 Cases that cite this headnote

[26] **Criminal Law** ⇌ Attempts

To establish the crime of attempt, the state must prove a specific intent to commit a particular crime and an overt act toward the commission of the crime.

3 Cases that cite this headnote

[27] **Homicide** ⇌ Sex offenses

Trial court properly submitted to jury a first-degree felony murder charge based on the underlying felony of attempted sexual battery, even though victim did not die during the attempted battery; sufficient evidence existed to demonstrate that stabbing and the attempted sexual battery of victim were part of one prolonged criminal episode, and death was clearly a predictable result of the multiple stab wounds inflicted to victim's chest and back.

Cases that cite this headnote

[28] **Homicide** ⇌ Deliberation and premeditation

Evidence of premeditation was sufficient to submit first-degree murder case to jury; physician testified that victim, was stabbed in the upper chest and back area no fewer than seven times, that one stab wound penetrated her sternum, one of the hardest bones in the body, and entered the pericardial sac that surrounds the heart, and that other stab wounds perforated her lungs.

2 Cases that cite this headnote

[29] **Criminal Law** ⇌ Reasonable Doubt

If a rational trier of fact could find the existence of the elements of the crime beyond a reasonable doubt, sufficient evidence exists to sustain a conviction.

Cases that cite this headnote

[30] **Criminal Law** ⇌ Necessity of requests

Failure of defense counsel to request a specific instruction on the presumption of innocence with regard to the felony murder charge waived defendant's challenge that trial court committed fundamental error by failing to give such instruction.

Cases that cite this headnote

[31] **Criminal Law** ⇌ Sufficiency of instructions as to presumption of innocence

Even if defense counsel had requested specific instruction on the presumption of innocence with regard to the felony murder charge, trial court's failure to give instruction was not error; trial court had read the standard jury instruction regarding the presumption of innocence, instruction was provided after the trial court enumerated the elements of first-degree premeditated and felony murder and each of the lesser included offenses, and thus it was logical for jurors to conclude that presumption of innocence applied to charges of premeditated murder, felony murder, or any of the lesser included offenses.

4 Cases that cite this headnote

[32] **Criminal Law** ⇌ Necessity of requests

Criminal Law ⇌ Instructions

Defendant waived for appellate review his claim that trial court committed reversible error in first-degree murder trial by failing to provide an instruction that a conviction on the theory of the murder must be unanimous, where defendant replied in the negative to trial court's question of whether there was any instructions that court failed to give, and did not request that the court instruct that the theory of the murder be unanimous.

Cases that cite this headnote

[33] **Criminal Law** ⇌ Effect of verdict or determination

Trial court's failure to provide an instruction in first-degree murder trial that a conviction on the theory of the murder must be unanimous did not constitute reversible error; trial court utilized a verdict form upon which the jury could specify whether it found defendant guilty of premeditated or felony murder, and the jury found defendant guilty under both theories.

2 Cases that cite this headnote

[34] **Sentencing and Punishment** ⇌ Presentation and reservation in lower court of grounds of review

Capital murder defendant waived for appellate review his claim that the trial court erred in failing to instruct jury during penalty phase that it was required to determine that aggravators found outweighed the mitigators found beyond a reasonable doubt rather than by a preponderance of the evidence standard, and in instructing the jury that it was required to determine whether sufficient mitigating circumstances existed that outweighed the aggravating circumstances, where defendant did not object at trial when trial court asked whether there was any instructions that the court misread or should have given.

4 Cases that cite this headnote

[35] **Sentencing and Punishment** ⇌ Sufficiency

Sentencing and Punishment ⇌ Harmless and reversible error

Failure of trial court to include in its sentencing order for defendant convicted of first-degree murder, the precise words finding that sufficient aggravators existed to justify death sentence, did not warrant vacation of death sentence; it was clear from trial court's order that it found sufficient aggravators existed to jury sentence of death, as trial court stated that the aggravators were proven beyond a reasonable doubt and were not outweighed by the statutory and non-statutory mitigating evidence. West's F.S.A. § 921.141(3).

5 Cases that cite this headnote

[36] **Sentencing and Punishment** ⇌ Nature, degree, or seriousness of other offense

Trial court properly considered defendant's prior conviction for indecent assault as a prior violent felony aggravator during penalty phase of capital murder trial; officer testified that nine-year-old victim of prior conviction told him that defendant came into her residence, forced her into a room, and put her in fear of her life, by telling her that he would kill her, if she did not comply with his actions, that defendant then penetrated her vagina with his finger, and that victim had sustained bleeding as a result of defendant's actions. West's F.S.A. § 921.141(5)(b).

Cases that cite this headnote

[37] **Sentencing and Punishment** ⇌ Nature, degree, or seriousness of other offense

Whether a crime constitutes a prior violent felony for purposes of a death penalty aggravator is determined by the surrounding facts and circumstances of the prior crime; the existence of violence as an "inherent element" is not the test. West's F.S.A. § 921.141(5)(b).

Cases that cite this headnote

[38] **Sentencing and Punishment** ⇌ Vileness, heinousness, or atrocity

Competent and substantial evidence supported finding of heinous, atrocious, or cruel (HAC) aggravating factor in penalty phase of capital murder trial; defendant stabbed pregnant victim multiple times in her chest and back and viciously bit her, repeated stab wounds and bites to victim by defendant coupled with the level of force necessary to penetrate victim's sternum, and victim sustained defensive wounds in an unsuccessful attempt to defend herself against defendant's vicious attack. West's F.S.A. § 921.141(5)(h).

3 Cases that cite this headnote

[39] **Sentencing and Punishment** ⇌ Questions of fact

Standard of review applicable to the finding of an aggravating circumstance in sentencing for capital murder is whether competent, substantial evidence supports the trial court's finding.

Cases that cite this headnote

[40] **Sentencing and Punishment** ⇌ Planning, premeditation, and calculation

Competent and substantial evidence did not support finding of cold, calculated, and premeditated manner (CCP) aggravating factor in penalty phase of capital murder trial; no evidence refuted state's possible theory that defendant intended only to get victim to act as a mediator in his troubles with his girlfriend, as she had done in the past when the couple had previously experienced difficulties, and that when victim refused, defendant became enraged and attacked her, and second-degree murder of defendant's former girlfriend committed by defendant eight years earlier failed to demonstrate that he formulated a carefully prearranged design to kill

victim as an act of revenge against girlfriend for terminating their relationship, but rather only demonstrated that when he is rejected by a girlfriend, an angry response is triggered which has produced deadly consequences. West's F.S.A. § 921.141(5)(i).

1 Cases that cite this headnote

[41] Sentencing and Punishment ⇌ Harmless and reversible error

Where an aggravating factor is stricken on appeal, the harmless error test is applied to determine whether there is no reasonable possibility that the error affected the sentence.

6 Cases that cite this headnote

[42] Sentencing and Punishment ⇌ Proportionality

Imposition of death penalty on defendant convicted of first-degree murder was not disproportionate; defendant bit, repeatedly stabbed, and attempted to rape an eighteen-year-old woman who was almost eight months pregnant in a prolonged attack, wounds were inflicted to the chest and back in such a manner as to strike major organs in victim's body, causing victim intense physical and mental pain and suffering, victim was conscious throughout the attack, and victim experienced circumstances that would provoke tremendous fear and terror for herself and her unborn child.

Cases that cite this headnote

[43] Sentencing and Punishment ⇌ Proportionality

In deciding whether death is a proportionate penalty, the Supreme Court considers the totality of the circumstances of the case and compares the case with other capital cases.

Cases that cite this headnote

[44] Sentencing and Punishment ⇌ Murder

The death penalty is reserved only for the most aggravated and least mitigated murders.

Cases that cite this headnote

[45] Jury ⇌ Death penalty

A jury was not constitutionally required to find that defendant had a prior violent felony conviction, as a death penalty aggravating factor.

Cases that cite this headnote

Attorneys and Law Firms

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Opinion

PER CURIAM.

In his first trial, the appellant, Ronnie Keith Williams, was convicted and sentenced to death for first-degree murder. On appeal, this Court reversed the conviction, vacated the sentence, and remanded for a new trial. *See Williams v. State*, 792 So.2d 1207 (Fla.2001). Williams was retried, and he was again convicted and sentenced to death. For the reasons that follow, we affirm the conviction and sentence.¹

FACTS AND PROCEDURAL HISTORY

On March 4, 1993, a grand jury indicted Williams on one count of first-degree premeditated murder for the murder of Lisa Dyke. The charges against Williams arose as a result of the death of Dyke nineteen days after she was stabbed multiple times with a knife in a Wilton Manors apartment complex. The evidence presented at trial established the following:

On Tuesday, January 26, 1993, at approximately 8:30 a.m., a call was made to 911 from a woman who identified herself as Lisa Dyke. Dyke stated that she had been stabbed in her heart and back, and she was more than seven months pregnant. When the operator inquired of Dyke as to who stabbed her, she responded with a name that sounded to the operator like "Rodney." Dyke then informed the operator that her attacker was a black male and, although she did not know his last name, she could provide a phone number from which that information could be obtained. Dyke provided the phone number and stated that it belonged to the girlfriend of the man who had stabbed her.

When Dyke opened her door for the police, Officer Brian Gillespie observed an eighteen-year-old black female who was nude, bloody, and wet, "as if she tried to take a shower." Dyke was holding clothing in front of herself in an attempt to cover her nudity. According to Gillespie, Dyke was upset and beginning to lose consciousness. Gillespie observed stab wounds on Dyke's upper torso and back and noticed that there was blood "pretty much everywhere." As she lay on the couch, Dyke stated repeatedly to Gillespie that she did not want to die. While the paramedics were treating Dyke, Gillespie asked who had stabbed her. Through the oxygen mask that covered Dyke's face, and over the sounds of numerous police and paramedic radios, Gillespie heard Dyke say the name "Rodney."² When Gillespie asked Dyke who Rodney was, Dyke replied, "Ruth's sister's boyfriend." Dyke gave Gillespie the telephone number of "Ruth's sister." Dyke then made the unsolicited statement to Gillespie, "He raped me." Soon after, the paramedics transported Dyke to the hospital. Hospital personnel were unable to perform a rape examination *742 or collect evidentiary samples for analysis before Dyke was rushed into surgery.

While processing the crime scene, Detective Bob Cerat noticed that there were no signs of forced entry into the apartment. In the bedroom, Cerat discovered a knife that was stained with the same reddish substance that appeared throughout the apartment. Cerat collected the knife, as well as other items from the scene that were stained with the reddish substance. Cerat and another detective lifted or photographed latent fingerprints from the scene.

Detective Anthony Lewis determined that Ruth Lawrence rented the apartment where the stabbing had occurred. He met with Ruth, and she stated that Lisa Dyke had been babysitting Ruth's nine-month-old son in the apartment. Dyke had been living with Ruth for approximately two weeks. Dyke was connected with Ruth because Dyke was dating Ruth's brother, Julius, and Julius was the father of Dyke's unborn baby. The detective discovered that Ruth's sister was named Stefanie Lawrence, and the name of Stefanie's boyfriend was Ronnie Williams. At the time of the attack, Stefanie and Ronnie had been dating for approximately six months. Stefanie lived with her father and Julius, and her telephone number was the number that Dyke provided to police and the 911 operator to identify her attacker. Ruth testified at

trial that when she left the apartment that morning to go to school, there was no blood in the apartment where Dyke was found, and Williams had never before bled in her apartment.

Subsequent investigation revealed that on the night before the crime, Ruth had participated in a three-way telephone call with Stefanie and Williams during which Ruth informed Stefanie of a disagreement between Ruth and Williams. Dyke was listening to the conversation on another extension in Ruth's apartment. During that call, Ruth prompted Stefanie to break her relationship with Williams, and Stefanie proceeded to do so during the phone conversation. Stefanie then advised Williams that he was not to return to Ruth's apartment again. According to Stefanie, Williams was upset, and he repeatedly stated that they could resolve the problem. After the call ended, Stefanie did not speak to Williams again, but he paged her four or five times that night. Stefanie did not respond to the pages, and the last page from Williams was around midnight.

Stefanie Lawrence agreed to assist the police in locating where Williams lived. Officer David Jones went to the house identified by Stefanie and encountered Williams's sister, Clinita Lawrence,³ who informed Officer Jones that she had transported Williams to a mental health crisis facility earlier that day when she noticed that he was acting bizarrely. Officer Jones proceeded to the crisis center and located Williams. Officer Jones observed that Williams had several fresh bandages on both of his hands. Williams was transported to the police station, and Officer Jones advised him of his *Miranda*⁴ rights.

When Dyke regained consciousness after her surgery, she wrote a note to a nurse indicating a desire to speak to the authorities. Detective Daniel James spoke to Dyke in the intensive care unit. Dyke agreed to respond to Detective James's questions by nodding her head for "yes" and moving her head from side-to-side for "no" because she was unable to speak with the tubes which had been placed in her mouth. Detective James produced a photographic *743 lineup of six individuals and asked Dyke if she recognized the person who attacked her. Dyke tapped on the photo of Ronnie Williams with her finger.

At the police station, Williams admitted to Officer Jones that he knew Dyke, but stated that he had not been in Ruth's apartment at the time Dyke was stabbed. With regard to the bandages on his hands, Williams stated that he had cut his fingers on a knife as he was washing dishes. He mentioned that he was having problems with his girlfriend, and that Dyke had been "kind of the go-between person." When Williams was informed that Dyke had identified him as the person who stabbed her, Williams requested an attorney, and the interview was terminated. At that time, Williams was arrested for the attack on Dyke.

On January 28, 1993, when Detective James returned to check on Dyke's condition and to photograph her wounds, he realized that some of the wounds appeared to be bite marks. James photographed bite marks on Dyke's chest, arm, breast, and the back of her shoulder. Dyke also indicated a bite mark in her groin area, but James was unable to photograph that area because Dyke was again taken into surgery to deliver her baby by cesarean section. Dyke died on February 14, 1993, nineteen days after the stabbing.

At trial, forensic pathologist Ronald Wright noted that Dyke had sustained six stab wounds in her back, some of which penetrated her lungs, which caused bleeding into the chest cavity and collapse of the lungs. Further, one stab wound had penetrated Dyke's sternum and was at least four inches deep.⁵ Wright opined that the original stab wound would have been deeper, but it was impossible to determine the exact depth because Dyke's wounds had been healing for nineteen days before her death. The doctor noted that Dyke had defensive wounds on her hands and bite marks on her body. Dr. Wright ultimately concluded that the cause of Dyke's death was multiple stab wounds which, over a period of nineteen days, produced a fatally high level of toxicity in Dyke's body.⁶ Dr. Wright further reviewed the photos of the cuts on Williams's hands, and concluded that the cuts were consistent with slippage—a phenomenon that occurs when a person

hits a hard surface (such as a sternum)⁷ with a hiltless knife (such as that which was recovered from the apartment), and the hand slides down the knife, producing a cut on the hand of the person holding it.

*744 Fingerprint analyst Fred Boyd testified that a fingerprint found in a reddish substance that was located on the bathroom door of Ruth's apartment matched the known print of Williams's left ring finger. DNA testing on blood samples taken from two pieces of clothing collected from the apartment generated DNA profiles that matched the profile of Williams at four genetic locations. According to a DNA analysis expert, the frequency of occurrence of finding the same profile in two unrelated individuals who matched at four of these points would be one in 120 million African-Americans. Finally, forensic dentist Richard Souviron compared the photographs of the bite mark on Dyke's breast with dental casts made from the mouth of Williams and concluded with reasonable certainty that the bite on Dyke's breast was made by Williams.

At trial, Williams testified that on the night before the stabbing he was upset that Stefanie had severed their relationship. This caused him to begin using drugs, specifically, crack cocaine, powder cocaine, and marijuana. He also consumed a fifth of rum that night. When he started to feel unwell, he went home and lay in bed. The next morning, Williams awoke around 7 a.m. and proceeded to consume a half of a fifth of vodka and use more crack cocaine, powder cocaine, and marijuana in his backyard. Williams testified that between the night prior to the stabbing and the morning of the stabbing, he consumed approximately fifteen rocks of crack cocaine. The last thing he remembered was walking back into his house, and then he awakened in the mental health facility. Williams remembered being brought to the police station and being questioned; however, he had no recollection of the questions asked because he was not feeling well.

Williams's sister, Clinita Lawrence, testified that on the morning of the stabbing, Williams appeared as if he was hallucinating. He was talking nonsensically and had trouble controlling his limbs. Before she went to work, Clinita took Williams to the mental health facility so that he would not hurt himself. Clinita stated that while she was driving to the facility, Williams attempted to exit the car. Clinita testified that upon arrival at the mental facility, Williams attempted to break out of the facility, and he was eventually placed in a straitjacket.

In rebuttal, the State presented the testimony of Michael Elwell, who was director of mental health services in Broward County during 1993. Elwell testified that the mental health facility to which Williams was brought never used straitjackets or anything that resembled a straitjacket. Elwell also stated that, had an individual arrived at the facility hallucinating, incapable of controlling his limbs, and attempting to break out of the facility, the guidelines in place at that time would have required that the individual be medically cleared at a local emergency room prior to admission to the facility.

After hearing all of the evidence, the jury rendered a verdict finding Williams guilty of the murder of Lisa Dyke. The verdict form required the jury to specify the theory of murder upon which it had convicted Williams. The jury indicated that it found Williams guilty of both premeditated murder and felony murder with sexual battery as the underlying felony.

During the penalty phase, the State presented testimony regarding Williams's prior convictions for second-degree murder and indecent assault. With regard to the second-degree murder conviction, Dr. James Ongley testified that in 1984 he worked for the office of the Broward County medical examiner. Dr. Ongley testified that the body of Gaynel Jeffrey was found at a construction site with eight stab wounds in the back and one stab *745 wound in the front. Dr. Ongley concluded that the cause of Jeffrey's death was multiple stab wounds. Robin Jeffrey, who was Gaynel's sister, testified that in 1984, Williams was her boyfriend. Robin testified that on September 11, 1984, she was in the process of severing her relationship with Williams. Williams arrived at the Jeffrey house and attempted to reconcile with Robin. Gaynel informed Williams that he was not to come back to the house or call Robin. The next morning Sybil French, the mother of Gaynel and Robin, found "blood all over" the house in a path that "dragged around" from the front door to the garage. Later that day, French found blood in the backseat of her vehicle.

With regard to Williams's 1982 conviction for indecent assault, retired officer Dennis Edwards testified that at the time of the crime, the victim was nine years old. According to a statement from the victim, Williams came into her residence, forced her into a room, and told her that he would kill her if she did not comply with his commands. Williams then proceeded to penetrate the victim's vagina with his finger, and the victim sustained bleeding as a result of Williams's conduct. The victim stated that at the time of the assault, she was in fear for her life.

The defense presented the testimony of six witnesses at the penalty phase. Arthur Lewis, a lifetime friend of Williams, testified that Williams had difficulty while growing up because of his small stature. According to Lewis, Williams was constantly attacked by the other schoolchildren (earning him the name "the punching bag"), had money taken from him, and was accused of things he did not do. Dorothea Simmons, who counsels individuals in religion, testified that when she counseled Williams in January 1993, she suspected he was on drugs because she had difficulty obtaining his attention. Carter Powell, a corrections deputy with the Broward County Jail, testified that Williams was a model inmate with no disciplinary problems who attended religious services at the jail once a week. Corrections Officer Herman Ruise testified that while incarcerated in the Department of Corrections, Williams was a model prisoner, he was never involved in trouble, and he had amicable relationships with the other inmates.

Williams's sister, Clinita Lawrence, testified that Williams's mother died in childbirth when Williams was seven years old, and that Williams's father was never involved in his life. After his mother's death, Williams went to live with Clinita, who was nineteen years old at the time. Clinita had four other children in her care, one of which was her own child. Clinita stated that she was unable to obtain benefits for the children because she did not have the necessary paperwork to make proper application. For approximately three months, Clinita and the children lived in an abandoned car, and they had to cover themselves with plastic when it rained because the car did not have a roof. Clinita testified that Williams did not do well in school, did not start first grade until he was ten years old, and did not finish high school. She stated that the other children often beat him up and teased him about not having a mother and father. Clinita testified that Williams is "the closest brother that anyone could ever have," and she loves him and depends on him.

Finally, psychologist Dr. Michael Walczak testified concerning Williams's extremely troubled childhood, and concluded that Williams lacked the necessary parental role models to teach him right from wrong. Dr. Walczak concluded that the daily beatings that Williams suffered at the hands of other children were the source of his anger and hostility. Dr. Walczak noted that Williams started using alcohol around the age of eighteen and *746 started using crack cocaine around age twenty. He testified that Williams held a series of jobs, but was fired from them for stealing money to buy drugs. Dr. Walczak opined that it is possible for an individual who consumed ten or fifteen rocks of crack and a fifth of alcohol to have a blackout and to have his or her memory affected. Dr. Walczak ultimately concluded that, at the time of the stabbing, Williams was under the influence of a significant amount of intoxicants and was unable to function normally. He further opined that Williams's capacity to appreciate the criminality of his conduct was substantially impaired in that Williams had no recollection of the stabbing.

After considering the evidence, the jury returned a recommendation of death by a vote of ten to two. After the jury was dismissed, the trial judge informed the parties that he believed that sufficient evidence existed to find the cold, calculated, and premeditated (CCP) aggravator proven beyond a reasonable doubt. The trial court informed the parties that they would have an opportunity to rebut the finding of CCP at the *Spencer*⁸ hearing. At the *Spencer* hearing, the defense presented no additional evidence, but argued that it would not be proper for the trial judge to consider an aggravator that was never submitted to the jury. The trial court concluded that case law permits a trial court to make findings as to aggravating circumstances where it believes a circumstance has been proven beyond a reasonable doubt. The Court further concluded that *Appendi*⁹ did not apply because the jury had already made a recommendation of death.

The trial judge sentenced Williams to death for the murder of Dyke. In pronouncing Williams's sentence, the trial court determined that the State had proven beyond a reasonable doubt the existence of four statutory aggravators: (1) Williams had previously been convicted of a felony involving a threat of violence to the person, *see* § 921.141(5)(b), Fla. Stat. (2003)

(great weight); (2) the murder was committed while Williams was engaged in the commission of, or an attempt to commit, or flight after committing or attempting to commit sexual battery, *see* § 921.141(5)(d), Fla. Stat. (great weight); (3) the murder was especially heinous, atrocious, or cruel, *see* § 921.141(5)(h), Fla. Stat. (great weight); and (4) the murder was cold, calculated, and premeditated, *see* § 921.141(5)(i), Fla. Stat. (moderate weight). The trial court further determined that there was “some” evidence of two statutory mitigating circumstances, that Williams was under extreme mental or emotional disturbance at the time of the crime, *see* § 921.141(6)(b), Fla. Stat., and that the capacity of Williams to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired, *see* § 921.141(6)(f), Fla. Stat.; however, the trial court accorded each of these circumstances little weight. The trial court found a total of five nonstatutory mitigating circumstances,¹⁰ each of which the Court assigned *747 slight weight. The trial court concluded:

[S]uch circumstances fail to produce any effect upon the defendant, relative to his character, or relative to the circumstances of his murder of Lisa Dyke. The Defendant's abusive childhood did not vitiate or influence his murder of Lisa Dyke. There is simply no nexus between the adversities of the Defendant's youth, and his vicious and brutal murder of Lisa Dyke. Clinita Lawrence, the sister of ... Williams was subject to many of the adversities thrust upon the Defendant, and she managed to obtain a college degree and become a productive member of society. The trial court concluded that the statutory aggravating circumstances were not outweighed by the statutory and nonstatutory mitigating evidence. In imposing a sentence of death, the trial court expressly noted that “the imposition of the sentence in the present case is not contingent upon the Court's finding of the statutory aggravating factor of cold, calculating and premeditated.” This direct appeal followed.

ANALYSIS

1. Out-of-Court Statements by Dyke

[1] [2] [3] [4] Williams first claims that the trial court abused its discretion in admitting the out-of-court statements made by Dyke (1) during the 911 call (the 911 statements), (2) to Officer Gillespie (the Gillespie statements), and (3) while in the intensive care unit of the hospital (the hospital statements).¹¹ Generally, a trial court's *748 ruling on the admissibility of evidence will be upheld absent an abuse of discretion. *See Alston v. State*, 723 So.2d 148, 156 (Fla.1998). We conclude that these statements were admissible under the concepts of excited utterances or dying declarations as we more fully discuss below.

Excited Utterance.

[5] [6] An excited utterance, which is a statement “relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition,” is admissible under section 90.803(2) of the Florida Statutes. § 90.803(2), Fla. Stat. (2006). Generally, to be admissible under the excited utterance hearsay exception, the out-of-court statement must be made while the declarant is under the stress of the startling event and without time for reflective thought. *See Hutchinson v. State*, 882 So.2d 943, 951 (Fla.2004). If sufficient time passed for reflective thought, the proponent for admission of the statement must show that reflective thought did not occur. *See id.*

[7] With regard to the 911 statements, even though Dyke informed the 911 operator that approximately twenty minutes had elapsed after she was stabbed and before the call, the record illustrates that Dyke did not engage in reflective thought. During the 911 call Dyke was crying and in obvious pain, which was consistent with the severe injuries she had suffered. *See Rogers v. State*, 660 So.2d 237, 240 (Fla.1995) (holding that statements qualified as excited utterances when declarant was excited and hysterical after time interval in which reflective thought could have occurred).

Williams argues that the fact that Dyke may have attempted to shower demonstrates reflective thought, and, therefore, the 911 statements do not qualify as excited utterances. While this assertion may be arguable, we conclude that it is insufficient to overcome the abuse of discretion standard necessary to overturn the trial court's evidentiary ruling. This Court has stated that "[f]actors that the trial judge can consider in determining whether the necessary state of stress or excitement is present are the age of the declarant, the physical and mental condition of the declarant, the characteristics of the event and the subject matter of the statements." *State v. Jano*, 524 So.2d 660, 661 (Fla.1988).

[8] Even if Dyke did shower before making the 911 call, it is undisputed that during that time she was suffering from at least seven stab wounds and both of her lungs were punctured. Williams does not assert that during the time period between the stabbing and the 911 call, Dyke's pain from the stab wounds had relented; Dyke had overcome the shock of the stabbing, the biting, or the attempted rape; or that Dyke's fear for her life or the life of her unborn baby had ceased. Therefore, even though it may not be clear as to why Dyke showered (if, indeed, she did shower), we do not believe that the trial court abused its discretion in concluding that Dyke did not "have the reflective capacity necessary *749 for conscious misrepresentation" at the time she called 911. *Rogers*, 660 So.2d at 240. Additionally, Dyke made the Gillespie statements only minutes after she made the 911 statements. The fact that she was still grievously injured, upset, and fading in and out of consciousness refutes Williams's assertions that Dyke had "the reflective capacity necessary for conscious misrepresentation" at the time she made the Gillespie statements. *Id.*

Dying Declarations.

[9] A dying declaration is "a statement made by a declarant while reasonably believing that his or her death was imminent, concerning the physical cause or instrumentalities of what the declarant believed to be impending death or circumstances surrounding impending death." § 90.804(2)(b), Fla. Stat. (2006). For a statement to be admissible under this hearsay exception, the declarant must believe death is imminent and inevitable with no hope of recovery. *See Tillman v. State*, 44 So.2d 644, 648 (Fla.1950). This Court has held that whether a proper and sufficient predicate has been established for the admission of a statement under the dying declaration hearsay exception is a mixed question of law and fact that is reviewed under a "clearly erroneous" standard. *See Teffeteller v. State*, 439 So.2d 840, 843-44 (Fla.1983).

[10] During the 911 call, Dyke told the operator that she had been stabbed in the heart and back. She further exclaimed to the operator, "I'm dying," "I can't breathe," and "I can't make it anymore." It is clear from these statements and the circumstances underlying the 911 call that Dyke believed that her death was imminent as a result of the multiple stab wounds she had sustained. Further, by the time the paramedics and the police officers arrived, which was immediately after the 911 call, her condition had not improved. Indeed, it had continued to deteriorate. Gillespie testified that when Dyke opened the door for him, she was beginning to lose consciousness, and her skin was grey. When the paramedics arrived, they gave Dyke oxygen, commenced intravenous fluids, placed Dyke on a heart monitor, and also placed her in a "masked trouser suit," which is an air bladder designed to force blood from the legs into the upper body to increase blood pressure. During her encounter with Officer Gillespie, Dyke expressed that she was afraid of dying. The paramedics even expressed concern to Officer Gillespie that Dyke would not survive. Given these facts and the dire medical circumstances present, we conclude that when Dyke made the Gillespie statements, she feared her death was imminent.

[11] Finally, with regard to the hospital statements, Dyke was very anxious between the time she regained consciousness from general anesthesia and when her statements were made to Detective James. Additionally, even after she made the hospital statements, Dyke expressed to Nurse Walters that she had a fear of dying. Also relevant to Dyke's perception of her imminent death following her surgery is a recognition that she was attached to medical machinery, including a respirator, a heart monitor, and two chest tubes, of which she was clearly aware. Despite supportive attempts by hospital personnel, there is no clear evidence from the record that Dyke believed she had any hope of recovery. Under these facts, we conclude that the admission of the hospital statements as dying declarations was not clearly erroneous. *See Teffeteller*, 439 So.2d at 843-44.

2. Alleged Departure of Trial Court from a Neutral Stance

Williams asserts that the trial court departed from its position of neutrality three ^{*750} times during Williams's trial: (1) when it issued the order ruling on the admissibility of the out-of-court statements by Dyke before conducting a full hearing to allow the parties an opportunity to present oral argument on the issue; (2) when it determined that the hospital statements were admissible as excited utterances *and* dying declarations although the State had only asserted that Dyke's statements were admissible as dying declarations; and (3) when it found an aggravating circumstance (CCP) that was not advanced by the State. With regard to the latter two actions, Williams asserts that the trial court abandoned its position of impartiality and acted as prosecutor by adopting bases that were never advanced by the State. Having considered Williams's assertions, we conclude that his allegations of judicial bias are without merit.

With regard to the first challenge, at the hearing on Williams's Motion to Exclude, the trial judge admitted that he had prematurely drafted an order denying the motion. The trial court stated: "You know, maybe I jumped the gun, but I read over all my notes and I thought I had taken it under advisement.... I read over all my notes. I read over the motions. I read over your memorandum and I had done an order." However, the trial court informed the parties that he was willing to receive and consider additional arguments. The trial court then proceeded to receive oral arguments from the parties, and, after the arguments concluded, the order denying exclusions was delivered in open court.

[12] [13] A review of the arguments made during this hearing demonstrates that Williams did not object to the entry of an order that was drafted prior to hearing the oral arguments of the parties. This Court has held that "[e]xcept in cases of fundamental error, an appellate court will not consider an issue unless it was presented to the lower court." *Steinhorst v. State*, 412 So.2d 332, 338 (Fla.1982); *see also Spann v. State*, 857 So.2d 845, 852 (Fla.2003) ("[T]he specific legal ground upon which a claim is based must be raised at trial and a claim different than that will not be heard on appeal."). Therefore, we conclude that even if the claim were meritorious, which it is not, Williams waived his challenge to the prematurely prepared order. The trial court specifically informed the parties that, despite drafting the order earlier, he would listen to the oral presentations and, if he was persuaded, he would be "more than happy" to change the order. Thus, by the judge's own words, he afforded Williams an opportunity to be heard, and the contention that he was denied such an opportunity is without merit.

[14] [15] With regard to the determination that the hospital statements were admissible on a ground not advanced by the State, we conclude that the trial court did not depart from a stance of neutrality and assume the role of prosecutor. We have held that "the trial court's ruling on an evidentiary matter will be affirmed even if the trial court ruled for the wrong reasons, as long as the evidence or an alternative theory supports the ruling." *Muhammad v. State*, 782 So.2d 343, 359 (Fla.2001). Thus, if an appellate court can affirm an evidentiary ruling on a basis that was never presented by the parties or relied upon by the trial court, a trial court may base an evidentiary ruling on an alternate basis that was not suggested by the parties.¹² Williams has not presented any authority where this Court has held otherwise. Indeed, ^{*751} the cases upon which Williams relies to support his claim that the trial court departed from neutrality are clearly distinguishable because they involve situations where the trial judge prompted the prosecution to either present certain evidence or take certain actions. *See, e.g., Williams v. State*, 901 So.2d 357 (Fla. 2d DCA 2005) (court prompted the State during trial to alter allegation in first of two counts of information to fit proof of offense); *Evans v. State*, 831 So.2d 808 (Fla. 4th DCA 2002) (trial court suggested that prosecution inquire into the immigration status of the defendant); *Sparks v. State*, 740 So.2d 33 (Fla. 1st DCA 1999) (trial court indicated evidence that prosecution could use for impeachment). Unlike the cases upon which Williams relies, here the trial court did not interject itself into the suppression proceedings. Rather, the trial court read the documents submitted by each party, observed testimony, listened to argument, and ultimately determined that the evidence supported the admission of the hospital statements under two hearsay exceptions. The trial court's conduct was not improper.¹³

[16] Finally, with regard to the trial court finding the CCP aggravator to exist and apply when this aggravator was not advanced by the State, we conclude that the trial court's action was not improper in the abstract.¹⁴ This Court has held that "it is not error for a judge to consider and find an aggravator that was not presented to or found by the jury." *Davis v. State*, 703 So.2d 1055, 1061 (Fla.1997), *cert. denied*, 524 U.S. 930, 118 S.Ct. 2327, 141 L.Ed.2d 701 (1998). In support of this holding, we concluded that "[t]he trial judge ... is not limited in sentencing to consideration of only that material put before the jury, is not bound by the jury's recommendation, and is given final authority to determine the appropriate sentence." *Id.* (quoting *Engle v. State*, 438 So.2d 803, 813 (Fla.1983)). In *Hoffman v. State*, 474 So.2d 1178 (Fla.1985), this Court, in reaching a similar decision, stated, "We fail to see how the jury's not being instructed on this aggravating circumstance has worked to appellant's disadvantage...." *Id.* at 1182.¹⁵

In light of the foregoing, we reject Williams's claim that the trial court departed from a neutral stance.

3. Transcript of the 911 Call

[17] [18] Williams next asserts that the trial court abused its discretion in allowing the jury access to a transcript of the 911 call that was prepared by the State because the transcript improperly editorialized *752 and emphasized portions of the call. Williams further contends that the transcript invaded the province of the jury by suggesting how to interpret certain portions of the tape that are not clear—for example, whether Dyke was referring to "Rodney" or "Ronnie" as her attacker. We conclude that this claim is without merit. The standard of review for the use of a demonstrative aid at trial is abuse of discretion. *See Chamberlain v. State*, 881 So.2d 1087, 1102 (Fla.2004). In *Martinez v. State*, 761 So.2d 1074 (Fla.2000), this Court, relying upon federal case law, enunciated the procedures to be followed before allowing jurors access to a transcript of a recording:

[T]rial courts should exercise extreme caution before allowing transcripts of recordings to be viewed by the jury. The preferred approach is for the parties to stipulate to the accuracy of the transcript. If there is a dispute as to the accuracy, the trial court should make an independent pretrial determination of the accuracy of the transcript after hearing from persons who can properly testify as to its accuracy. Those who may be able to verify the accuracy of the transcript are: (1) the actual participants to the conversation; or (2) those who listened to or overheard the conversation as it was being recorded, so long as such persons can establish that the quality of the conversation that they overheard or listened to was better at the time they overheard it than the quality of the tape recording.

....

In addition ... where a transcribed version of an audio-video tape is used as an aid to the jury and there is no stipulation as to its accuracy, trial courts should give a cautionary instruction to the jury regarding the limited use to be made of the transcript.... The federal circuits that have considered this issue agree that whenever a transcript is allowed by the trial court, it is "important that the judge instruct the jurors that their personal understanding of the tape supersedes the text in a transcript."

Id. at 1086–87 (quoting *United States v. Slade*, 627 F.2d 293, 302 (D.C.Cir.1980)).

We conclude that the trial court sufficiently complied with the guidelines announced by this Court in *Martinez*, and, therefore, no abuse of discretion occurred in allowing the jury to use a transcript of the 911 call. During trial, the 911 operator who received the call from Dyke testified that she had compared the tape with the transcript, and concluded that the transcript was "a fair and accurate transcription of the recording." Thus, the accuracy of the transcript was verified in court by an actual participant to the conversation. *See Martinez*, 761 So.2d at 1086. Further, because the parties did not stipulate to the accuracy of the transcript, the judge provided the following cautionary instruction to the jury: "State's 41 is in evidence, that is the tape. The transcript is not in evidence. So, if there's a conflict between the transcript that is not in evidence, and the tape that is in evidence, you are to rely on the tape that is in evidence."

This record does not confirm the argument that the trial court abused its discretion in allowing the jury access to a transcript of the 911 call that was created by the State. *See Martinez*, 761 So.2d at 1086–87.

4. Evidence of Lisa Dyke's Pregnancy

Williams contends that the trial court also abused its discretion in admitting evidence of Lisa Dyke's pregnancy because it was unduly prejudicial in that it could have appealed to passion and could have misdirected the jury in evaluating or weighing the evidence. Although Williams objected at various stages to the admission of this evidence, we conclude that this claim is *753 without merit. The totality of the circumstances became a relevant consideration, and this case also involved a lesser included offense of third-degree felony murder, with Dyke's pregnancy constituting an element of the lesser included offense that the State was required to prove.

Under the Florida Statutes, third-degree felony murder is defined as “[t]he unlawful killing of a human being, when perpetrated without any design to effect death, by a person engaged in the perpetration of, or in the attempt to perpetrate,” any felony other than those enumerated in statutory subsection 782.04(4). § 782.04(4), Fla. Stat. (1993). Aggravated battery is a second-degree felony that is not enumerated in subsection (4) of section 782.04. *See id.*; § 784.045(2), Fla. Stat. (1993). Under section 784.045 of the Florida Statutes, “[a] person commits aggravated battery if the person who was the victim of the battery was pregnant at the time of the offense and the offender knew or should have known that the victim was pregnant.” § 784.045(1)(b), Fla. Stat.

Thus, to convict Williams on the lesser included offense of third-degree felony murder, the State was required to prove that (1) Williams battered Dyke, (2) Dyke was pregnant, and (3) Williams knew or should have known that Dyke was pregnant. *See id.* The third-degree murder aspect of this case essentially placed a burden on the State to prove as an element of the crime that Dyke was pregnant. As a result, Williams cannot claim that he was prejudiced by admission of Dyke's pregnancy into evidence.

[19] Williams unsuccessfully attempted to raise this claim before the trial court when he requested a new jury during the penalty phase on the basis that the guilt phase jury had heard “extensive” evidence of Dyke's pregnancy. When confronted with regard to his specific request for the third-degree felony murder instruction, counsel for Williams stated: “The Court overruled every objection regarding allowing in the pregnancy. And at that point, since [Dyke's pregnancy] was part of the evidence, we had no choice but to ask for that lesser include offense.” The trial court countered this assertion by saying:

No, in other words, you requested Third-degree murder, and you knew in advance that one of the elements was that the state had to prove an aggravated battery. And that the homicide occurred during an aggravated battery. And one of the elements of aggravated battery is that ... the woman was pregnant. So, it seems like you sort of invited that.

We agree that having affirmatively requested a jury instruction on an offense of which the pregnancy of the victim is an element, Williams should not prevail on a challenge to the admission of Dyke's pregnancy during the trial court proceedings.

[20] Moreover, even if Williams had preserved this challenge, we would conclude that the trial court did not err in admitting evidence of Dyke's pregnancy. The Evidence Code provides that “[a]ll relevant evidence is admissible, except as provided by law.” § 90.402, Fla. Stat. (2006). The Code places the following limitation on the admission of evidence: “Relevant evidence is inadmissible if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of issues, misleading the jury, or needless presentation of cumulative evidence.” § 90.403, Fla. Stat. (2006).

The standard of review for a trial court's ruling on the admissibility of evidence is abuse of discretion. *See Alston*, 723 So.2d at 156.

[21] [22] We conclude that the admission of Dyke's pregnancy was relevant to the totality of the circumstances and to specifically proving the underlying felony in the felony murder charge, attempted *754 sexual battery. The sexual battery statute provides, in pertinent part:

A person who commits sexual battery upon a person 12 years of age or older, *without that person's consent*, and in the process thereof uses or threatens to use a deadly weapon or uses actual physical force likely to cause serious personal injury commits a life felony....

§ 794.011(3), Fla. Stat. (Supp.1992) (emphasis supplied). Under this statute, "the state must prove the victim's lack of consent as an element of the crime." *Hodge v. State*, 419 So.2d 346, 347 (Fla. 2d DCA 1982). Other states have considered the pregnancy of the victim of a rape to be relevant to the issue of the victim's lack of consent, and we find the rationale of those courts to be persuasive. *See, e.g., State v. Burd*, 921 So.2d 219, 223 (La.Ct.App.) (concluding that evidence supported conviction of aggravated rape where "[t]he parties were not prior acquaintances; [the victim] was 7-1/2 months pregnant; and [the defendant] confirmed that they first encountered each other by chance only because of her need for a ride home"), *review denied*, 941 So.2d 35, 35-36 (La.2006); *Justus v. Commonwealth*, 220 Va. 971, 266 S.E.2d 87, 93 (1980) (where defendant was charged with murder while in the commission of or subsequent to rape, trial court did not err in allowing evidence of victim's pregnancy where "[t]he advanced state of pregnancy of the victim ... rendered remote the possibility that the victim would have had intercourse voluntarily with anyone"). At the time of the attack, Dyke was seven months and three weeks pregnant. Further, Williams was not the father of Dyke's child; rather, the father was Julius Lawrence, and Dyke was still in a relationship with Julius at the time of the attack. We conclude that the evidence of Dyke's pregnancy was probative to demonstrate Dyke's lack of consent to any type of sexual conduct with, or sexual advance by, Williams. Accordingly, we deny this claim.¹⁶

5. Felony Murder/Attempted Sexual Battery

Williams next claims that the trial court erred in submitting a felony murder case with sexual battery or attempted sexual battery as the underlying felony to the jury and by instructing the jury on the aggravating circumstance that the murder occurred during a sexual battery or an attempted sexual battery. Williams further contends that the submission of a first-degree felony murder charge to the jury in this case constituted fundamental error because the statute governing felony murder requires that the death occur *during* the commission of the underlying felony, and Dyke succumbed to her injuries long after any alleged attempted sexual battery had ended.

*755 [23] [24] [25] With regard to the first challenge, Williams is essentially contending that the trial court erred in failing to grant his motion for judgment of acquittal (JOA) on the felony murder charge. In determining whether a trial court should have entered a JOA rather than submitting a case to a jury, this Court has stated:

If, after viewing the evidence in the light most favorable to the State, a rational trier of fact could find the existence of the elements of the crime beyond a reasonable doubt, sufficient evidence exists to sustain a conviction. However, if the State's evidence is wholly circumstantial, not only must there be sufficient evidence establishing each element of the offense, but the evidence must also exclude the defendant's reasonable hypothesis of innocence.

Pagan v. State, 830 So.2d 792, 803 (Fla.2002) (citation omitted). A motion for JOA should not be granted unless "there is no view of the evidence which the jury might take favorable to the opposite party that can be sustained under the law," *Gudinas v. State*, 693 So.2d 953, 962 (Fla.1997) (quoting *Taylor v. State*, 583 So.2d 323, 328 (Fla.1991)). Finally, "[t]he

fact that the evidence is contradictory does not warrant a judgment of acquittal because the weight of the evidence and the witnesses' credibility are questions solely for the jury." *Fitzpatrick v. State*, 900 So.2d 495, 508 (Fla.2005).

[26] Under the Florida Statutes, first-degree felony murder is defined as "[t]he unlawful killing of a human being ... 2. [w]hen committed by a person engaged in the perpetration of, or in the attempt to perpetrate, any: ... (c) [s]exual battery " § 782.04(1)(a), Fla. Stat. (1993) (emphasis supplied).¹⁷ To establish the crime of attempt, the State must "prove a specific intent to commit a particular crime and an overt act toward the commission of the crime." *Gudinas*, 693 So.2d at 962 (quoting *Rogers*, 660 So.2d at 241). Florida case law demonstrates that various actions satisfy the overt act requirement of an attempted sexual battery charge. In *Gudinas*, this Court concluded that a trial court properly denied a motion for JOA where there was

undisputed eyewitness testimony that the defendant followed [the victim] and then tried to forcibly enter her car on three separate occasions, including an attempt to smash her window while screaming, "I want to f____ you." *Gudinas* only ceased his attempt to gain entry to the car when [the victim] "laid on the horn," creating a loud noise. 693 So.2d at 962.

In *State v. Ortiz*, 766 So.2d 1137, 1142 (Fla. 3d DCA 2000), the Third District reversed the trial court order dismissing a charge of attempted sexual battery where "[t]he victim was found beaten and virtually nude in an isolated wooded area of a park with her shirt pulled up around her head and her shorts down around her ankles." The district court noted that the evidence was "admittedly circumstantial"; however, the court concluded that "the state's substantial and competent evidence in this case is sufficient to establish a prima facie case of guilt against the appellee." *Id.* at 1142-43; *see also Geldreich v. State*, 763 So.2d 1114, 1118-19 (Fla. 4th DCA 1999) (affirming denial of JOA motion on attempted sexual battery charge where the defendant "forcibly carried [the victim] to the parking lot, threw her down, straddled her, and began to take her blouse off"); *L.J. v. State*, 421 So.2d 198, 199 (Fla. 3d DCA 1982) (denying motion to *756 dismiss and noting that an attempted sexual battery "would certainly be facilitated by the overt act of attempting to remove the pants of the victim").

Evidence during this trial revealed there was no sign of forced entry to the apartment where Dyke was found. Therefore, it appears that Dyke voluntarily opened the door for the attacker, and, given her advanced state of pregnancy, it can logically be presumed that she was clothed when she did so. However, when the police arrived Dyke appeared at the door completely nude and was attempting to cover her nudity.¹⁸ Further, when police processed the crime scene, they discovered Dyke's blood-stained shorts and panties on the bed under some bloody sheets in a condition that indicated they were removed either during or in close proximity to the attack. Additionally, Dyke had bite marks on her bare breast and back, and in the general area of her groin. *See generally State v. Perea*, 142 Ariz. 352, 690 P.2d 71, 76 (1984) (concluding that photograph of bite mark on victim's neck was "probative on the issue of whether a sexual assault had occurred"). Finally, Dyke made an unsolicited statement to Officer Gillespie that she had been "raped."¹⁹ Viewing the totality of these circumstances in a light most favorable to the State, we conclude that there was sufficient evidence upon which a jury could find the existence of the elements of attempted sexual battery beyond a reasonable doubt, and therefore, the trial court did not err in denying the motion for JOA on the felony murder charge.

[27] We further reject Williams's claim that the trial court committed fundamental error in submitting a first-degree felony murder charge to the jury because Dyke did not die during the attempted sexual battery. In cases involving felony murder with sexual battery as the underlying felony, this Court has rejected claims by a defendant that "the murder did not occur 'during' the actual sexual battery" and has upheld a felony murder conviction where the murder of one victim and the subsequent kidnapping and sexual battery of another victim "were part of the same criminal episode." *Roberts v. State*, 510 So.2d 885, 888 (Fla.1987) (citing *Jefferson v. State*, 128 So.2d 132, 137 (Fla.1961) ("It is a homicide committed during the perpetration of a felony, if the homicide is part of the res gestae of the felony.")). We have further stated that "[n]either the passage of time nor separation in space from the felonious act to the killing precludes a felony murder

conviction when it can be said ... that the killing is a predictable result of the felonious transaction.” *757 *Stephens v. State*, 787 So.2d 747, 757 (Fla.2001) (quoting *Mills v. State*, 407 So.2d 218, 221 (Fla. 3d DCA 1981)).

In the instant case, we conclude the trial court properly submitted a felony murder case to the jury because sufficient evidence existed to demonstrate that the stabbing and the attempted sexual battery of Dyke were part of one prolonged criminal episode. See *Roberts*, 510 So.2d at 888; *Pagan*, 830 So.2d at 803. Williams obtained a knife from the kitchen of the apartment and used that knife to stab Dyke repeatedly. The bloody knife was subsequently discovered on the floor of the bedroom. Dyke's bloody shorts and underwear were also discovered in the bedroom, on the bed under a sheet. There is no indication from the record that Williams first attempted to sexually batter Dyke, and then made a separate and independent decision to repeatedly stab her. Indeed, the more logical explanation is that the attempted sexual battery and the stabbing were part of one prolonged attack. Further, even though Dyke survived nineteen days after the attack, the trial court did not err in submitting a felony murder case to the jury because death was clearly a predictable result of the multiple stab wounds inflicted to Dyke's chest and back. See *Stephens*, 787 So.2d at 757. Accordingly, we reject this claim.

6. Premeditation

[28] In his next claim, Williams asserts that the trial court erred in submitting a premeditated murder case to the jury. According to Williams, there is no evidence in the instant case of a plan to kill because Williams did not bring a weapon to the apartment, and there was no sign of forced entry. In further support of this claim, Williams states that no lethal wounds were inflicted—Dyke died from infection, not from the wounds themselves—and that had he intended to kill Dyke, she would have died much earlier because there was nothing to stop him from killing her.

[29] As with the felony murder charge, if “a rational trier of fact could find the existence of the elements of the crime beyond a reasonable doubt, sufficient evidence exists to sustain a conviction.” *Pagan*, 830 So.2d at 803. With regard to the element of premeditation, this Court has stated:

“Premeditation is defined as more than a mere intent to kill; it is a fully formed conscious purpose to kill.” This purpose to kill must exist for such a time before the homicide “to permit reflection as to the nature of the act to be committed and the probable result of that act.” Premeditation can be shown by circumstantial evidence. Whether the State's evidence fails to exclude all reasonable hypotheses of innocence is a question of fact for the jury. As this Court has stated:

Evidence from which premeditation may be inferred includes such matters as the nature of the weapon used, the presence or absence of adequate provocation, previous difficulties between the parties, the manner in which the homicide was committed, and the nature and manner of the wounds inflicted.

Green, 715 So.2d at 944. Moreover, whether premeditation exists is a question of fact for the jury, but the jury is not required “to believe the defendant's version of the facts when the State has produced conflicting evidence.”

Perry v. State, 801 So.2d 78, 84 (Fla.2001) (citations omitted) (quoting *Green v. State*, 715 So.2d 940, 943 (Fla.1998), and *Spencer v. State*, 645 So.2d 377, 381 (Fla.1994)). This Court has also held that “[p]remeditation may be formed in a moment and need only exist for such time as will allow the accused to be conscious of the nature of the act he is about to commit and the probable result of that act.” *Boyd v. State*, *758 910 So.2d 167, 181 (Fla.2005) (internal quotation marks omitted). Further, we have held that “the deliberate use of a knife to stab a victim multiple times in vital organs is evidence that can support a finding of premeditation.” *Perry*, 801 So.2d at 85–86.

In the instant case, Doctor Wright testified that Dyke was stabbed in the upper chest and back area no fewer than seven times. One stab wound penetrated her sternum, one of the hardest bones in the body, and entered the pericardial sac

that surrounds the heart. Other stab wounds perforated her lungs. Williams unquestionably stabbed Dyke in areas of her body where vital organs were located. *See Perry*, 801 So.2d at 85–86.

Further, the evidence presented during trial demonstrated that twelve hours before the attack, Stefanie Lawrence terminated her relationship with Williams during a phone call in which both Ruth Lawrence and Dyke participated. The next morning, Williams drove from Fort Lauderdale to Ruth Lawrence's apartment—a fifteen-minute drive. There was evidence at trial from which the jury could conclude that Williams approached the apartment in a manner that minimized the possibility of him being seen by the other tenants.²⁰ There were no signs of pry marks or forced entry to the front door of the apartment, indicating that Dyke, who was babysitting a nine-month-old child, voluntarily admitted the person who entered the apartment. Ruth testified that the knife used was removed from the top of the kitchen sink where it was kept in plain view with other knives in a holder. Evidence presented at trial demonstrated that Williams had been to Ruth's apartment previously, and he had even helped Dyke move into Ruth's apartment only two weeks before. Under these facts, we conclude that there was competent, substantial evidence from which the jury could conclude that Williams possessed “a fully formed conscious purpose to kill.” *Perry*, 801 So.2d at 84. Accordingly, we conclude that the trial court properly submitted a premeditated murder case to the jury.

7. The Indictment

Williams next asserts that the indictment in this case was constructively amended when the trial court instructed the jury on felony murder and the State argued for conviction on a theory of felony murder. Williams contends that the amendment was improper because the grand jury only charged Williams with premeditated murder. Williams also asserts that the trial court erred in allowing the State to proceed on a theory of felony murder where the indictment gave no indication of that theory.

Williams is correct that the indictment charged first-degree premeditated murder, but did not reference felony murder. Nonetheless, we have stated: “It is well established that an indictment which charges premeditated murder permits the State to prosecute under both the premeditated and felony murder theories.” *Parker v. State*, 904 So.2d 370, 382–83 (Fla.2005). We have further held that “[t]he State need not charge felony murder in an indictment in order to prosecute a defendant under alternative theories of premeditated and felony murder when the indictment charges premeditated murder.” *759 *Kearse v. State*, 662 So.2d 677, 682 (Fla.1995). Similarly, this Court has “repeatedly rejected claims that it is error for a trial court to allow the State to pursue a felony murder theory when the indictment gave no notice of the theory.” *Gudinas*, 693 So.2d at 964. Accordingly, these claims are without merit.

8. The Presumption of Innocence

In this claim, Williams asserts that the trial court committed fundamental error by failing to instruct the jury that the presumption of innocence applied to the charge of felony murder. Williams notes that the trial court did instruct the jury that the presumption of innocence applied to the allegations in the indictment; however, felony murder was not alleged in the indictment.

[30] Williams does not dispute that he did not request the trial court to instruct the jury that the presumption of innocence applied to the charge of felony murder. This Court has held that jury instructions “are subject to the contemporaneous objection rule, and, absent an objection at trial, can be raised on appeal only if fundamental error occurred.” *Walls v. State*, 926 So.2d 1156, 1180 (Fla.2006) (quoting *State v. Delva*, 575 So.2d 643, 644 (Fla.1991)).

A review of this Court's case law demonstrates that the failure of counsel to request specific additional instructions on the presumption of innocence waives a challenge to those instructions given. In *Griffin v. State*, 414 So.2d 1025 (Fla.1982),

the court instructed the jury on felony murder, but failed to instruct the jury on the elements of the underlying felony, i.e., robbery. *See id.* at 1027. When the omission was brought to the judge's attention, the judge reinstructed the jurors on felony murder and on the underlying felony of robbery. *See id.* At that time, defense counsel did not request that the court repeat the instruction on the presumption of innocence as to the crime of robbery. *See id.* at 1028. On review, this Court concluded that the failure of defense counsel to request a repetition of the instruction on the presumption of innocence as to the robbery charge waived the challenge to the jury instructions that were given. *See id.* Similarly, we would conclude that the failure here to request a specific instruction on the presumption of innocence with regard to the felony murder charge waived the instant challenge.

[31] Further, even if an additional instruction had been requested, we conclude that the failure to give such an instruction would not constitute error. In *McCrae v. State*, 510 So.2d 874 (Fla.1987), this Court held in postconviction proceedings that trial counsel was not ineffective for failing to request special additional instructions on the presumption of innocence because “the general standard instructions on the presumption of innocence ... were sufficient to apprise the jury of the applicable principles.” *Id.* at 878. In the instant case, the trial court read the standard jury instruction regarding the presumption of innocence:

The defendant has entered a plea of not guilty. This means you must presume or believe that the defendant is innocent. The presumption stays with the Defendant, as to each material allegation in the indictment, through each stage of the trial, unless it has been overcome by the evidence, to the exclusion of and beyond a reasonable doubt.

Fla. Std. Jury Instr. (Crim.) 3.7. This instruction was provided *after* the trial court enumerated the elements of first-degree premeditated and felony murder and each of the lesser included offenses. As noted earlier, an indictment which charges premeditated murder “permits the State to prosecute under both the premeditated and felony murder theories.” *Parker*, 904 So.2d at 382–83. Therefore, even *760 though the standard jury instruction for the presumption of innocence that the trial court read to the jurors referenced “the indictment,” we conclude that the trial court's reading of this instruction was “sufficient to apprise the jury of the applicable principles.” *McCrae*, 510 So.2d at 878. Indeed, it would be illogical under these circumstances for the jurors to conclude that the presumption of innocence only applied to the charge of premeditated murder, but not to the charge of felony murder or any of the lesser included offenses. Accordingly, we conclude that this claim is without merit.

9. Unanimity of the Verdict

[32] [33] In his next challenge, Williams claims that the trial court committed reversible error in only instructing the jury that its verdict must be unanimous, but not providing an additional instruction that a conviction on the theory of the murder must be unanimous. A review of the record demonstrates that after the jury had been instructed, but before the jury began to deliberate, the trial court specifically asked the parties, “Other than the objections previously made, are there any objections as to the manner I read the instructions, any instructions that I misread, or any instructions that I said I would give that I neglected to give?” Williams's counsel replied, “No, Your Honor. We would just renew the objections that were previously made. There's no new objection.” Williams has waived the current challenge because he failed to object to the jury instructions on this basis, and he failed to request that the court instruct the jury that the theory of the murder must also be unanimous. *See Walls*, 926 So.2d at 1180. Nonetheless, even if this challenge had been preserved, we would conclude that it is without merit because the United States Supreme Court has held “that the United States Constitution [does] not require the jury to come to a unanimous decision on the theory of first-degree murder.” *Mansfield v. State*, 911 So.2d 1160, 1178 (Fla.2005) (citing *Schad v. Arizona*, 501 U.S. 624, 645, 111 S.Ct. 2491, 115 L.Ed.2d 555 (1991)). Moreover, the trial court utilized a verdict form upon which the jury could specify whether it found Williams guilty of premeditated or felony murder, and the jury found Williams guilty under both theories. Accordingly, we reject this claim.

10. Weighing of Aggravating and Mitigating Factors

In his next claim, Williams contends that the trial court erred in failing to instruct the jury that it was required to determine that the aggravators found outweighed the mitigators found beyond a reasonable doubt, rather than by a preponderance of the evidence standard, before it could recommend a penalty of death. Williams further asserts that the trial court erroneously instructed the jury that it was required to determine whether sufficient mitigating circumstances existed that outweighed the aggravating circumstances. According to Williams, such an instruction unconstitutionally created the presumption that a death sentence was appropriate because the burden of persuasion cast upon the defendant was higher to prove that a life sentence was justified than that placed on the State to initially prove that the death penalty was the proper sentence. Finally, Williams claims that the standard jury instruction which provides that the jury is to consider mitigation only if it is "reasonably convinced" of its existence unconstitutionally limits the consideration of mitigating evidence.

[34] As with the guilt phase, during the penalty phase, after instructing the jury but before the jury began to deliberate, the judge asked counsel, "[A]re there any objections to the manner I read the *761 instructions, any instructions I said that I would give, or any instructions that I misread?" Defense counsel mentioned that the court had failed to give an agreed-upon instruction (which the court subsequently read to the jury), but then stated that the "only other objections are to the indecent assault and sexual battery" instructions. We conclude that Williams has waived the current challenge because he failed to object to the jury instructions on this basis. *See Walls*, 926 So.2d at 1180.

Again, however, even if these objections had been preserved, these challenges to the jury instructions are without merit because this Court has repeatedly rejected the argument that the standard penalty phase jury instructions impermissibly shift the burden to the defense to prove that death is not the appropriate sentence. *See, e.g., Elledge v. State*, 911 So.2d 57, 79 (Fla.2005); *Sweet v. Moore*, 822 So.2d 1269, 1274 (Fla.2002). This Court in *Sweet* further rejected a claim of error where a trial court failed to instruct the jury that "it was required to find beyond a reasonable doubt that the aggravators outweighed the mitigators before recommending a sentence of death." *Id.* at 1275. Finally, in *Bogle v. State*, 655 So.2d 1103, 1108 (Fla.1995), we rejected the claim that a jury instruction which provides that a mitigator may be considered if the jury is reasonably convinced of its existence erroneously restricts the evidence that a jury may consider in mitigation. Accordingly, we reject these claims.

11. Required Findings for Imposition of the Death Penalty

[35] In this claim, Williams asserts that the trial court failed to make the required findings for imposition of the death penalty. Section 921.141(3) of the Florida Statutes requires that a trial court sentencing a defendant to death must set forth in writing its findings that sufficient aggravators exist to justify the death penalty *and* that the mitigators are insufficient to outweigh the aggravators. If these findings are not made within thirty days, a life sentence must be imposed. *See* § 921.141(3), Fla. Stat. (2006). According to Williams, because the trial court's sentencing order does not contain the finding that sufficient aggravators exist to justify a death sentence, but only weighs the aggravators against the mitigators, the trial court is required to impose a life sentence. We disagree.

This Court has stated:

There is no prescribed form for the order containing the findings of mitigating and aggravating circumstances. The primary purpose of requiring these findings to be in writing is to provide an opportunity for meaningful review by this Court so that it may be determined that the trial judge viewed the issue of life or death within the framework of the rules provided by statute. It must appear that the sentence imposed was the result of reasoned judgment.

Holmes v. State, 374 So.2d 944, 950 (Fla.1979). In its order, the trial court stated that it found four statutory aggravators beyond a reasonable doubt, and it found evidence of two statutory and five nonstatutory mitigators. The trial court also noted that it did not find age to be a statutory mitigator, even though the jury was instructed as to this mitigator, because “Williams was approximately 30 years of age when he murdered Lisa Dyke.” Finally, in weighing the aggravators and mitigators, the trial court stated the aggravators were proven beyond a reasonable doubt and were “not outweighed by the statutory and non-statutory mitigating evidence.” It is clear from the trial court’s order that it found sufficient aggravators existed to justify a death sentence even though it did not make this precise statement in its order. Williams has failed to *762 provide authority in which this Court has vacated a death sentence based on a trial court’s failure to include the precise words finding that sufficient aggravators exist to justify a death sentence. Therefore, we conclude that this claim is without merit.

12. Indecent Assault as a Prior Violent Felony

[36] [37] In this claim, Williams asserts the trial court erred in using Williams’s conviction for indecent assault as a prior violent felony aggravator. According to Williams, before an offense can qualify as a prior violent felony, violence must be an inherent element of the offense, and violence is not an inherent element of the crime of indecent assault. However, this Court has stated that the finding of a prior violent felony conviction aggravator attaches to life-threatening crimes in which the perpetrator comes in direct contact with a human victim. Further, whether a crime constitutes a prior violent felony is determined by the surrounding facts and circumstances of the prior crime. See *Rose v. State*, 787 So.2d 786, 800 (Fla.2001). The existence of violence as an “inherent element” is not the test.

This Court has held that lewd and lascivious acts against minors qualify as prior violent felonies, see, e.g., *Lawrence v. State*, 846 So.2d 440, 455 n. 12 (Fla.2003) (sexual activity with a child and lewd and lascivious assault); *Hess v. State*, 794 So.2d 1249 (Fla.2001) (lewd assault on a child), and we conclude that the prior indecent assault similarly constitutes a violent felony. According to the testimony of former deputy Edwards, the nine-year-old victim told him that Williams “came into [her] residence, forced her into a room, and put her in fear of her life, by telling her that he would kill her, if she didn’t comply with his actions.” Williams then penetrated her vagina with his finger, and the victim sustained bleeding as a result of his actions. This testimony demonstrates that violence occurred at least three times during the indecent assault: (1) when he forced her into a room; (2) when he threatened to kill her; and (3) when he penetrated her in a manner that caused her to bleed. Cf. *Rose*, 787 So.2d at 800–01 (prior violent felony aggravator established where the defendant “entered the victim’s apartment in the middle of the night ... covered her mouth with his hand as he threatened to kill her if she made any noise ... [and] shoved her to the floor on his way out of the apartment”). Therefore, the trial court properly considered the conviction for indecent assault as a prior violent felony aggravator, and we reject this challenge.

13. HAC Aggravator

[38] Williams contends that the trial court erred in finding the HAC aggravator proven beyond a reasonable doubt because the trial court’s finding was based on Dyke’s pain and fear. Williams contends that the suffering of the victim is not probative of the HAC aggravator because it does not set the murder apart from the norm of capital felonies. According to Williams, it is the intentional design of the perpetrator to inflict pain which HAC is designed to cover. Since the trial court did not find that Williams had an intentional design to torture or inflict pain, Williams asserts that the finding of this aggravator is improper.

[39] With regard to the HAC aggravator, this Court has stated:

The HAC aggravating factor applies in physically and mentally torturous murders which can be exemplified by the desire to inflict a high degree of pain or utter indifference to or enjoyment of the suffering of another. HAC focuses on the means and manner in which the death is inflicted and the immediate circumstances surrounding the death, rather than the intent and motivation of a *763 defendant, where a victim experiences the torturous anxiety and fear of impending death. Thus, if a victim is killed in a torturous manner, a defendant need not have the intent or desire to inflict torture, because the very torturous manner of the victim's death is evidence of a defendant's indifference.

Barnhill v. State, 834 So.2d 836, 849–50 (Fla.2002) (citations omitted). “The standard of review applicable to this issue is whether competent, substantial evidence supports the trial court's finding.” *Conde v. State*, 860 So.2d 930, 953 (Fla.2003). In determining whether an aggravator has been proven, this Court has held that “the trial judge may apply a common-sense inference from the circumstances.” *Gilliam v. State*, 582 So.2d 610, 612 (Fla.1991) (internal quotation marks omitted). This Court has also noted that “the fear and emotional strain preceding the death of the victim may be considered as contributing to the heinous nature of a capital felony.” *Walker v. State*, 707 So.2d 300, 315 (Fla.1997); see also *Adams v. State*, 412 So.2d 850, 857 (Fla.1982) (noting that the victim was screaming prior to her death and concluding that “[a] frightened eight-year-old girl being strangled by an adult man should certainly be described as heinous, atrocious, and cruel”). Finally, this Court has held that the fact that the attack occurred within the supposed safety of the victim's own home “adds to the atrocity of the crime.” *Perry v. State*, 522 So.2d 817, 821 (Fla.1988).

The trial court's sentencing order provides abundant support for the court's conclusion that Dyke's murder was heinous, atrocious, or cruel:

The evidence reflects that Lisa Dyke suffered great fear, emotional strain, and terror during the events leading up to her death.... Williams stabbed Ms. Dyke multiple times in her chest and back, and viciously bit her.... [Williams's] actions were designed to inflict unnecessary pain and suffering upon Lisa Dyke.

The repeated stab wounds and bites to [Dyke] by [Williams] coupled with the level of force necessary to penetrate Lisa Dyke's sternum reflects that the murder of Lisa Dyke was a conscienceless and pitiless crime which was prolonged, and was unnecessarily torturous to [Dyke]. The evidence further reflects that Ms. Dyke sustained defensive wounds in an unsuccessful attempt to defend herself against [Williams's] vicious attack. Thus, the defensive wounds support the fact that Ms. Dyke was alive while being repeatedly stabbed by Mr. Williams.

The evidence reflects that Lisa Dyke suffered extreme mental anguish as the result of her anxiety and concern over the state of health of her unborn child following her stabbing by [Williams]....

The murder of Lisa Dyke was committed in such a manner as to cause unnecessary and prolonged suffering of [Dyke]. The evidence reflects that Lisa Dyke languished in the hospital for nineteen days before passing away. During this time, she expressed constant fear of her impending death, and was forced to endure the discomfort and fear of having tubes inserted in her throat, which made it impossible for her to vocally express the level of her pain and suffering.... The evidence reflects that Lisa Dyke remained conscious throughout [Williams's] vicious attack upon her, that she was aware of the seriousness of her wounds, and that she was aware of the likelihood of her impending death.

Further evidence that the HAC aggravator existed is in the testimony from Courtney Mylott, who lived in the apartment next door to Dyke and Ruth Lawrence and heard a female in Lawrence's apartment screaming for help for approximately five *764 minutes on the morning of the attack. See also *Bates v. State*, 750 So.2d 6, 17–18 (Fla.1999) (in concluding that HAC aggravator was proven, Court noted that “[t]he terror and fear experienced by the victim ... is best evidenced by her scream as vividly described by the phone caller ... who placed the phone call at precisely the time [the victim] first encountered the Defendant”).

We hold that the trial court's finding of the HAC aggravator was proper. Accordingly, we reject this claim.

14. CCP aggravator

[40] Williams also contends that the trial court erred in finding the CCP aggravator to exist. Williams states that CCP ordinarily applies in those murders which are characterized as executions or contract murders, and that heightened premeditation is required. According to Williams, the instant case meets neither the spirit nor the literal requirements for this aggravator. Williams further notes that the killing of Gaynel Jeffrey in an earlier episode was not premeditated because he was only convicted of second-degree murder, which does not include a finding of premeditation. Hence, Williams contends that the trial court erred in using factual allegations from charges of which he had been acquitted to find the existence of this aggravator.

This Court has held that:

To support the CCP aggravator, a jury must find “that the killing was the product of cool and calm reflection and not an act prompted by emotional frenzy, panic, or a fit of rage (cold), *and* that the defendant had a careful plan or prearranged design to commit murder before the fatal incident (calculated), *and* that the defendant exhibited heightened premeditation (premeditated), *and* that the defendant had no pretense of moral or legal justification.”

Buzia v. State, 926 So.2d 1203, 1214 (Fla.) (quoting *Jackson v. State*, 648 So.2d 85, 89 (Fla.1994)), *cert. denied*, — U.S. —, 127 S.Ct. 184, 166 L.Ed.2d 129 (2006). The standard of review for a trial court's ruling on an aggravating factor is whether competent, substantial evidence supports the trial court's finding. *See Conde v. State*, 860 So.2d at 953. This Court has concluded that “competent substantial evidence” is tantamount to “legally sufficient evidence” and “[i]n criminal law, a finding that the evidence is legally insufficient means that the prosecution has failed to prove the defendant's guilt beyond a reasonable doubt.” *Almeida v. State*, 748 So.2d 922, 932 & n. 20 (Fla.1999) (quoting *Tibbs v. State*, 397 So.2d 1120, 1123 (Fla.1981)).

We agree with Williams that the CCP aggravator is not supported by competent substantial evidence and that the trial court erred in finding and weighing this aggravator. During trial, one theory of the events advanced by the State was that Williams originally traveled to Ruth Lawrence's apartment to only ask Dyke to act as a mediator in his troubles with Stephanie Lawrence, as she had done in the past when the couple had previously experienced difficulties. When Dyke refused to act as mediator, Williams became enraged and attacked her. There is no evidence in the record that refutes this possible theory of the events. Further, the second-degree murder of Gaynel Jeffries committed by Williams eight years earlier fails to demonstrate beyond a reasonable doubt that he formulated a carefully prearranged design to kill Ruth Lawrence or Lisa Dyke in this episode as an act of revenge against Stephanie Lawrence for terminating their relationship. At most, the similarity between these two crimes only demonstrates that Williams does have serious emotional problems, and when he is rejected by a girlfriend, an angry response is triggered which has produced deadly consequences. *765 Williams's earlier murder conviction has no bearing in the instant case except to show that Williams reacts violently to rejection. Accordingly, we conclude that competent substantial evidence does not exist to support the trial court's finding of the CCP aggravator. *See Almeida*, 748 So.2d at 932 n. 20.

[41] When this Court strikes an aggravating factor on appeal, “the harmless error test is applied to determine whether there is no reasonable possibility that the error affected the sentence.” *Jennings v. State*, 782 So.2d 853, 863 n. 9 (Fla.2001); *see also Douglas v. State*, 878 So.2d 1246, 1268 (Fla.2004) (“Striking [an] aggravator necessitates a harmless error analysis.”). We conclude that the trial court's erroneous finding of the CCP aggravator was harmless because the jury was not instructed with regard to this statutory aggravator, and the trial court expressly stated that its imposition of the death penalty was not contingent on the finding of this aggravator. In light of these facts, there is no reasonable probability that the finding of the CCP aggravator affected the sentence that was imposed in this case.

15. Proportionality

[42] [43] [44] Williams asserts that the imposition of the death sentence for the murder of Lisa Dyke is disproportionate. In reviewing for proportionality, the totality of the circumstances should be considered and the matter should be compared with other capital cases. *See Nelson v. State*, 748 So.2d 237, 246 (Fla.1999). This comparison, however, is not simply between the number of aggravating and mitigating circumstances. *See Porter v. State*, 564 So.2d 1060, 1064 (Fla.1990). Additionally, the death penalty is reserved “only for the most aggravated and least mitigated murders.” *Kramer v. State*, 619 So.2d 274, 278 (Fla.1993).

In the instant matter, the jury recommended the death penalty by a vote of ten to two. The trial court found this recommendation appropriate after weighing the statutory aggravating circumstances against the statutory and nonstatutory mitigating circumstances. Without including a CCP aggravating factor which we have stricken, the trial court found the following three aggravating factors to be proven beyond a reasonable doubt: (1) Williams had previously been convicted of a felony involving a threat of violence, *see* § 921.141(5)(b), Fla. Stat.; (2) Williams committed the capital felony while he was engaged in the commission of, or while attempting to commit, a sexual battery upon Dyke, *see* § 921.141(5)(d), Fla. Stat.; and (3) the killing was especially heinous, atrocious, or cruel, *see* § 921.141(5)(h), Fla. Stat. The court assigned these three aggravators “great” weight. The trial court found “some evidence” of the following statutory and nonstatutory mitigating factors and assigned “slight” or “little” weight to each: (1) the capital felony was committed while Williams was under the influence of extreme mental or emotional disturbance, *see* § 921.141(6)(b), Fla. Stat.; (2) the capacity of Williams to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired, *see* § 921.141(6)(f), Fla. Stat.; (3) Williams was a model prisoner in jail; (4) Williams attended religious services in jail; (5) Williams had a deprived childhood and had trouble finding work after previous convictions; (6) Williams was a loving person and a good brother; and (7) Williams was slight in stature, and was frequently beaten and robbed as child.

After reviewing the totality of the circumstances, we conclude that the instant matter is comparable to other capital cases in which this Court has upheld the death penalty. In *766 *Spencer v. State*, 691 So.2d 1062 (Fla.1996), we held the death sentence to be proportionate in connection with a stabbing murder where the trial court found two aggravating factors (prior violent felony and HAC), two statutory mitigating factors (extreme emotional disturbance and impaired capacity to appreciate criminality or conform conduct), and at least six nonstatutory mitigating factors. *See id.* at 1063–66. In *Singleton v. State*, 783 So.2d 970 (Fla.2001), a death sentence was also upheld where the defendant stabbed a supine victim as she was calling for help, and the trial court found two aggravating factors (prior violent felony and HAC), three statutory mitigating factors (extreme emotional disturbance, impaired capacity to appreciate criminality or conform conduct, and age), and nine nonstatutory mitigating factors (including drug use at the time of the offense and being a model prisoner). *See id.* at 972–73, 979. *Pope v. State*, 679 So.2d 710 (Fla.1996), affirmed a death sentence in another stabbing murder where the trial court found two aggravating factors (prior violent felony and pecuniary gain), two statutory mitigating factors (extreme emotional disturbance and impaired capacity to appreciate criminality or conform conduct), and three nonstatutory mitigating factors (including drug use at the time of the offense). *See id.* at 713–16. Finally, the death sentence was affirmed in *Bates v. State*, 750 So.2d 6 (Fla.1999), which was also a stabbing murder, where the trial court found three aggravating factors (the murder was committed during an attempted sexual battery, pecuniary gain, and HAC), two statutory mitigating factors (no history of significant criminal activity and age), and eight nonstatutory mitigating factors (including family background and being a good husband/father). *See id.* at 9–12.

The instant case is comparable to, and probably even more aggravated than, other cases in which this Court has affirmed the death penalty. Williams bit, repeatedly stabbed, and attempted to rape an eighteen-year-old woman who was almost eight months pregnant in a prolonged attack. The wounds were inflicted to the chest and back in such a manner as to strike major organs in Dyke's body, causing Dyke intense physical and mental pain and suffering. Dyke was conscious throughout the attack, and experienced circumstances that would provoke tremendous fear and terror for herself and

her unborn child. Moreover, Williams has convictions for two prior violent felonies, one involving the murder of another woman, and the second involving an indecent assault upon a nine-year-old child, during which he threatened to kill the child if she did not obey his commands.

The case upon which Williams relies to assert that a death sentence is disproportionate is clearly distinguishable. In *Terry v. State*, 668 So.2d 954 (Fla.1996), we held that the death sentence was disproportionate in connection with a shooting that occurred during what was described as probably a “robbery gone bad,” *id.* at 965, where the trial court found two aggravating factors (prior violent felony and pecuniary gain) and no statutory mitigating factors, and the court rejected the nonstatutory mitigation. *See id.* at 965–66. In concluding that the sentence there was disproportionate, we reasoned that the circumstances surrounding the shooting were unclear, the aggravation was not sufficiently extensive based on consideration of the totality of the underlying circumstances, and the prior violent felony aggravating factor involved “a contemporaneous conviction as principal to the aggravated assault simultaneously committed by the codefendant ... who pointed an inoperable gun at [the victim].” *Id.* at 965. Unlike *Terry*, the aggravators in the instant matter do not all involve the circumstances of the stabbing. Williams was convicted of two *767 prior violent felonies that occurred before the murder of Dyke. Additionally, the aggravation is greater in this case due to the finding of the HAC aggravator. *See Douglas v. State*, 878 So.2d 1246, 1262 (Fla.2004) (noting that HAC is “one of the most serious aggravators in the statutory sentencing scheme”). Further, the murder of Dyke is more egregious than that committed in *Terry* because here there is evidence of a repeated stabbing of a conscious victim. *See Hutchinson v. State*, 882 So.2d at 963 (noting that a killing is inherently torturous where it involves “a strangulation or repeated stabbing of a conscious victim”).

Williams's death sentence is not disproportionate to other capital cases. Accordingly, we uphold the sentence in this case.

16. Constitutionality of the Death Penalty

In his final challenge, Williams asserts that the death penalty in the instant case violates *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002). Williams further asserts that Florida's sentencing structure unconstitutionally fails to narrow the category of death-eligible persons as mandated by the United States Supreme Court's decision in *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972), because a conviction for first-degree murder, without more, makes a defendant eligible for the death penalty in Florida.

[45] This Court has already rejected Williams's assertions in prior decisions, and, therefore, he is not entitled to relief. This Court has held that Florida's capital sentencing scheme does not violate the United States Constitution under *Ring*. *See Jones v. State*, 845 So.2d 55, 74 (Fla.2003). Furthermore, one of the aggravating factors found by the trial court in this case was Williams's prior convictions for two violent felonies, and this is a factor “which under *Apprendi* and *Ring* need not be found by the jury.” *Jones v. State*, 855 So.2d 611, 619 (Fla.2003). Finally, this Court has “rejected the claim that the death penalty system is unconstitutional as being arbitrary and capricious because it fails to limit the class of persons eligible for the death penalty.” *Miller v. State*, 926 So.2d 1243, 1260 (Fla.2006) (quoting *Lugo v. State*, 845 So.2d 74, 119 (Fla.2003)). Therefore, we reject Williams's challenges as being without merit.

CONCLUSION

For the reasons expressed above, we affirm Williams's conviction and sentence of death.

It is so ordered.

LEWIS, C.J., and WELLS, PARIENTE, QUINCE, CANTERO, and BELL, JJ., concur.

PARIENTE, J., concurs with an opinion, in which QUINCE, J., concurs.

ANSTEAD, J., concurs in result only.

PARIENTE, J., concurring.

I concur in the affirmance of Williams' death sentence, and write only to address the implication of *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002), on our precedent that had authorized a trial court to find an aggravator on which the jury was not instructed. As the majority correctly notes, the precedent that allows a trial judge to consider and find an aggravator on which the jury was not instructed and states that a judge is not bound by the jury's recommendation predates the United States Supreme Court's decision in *Ring*. See majority op. at 751, n. 15; see also *Davis v. State*, 703 So.2d 1055, 1061 (Fla.1997); *Hoffman v. State*, 474 So.2d 1178, 1182 (Fla.1985); *Engle v. State*, 438 So.2d 803, 813 (Fla.1983).

*768 It is clear after *Ring* that under the Sixth Amendment right to a jury trial, the jury is charged with the responsibility of finding the facts, other than the existence of a prior felony conviction, essential to the imposition of the death penalty. See *Ring*, 536 U.S. at 589, 122 S.Ct. 2428 ("Capital defendants ... are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment."). Most recently, in *Cunningham v. California*, 549 U.S. 270, — — —, 127 S.Ct. 856, 863–64, 166 L.Ed.2d 856 (2007), the United States Supreme Court reiterated that "under the Sixth Amendment, any fact that exposes a defendant to a greater potential sentence must be found by a jury, not a judge, and established beyond a reasonable doubt." The jury's responsibility to find such facts includes the "aggravating circumstances that make a defendant eligible for the death penalty." *Sattazahn v. Pennsylvania*, 537 U.S. 101, 111, 123 S.Ct. 732, 154 L.Ed.2d 588 (2003) (plurality opinion).

In this case, although the sentencing occurred after *Ring*, the trial court found that the cold, calculating, and premeditated (CCP) aggravator was applicable despite the fact that it was neither advanced by the State nor instructed to the jury. I agree with the majority that the trial court did not depart from its position of impartiality in finding this aggravator. See majority op. at 751. I also agree with the majority that the trial court's finding of this aggravator, which was not supported by competent, substantial evidence, was harmless beyond a reasonable doubt because the trial court expressly stated it did not consider this aggravator in imposing the death sentence and substantial other aggravating circumstances existed. See majority op. at 764–65. However, I caution trial courts in the future not to consider or find aggravators on which the jury was not instructed.

QUINCE, J., concurs.

All Citations

967 So.2d 735, 32 Fla. L. Weekly S347, 32 Fla. L. Weekly S667

Footnotes

- 1 We have jurisdiction. See art. V, § 3(b)(1), Fla. Const.
- 2 However, Detective Daniel James, who was also at the scene, testified that he heard Dyke say the name "Ronnie."
- 3 Clinita Lawrence is not related to Stefanie, Ruth, or Julius Lawrence.
- 4 *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

- 5 Dr. Wright noted that Dyke had four wounds in her chest; however, he could not determine if the doctors in treating Dyke
“had made stab wounds, or they had used the existing stab wounds to put the chest tubes in.” The only chest wound he could
conclusively say was not caused by hospital personnel was the stab wound through Dyke's sternum.
- 6 Dr. Wright testified that it was, in effect, the healing process which killed Dyke:
[T]he organs were put in a position of almost dying, from a lack of blood pressure and oxygen. When that happens ... the
white blood cells, that were dormant ... started circulating, and they are now activated white blood cells. And they fight
infection, but in their activated state, are a danger to the rest of the body. They produce something called systemic ...
inflammatory ... response syndrome. The toxins that are actually released by these blood cells attack the blood in the
body as well. They produce something called ARDS, which is acute respiratory distress syndrome, they produce toxicity
and destruction of the liver, which she had. They produce toxicity and destruction of the kidneys, which she had, and
then produce toxicity and destruction of the brain, which she had.
- 7 Dr. Wright noted that three of the wounds to Dyke's back made contact with her ribs, and that these stab wounds could have
produced slippage as well.
- 8 *Spencer v. State*, 615 So.2d 688 (Fla.1993).
- 9 *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000).
- 10 The trial court found the following nonstatutory mitigating circumstances: (1) while housed in the Broward County Jail,
Williams was a model prisoner; (2) while housed in the Broward County Jail, Williams attended religious services; (3) Williams
had a deprived childhood because he did not know his father, he lost his mother at an early age, he was raised in poverty by
his sister, he did not start school until adolescence, and he had difficulty finding work after his two prior criminal convictions;
(4) Williams is a loving person who never fought with his relatives, and was a good brother to his sister; and (5) Williams was
slight in stature and was frequently beat up and robbed of his bus money on his way to school.
- 11 Williams also asserts that the admission of these statements violated his Sixth Amendment right to confrontation under
Crawford v. Washington, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004), in which the United States Supreme Court held
that “[w]here testimonial evidence is at issue ... the Sixth Amendment demands what the common law required: unavailability
and a prior opportunity for cross-examination.” *Id.* at 68, 124 S.Ct. 1354. However, this Court has held that a specific objection
is necessary to preserve a *Crawford* challenge. See *Schoenwetter v. State*, 931 So.2d 857, 871 (Fla.), *cert. denied*, 549 U.S.
1035, 127 S.Ct. 587, 166 L.Ed.2d 437 (2006). In the instant case, while Williams objected to Dyke's out-of-court statements
as inadmissible hearsay, he did not argue that admission of Dyke's statements would violate his right to confrontation. Since
Williams failed to allege a confrontation violation in objecting to the admission of Dyke's statements, his *Crawford* challenge
was not preserved. Cf. *Rodgers v. State*, 948 So.2d 655, 662–63 (Fla.2006) (*Crawford* challenge preserved where “[b]efore trial,
Rodgers filed a motion to bar the State from using any hearsay during the penalty phase that would violate his rights under the
Confrontation Clauses of both the state and federal constitutions”), *petition for cert. filed*, No. 06–10961 (U.S. Apr. 24, 2007).
- Nonetheless, even if a *Crawford* challenge had been preserved, Williams would not be entitled to a new trial. In *Davis*
v. Washington, 547 U.S. 813, 126 S.Ct. 2266, 165 L.Ed.2d 224 (2006), the High Court held that a victim's statements in
response to a 911 operator's questions were not testimonial because they were made to enable police assistance in an ongoing
emergency rather than in anticipation of trial. See *id.* at 2276–79. Similarly, Dyke's responses to the 911 operator's questions
were not testimonial because Dyke was seeking emergency medical assistance for her life-threatening injuries. Further, even
if the Gillespie statements and the hospital statements were testimonial to the extent that Dyke identified Williams as her
attacker, there was abundant nontestimonial evidence offered at trial identifying Williams as the assailant. Specifically,
during the 911 call, Dyke informed the operator that her attacker was a black man whose name was either “Rodney” or
“Ronnie.” She told the operator that she had the phone number of the attacker's girlfriend, and then proceeded to give the
operator Stefanie Lawrence's phone number. The bite mark on Dyke's breast was matched to the dental cast of Williams.
Williams's fingerprint was found in a stain of blood that had not been in the apartment when Ruth Lawrence left that
morning to attend school. Williams's blood was found in Ruth's apartment after the attack, and both Ruth and Stefanie
Lawrence testified that Williams had not previously bled in the apartment. Finally, when taken into custody, Williams had
fresh wounds on his hands that were consistent with slippage, and one of the stab wounds to Dyke penetrated her sternum,
the second most dense bone in the body. Given this overwhelming nontestimonial evidence that the jury could have relied
upon in concluding that Williams was the individual who attacked Dyke, we conclude that any possible error by the trial
court in admitting these statements was harmless. See *Rodgers*, 948 So.2d at 665 (holding that *Crawford* violation constituted
harmless error where the erroneously admitted testimonial statement was merely cumulative to and corroborative of the
defendant's own admissions).

- 12 Indeed, in the previous section, we concluded the trial court did not abuse its discretion when it held that the 911 statements and the Gillespie statements were admissible as excited utterances even though the State did not assert that they were admissible under this hearsay exception.
- 13 Further, because we have determined that the hospital statements were properly admitted as dying declarations, we do not address whether the statements were also admissible as excited utterances.
- 14 In reaching this conclusion, we do not here address whether the trial court's finding of the CCP aggravator was supported by competent, substantial evidence. That issue will be addressed in the discussion of penalty phase challenges.
- 15 Each of the aforementioned cases predates the United States Supreme Court's decision in *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002), requiring that the facts essential to the imposition of the punishment be found by a jury beyond a reasonable doubt. *See id.* at 589, 122 S.Ct. 2428. Moreover, the jury had already recommended that Williams receive a sentence of death based upon the aggravators actually argued by the State, and in imposing a sentence of death, the trial court expressly stated that "[t]he imposition of the sentence in the present case is not contingent on the Court's finding the statutory aggravator of cold, calculating and premeditated." Accordingly, unless we were to strike all three of the other aggravators that were submitted to the jury and found by the trial court, the finding of the additional CCP aggravator would have no legal impact on the jury's advisory sentence or the trial court's ultimate recommendation.
- 16 We would further note that the admission of evidence of Dyke's pregnancy was not such that it would have inflamed the jury or appealed to its emotions, and, therefore, the probative value of this evidence was not "substantially outweighed by the danger of unfair prejudice." § 90.403, Fla. Stat. (2006). According to the State, Dyke's pregnancy was only mentioned six times during the course of the entire trial, an assertion that Williams does not dispute. Three of the six references resulted from the 911 tape being played three times for the jury. The State mentioned Dyke's pregnancy during opening statements and during the penalty phase in asserting that Williams's crime was heinous, atrocious or cruel. Finally, Dyke's pregnancy was mentioned once by Officer Gillespie, who described Dyke's appearance when he arrived at the apartment in response to the 911 call. All evidence regarding the ultimate fate of Dyke's child was kept from the jury. Further, the jury did not view any photos of Dyke that revealed her advanced state of pregnancy or any scars that resulted from the cesarean section. The only photo of Dyke that the jury viewed was a postmortem photo, and it only depicts her face.
- 17 Under the 1993 Florida Statutes, sexual battery is defined as "oral, anal, or vaginal penetration by, or union with, the sexual organ of another or the anal or vaginal penetration of another by any other object." § 794.011(1)(h), Fla. Stat. (1993).
- 18 Despite Officer Gillespie's testimony that Dyke was "wet" when she answered the door, it is not established that Dyke, in fact, showered after the attack. Nonetheless, even if she did shower after the attack, a factual issue remains as to whether she voluntarily removed her clothing to shower or whether Williams forcibly removed her clothing.
- 19 As noted in footnote 11, Williams failed to preserve a *Crawford* challenge to this out-of-court statement by Dyke. Although we do not decide, nonetheless, we question whether an unsolicited statement blurted out by a traumatized victim in extreme medical distress could be considered testimonial. *See, e.g., People v. Diaz*, 21 A.D.3d 58, 798 N.Y.S.2d 21, 28 (N.Y.App.Div.2005) ("As Carillo's statement from the ambulance was a visceral response to the presence of his attackers, and his statement was volunteered, rather than the result of structured police questioning, there was no *Crawford* violation in this case."); *State v. Searcy*, 288 Wis.2d 804, 709 N.W.2d 497, 512 (Wis.Ct.App.2005) (holding that "statements ... offered unsolicited by a victim or witness at the scene of a traumatic event, and ... not generated by the desire of the prosecution or police to seek evidence against a particular suspect" were not testimonial).
- 20 Evidence revealed that there were two stairways to the second floor of the apartment complex where Ruth lived, located at opposite ends of the building. Ruth's apartment was on the second floor immediately adjacent to one of the stairways. Hence, by ascending that particular stairway, the subject apartment could be accessed without passing the windows of the apartments of any other tenants.

D

Supreme Court of Florida

FRIDAY, SEPTEMBER 29, 2017

CASE NO.: SC13-1472

Lower Tribunal No(s).:
061993CF003005A8881

RONNIE KEITH WILLIAMS

vs.

STATE OF FLORIDA

Appellant(s)

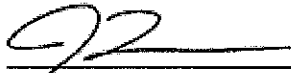
Appellee(s)

Appellant's Motion for Rehearing is hereby denied.

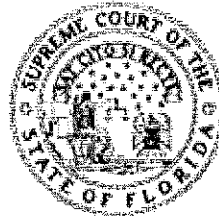
LABARGA, C.J., and PARIENTE, LEWIS, QUINCE, CANADY, POLSTON,
and LAWSON, JJ., concur.

A True Copy

Test:



John A. Tomasino
Clerk, Supreme Court



cd

Served:

NICOLE M. NOËL
MARTA JASZCZOLT
LESLIE T. CAMPBELL
HON. EILEEN M. O'CONNOR, SENIOR JUDGE
DEBORAH ZIMET
JOEL MICHAEL SILVERSHEIN
HON. BRENDA D. FORMAN, CLERK

E

West's Florida Statutes Annotated

Title XLVII. Criminal Procedure and Corrections (Chapters 900-999) (Refs & Annos)

Chapter 921. Sentence (Refs & Annos)

West's F.S.A. § 921.137

921.137. Imposition of the death sentence upon an intellectually disabled defendant prohibited

Effective: July 1, 2013

Currentness

(1) As used in this section, the term “intellectually disabled” or “intellectual disability” means significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the period from conception to age 18. The term “significantly subaverage general intellectual functioning,” for the purpose of this section, means performance that is two or more standard deviations from the mean score on a standardized intelligence test specified in the rules of the Agency for Persons with Disabilities. The term “adaptive behavior,” for the purpose of this definition, means the effectiveness or degree with which an individual meets the standards of personal independence and social responsibility expected of his or her age, cultural group, and community. The Agency for Persons with Disabilities shall adopt rules to specify the standardized intelligence tests as provided in this subsection.

(2) A sentence of death may not be imposed upon a defendant convicted of a capital felony if it is determined in accordance with this section that the defendant is intellectually disabled.

(3) A defendant charged with a capital felony who intends to raise intellectual disability as a bar to the death sentence must give notice of such intention in accordance with the rules of court governing notices of intent to offer expert testimony regarding mental health mitigation during the penalty phase of a capital trial.

(4) After a defendant who has given notice of his or her intention to raise intellectual disability as a bar to the death sentence is convicted of a capital felony and an advisory jury has returned a recommended sentence of death, the defendant may file a motion to determine whether the defendant is intellectually disabled. Upon receipt of the motion, the court shall appoint two experts in the field of intellectual disabilities who shall evaluate the defendant and report their findings to the court and all interested parties prior to the final sentencing hearing. Notwithstanding s. 921.141 or s. 921.142, the final sentencing hearing shall be held without a jury. At the final sentencing hearing, the court shall consider the findings of the court-appointed experts and consider the findings of any other expert which is offered by the state or the defense on the issue of whether the defendant has an intellectual disability. If the court finds, by clear and convincing evidence, that the defendant has an intellectual disability as defined in subsection (1), the court may not impose a sentence of death and shall enter a written order that sets forth with specificity the findings in support of the determination.

(5) If a defendant waives his or her right to a recommended sentence by an advisory jury following a plea of guilt or nolo contendere to a capital felony and adjudication of guilt by the court, or following a jury finding of guilt of a capital felony, upon acceptance of the waiver by the court, a defendant who has given notice as required in subsection (3) may file a motion for a determination of intellectual disability. Upon granting the motion, the court shall proceed as provided in subsection (4).

(6) If, following a recommendation by an advisory jury that the defendant be sentenced to life imprisonment, the state intends to request the court to order that the defendant be sentenced to death, the state must inform the defendant of such request if the defendant has notified the court of his or her intent to raise intellectual disability as a bar to the death sentence. After receipt of the notice from the state, the defendant may file a motion requesting a determination by the court of whether the defendant is intellectually disabled. Upon granting the motion, the court shall proceed as provided in subsection (4).

(7) Pursuant to s. 924.07, the state may appeal a determination of intellectual disability made under subsection (4).

(8) This section does not apply to a defendant who was sentenced to death before June 12, 2001.

(9) For purposes of the application of the criminal laws and procedural rules of this state to any matters relating to the imposition and execution of the death penalty, the terms "intellectual disability" or "intellectually disabled" are interchangeable with and have the same meaning as the terms "mental retardation" or "retardation" and "mentally retarded" as those terms were defined before July 1, 2013.

Credits

Added by Laws 2001, c. 2001-202, § 1, eff. June 12, 2001. Amended by Laws 2006, c. 2006-195, § 23, eff. June 12, 2006; Laws 2013, c. 2013-162, § 38, eff. July 1, 2013.

West's F. S. A. § 921.137, FL ST § 921.137

Current through the 2017 First Regular Session and Special "A" Session of the 25th Legislature