***** CAPITAL CASE *****

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

KEVIN DON FOSTER,

Petitioner,

v.

SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

VOLUME II

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September 4, 2025

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APPENDIX E

Petitioner–Appellant's Application for Certificate of Appealability,
Filed in the Eleventh Circuit Court of Appeals, No. 24-12953 (Docketed December 18, 2024)

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

CASE NO. 24-12953

KEVIN DON FOSTER,

Petitioner–Appellant,

vs.

SECRETARY,
Florida Department of Corrections,

Respondent–Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
DISTRICT COURT CASE NO.: 2:14-cv-00597-JES-KCD

PETITIONER–APPELLANT'S APPLICATION FOR CERTIFICATE OF APPEALABILITY

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CERTIFICATE OF INTERESTED PERSONS

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and Rule 26.1-1 of the Rules of the Court of Appeals for the Eleventh Circuit, Petitioner–Appellant Kevin Don Foster, hereby discloses the following interested persons:

Ahlbrand, Mark W. – Former Counsel for Co-Defendant Magnotti

Ake, Stephen D. – Senior Assistant Attorney General, State of Florida, Counsel for Respondent–Appellee

Anderson Jr., Isaac – Former Circuit Court Judge, Twentieth Judicial Circuit

Anstead, Harry Lee – Former Justice, Florida Supreme Court

Backhus, Terri L. – Former Assistant CCRC, Capital Collateral Regional Counsel – South Office

Barfield, Danielle – Former Staff Attorney, Capital Collateral Regional Counsel – South Office

Black, Christopher P. – Co-Defendant

Bondi, Pamela Jo – Former Attorney General, State of Florida

Burnett, Christopher T. – Co-Defendant

Butterworth, Robert A. – Former Attorney General, State of Florida

Canady, Charles T. – Justice, Florida Supreme Court

Chappell, Sheri Polster – United States District Court Judge, Middle District of Florida

Cipriano Jr., Eugene R. Louis – Former Counsel for Co-Defendant Black

Crews, Michael D. - Former Secretary, Florida Department of Corrections

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Dadowski, Renee – Former Staff Attorney, Capital Collateral Regional Counsel – South Office

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Dixon, Ricky D. – Secretary, Florida Department of Corrections

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Dudek, Kyle C. – United States District Court Magistrate Judge, Middle District of Florida

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McCoy, Mac R. – United States District Court Magistrate Judge, Middle District of Florida

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Moeller, Robert – Former Assistant Public Defender, Tenth Judicial Circuit

Moody, Ashley – Attorney General, State of Florida

Moorman, James Marion – Former Public Defender, Tenth Judicial Circuit

Nelson, William J. – Former Circuit Court Judge, Twentieth Judicial Circuit

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Ross, Cynthia – Assistant State Attorney, Twentieth Judicial Circuit

Russell, Stephen B. – Former State Attorney, Twentieth Judicial Circuit

Schwebes, Mark – Victim

Shaw, Leander – Former Justice, Florida Supreme Court

Shields, Derek – Co-Defendant

Smith, Kathleen A. – Public Defender, Twentieth Judicial Circuit

Starnes, Hugh E. – Former Circuit Court Judge, Twentieth Judicial Circuit

Steele, John E. – Senior United States District Court Judge, Middle District of Florida

Torrone, Thomas – Co-Defendant

Veleanu, Leor – Former Assistant CCRC, Capital Collateral Regional Counsel – South Office

Volz, Jr., Edward – Former Circuit Court Judge, Twentieth Judicial Circuit

Wells, Charles T. – Former Justice, Florida Supreme Court

No publicly traded company or corporation has an interest in the outcome of this appeal.

APPLICATION FOR CERTIFICATE OF APPEALABILITY

COMES NOW THE PETITIONER–APPELLANT, KEVIN DON FOSTER, by and through undersigned counsel, and herein respectfully moves this Court for the issuance of a Certificate of Appealability (COA) in the above-captioned capital case.

Foster is a death-sentenced inmate in the state of Florida who seeks to appeal the denial of his Amended Petition for Writ of Habeas Corpus by a Person in State Custody pursuant to 28 U.S.C. § 2254. (Doc. 89) The United States District Court for the Middle District of Florida issued its order denying Foster's petition on October 30, 2023, and declined to issue a COA. (Doc. 107; Doc. 108) Foster filed a timely motion for rehearing on November 27, 2023, which the district court denied on August 9, 2024. (Doc. 109; Doc. 110)

Foster timely filed a notice of appeal on September 9, 2024, (Doc. 111), and requests that this Court grant him a COA on the grounds set forth below.

STANDARD GOVERNING ISSUANCE OF A COA

A. The Standard for Issuing a COA is Less Than That Needed to Prevail on Appeal.

A petitioner seeking a COA need only demonstrate "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); *see also Buck v. Davis*, 580 U.S. 100, 115 (2017); *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003); *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). "A petitioner satisfies this standard by

demonstrating that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Miller-El*, 537 U.S. at 326 (citing *Slack*, 529 U.S. at 484).

Since its inception, this standard has remained a "threshold inquiry," *Slack*, 529 U.S. at 485, requiring a court to conduct a mere "overview of the claims in the habeas petition and general assessment of their merits" *without* "full consideration of the factual or legal bases adduced in [their] support." *Miller-El*, 537 U.S. at 336; *see also Buck*, 580 U.S. at 115. The Supreme Court has specifically determined that the statute forbids a merits analysis at this stage. *Miller-El*, 537 U.S. at 336; *Buck*, 580 U.S. at 116. Thus, a petitioner need not show—nor must a court be convinced—that "the appeal will succeed" for a COA to issue. *Miller-El*, 537 U.S. at 337. "Indeed, a claim can be debatable even though every jurist of reason might agree, after the COA has been granted and the case has received full consideration, that [the] petitioner will not prevail." *Id.* at 338.

The requirement that petitioners seek a COA is not meant to foreclose all appellate review in the federal system. Notwithstanding the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) and its requirement that federal courts accord substantial deference to state-court factual determinations, courts are not permitted to simply rubberstamp state court action. "'Even in the context of

federal habeas, deference does not imply abandonment or abdication of judicial review,' and 'does not by definition preclude relief.'" *Brumfield v. Cain*, 576 U.S. 305, 314 (2015) (quoting *Miller-El*, 537 U.S. at 340).

B. The Nature of the Penalty Weighs in Favor of Granting a COA

Death penalty cases require unique and heightened constitutional protections to ensure courts reliably identify those defendants who are both guilty of a capital crime and for whom execution is the appropriate punishment. *See Hall v. Florida*, 572 U.S. 701, 724 (2014). While the severity of the penalty does not warrant automatic issuance of a COA, "[i]n a capital case, the nature of the penalty is a proper consideration in determining whether to issue a certificate of probable cause." *Barefoot v. Estelle*, 463 U.S. 880, 893 (1983); *see also Mills v. Comm'r, Ala. Dep't of Corr.*, 102 F.4th 1235, 1241 (11th Cir. 2024) (Abudu, J., concurring) ("[I]t is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, the consequence of scrupulously fair procedures.'" quoting *Sawyer v. Whitley*, 505 U.S. 333, 361 (1992) (Stevens, J., concurring)). "[A]ny doubt as to whether a COA should issue in a death-penalty case must be resolved in favor of the petitioner." *Pippin v. Dretke*, 434 F.3d 782, 787 (5th Cir. 2005) (citing *Medellin v. Dretke*, 371 F.3d 270, 275 (5th Cir. 2004)).

STATEMENT

Kevin Foster was 18 years old at the time of the murder in this case. His

childhood was marred by instability, neglect, and exposure to violence. He bounced around the country at the erratic whim of his mentally ill mother, who abandoned him for unpredictable periods of time and subjected him to 4 different father figures with varying degrees violent tendencies. For Foster, growing up in this turbulent environment resulted in developmental delays, recurrent depression that escalated to suicide attempts, and manic episodes indicative of Bipolar disorder—all of which impaired his day-to-day functioning and judgment. Foster's trial counsel rendered ineffective assistance by failing to investigate and present this mitigation. Trial counsel failed to retain a competent, trained mitigation specialist—a standard and necessary practice in investigating a death penalty case—and instead relied on Foster's mother and a convicted felon/drug addict who entered into a sexual relationship with her during the course of the trial. Against this backdrop, the jury sentenced Foster to death by a mere 9–to–3 advisory recommendation.

The district court should have reviewed Foster's claims concerning his counsel's ineffectiveness at the penalty phase and the trial court's denial of his 17 change-of-venue motions *de novo* because the Florida Supreme Court unreasonably applied clearly established federal law and made unreasonable determinations of fact as shown by the state-court record. Reasonable jurists could debate the district court's conclusions on the issues presented herein—or at least find that they deserve encouragement to proceed further. This Court should grant a COA.

RELEVANT PROCEDURAL BACKGROUND[1]

On May 21, 1996, a Lee County grand jury indicted Kevin Foster, Christopher Black, Derek Shields, and Peter Magnotti with first-degree premeditated murder for the death of high school band teacher Mark Schwebes. The Lee County Public Defender's Office was appointed to represent Foster. (A1. 1)

On March 11, 1998, Foster's jury found him guilty of first-degree murder. (A8. 1059) A single-day penalty phase took place on April 9, 1998, where the jury returned a recommendation for death. (A10. 1239) The jury made no factual findings. On June 17, 1998, the trial court sentenced Foster to death, (A12. 1475-86), and the Florida Supreme Court affirmed. *Foster v. State*, 778 So. 2d 906 (Fla. 2000).

Foster timely filed his initial motion for postconviction relief pursuant to Florida Rule of Criminal Procedure 3.850 and an amended motion raising 11 claims on May 21, 2010. (C19-20. 1022-1320) The postconviction court summarily denied all claims except one: ineffective assistance of counsel at the penalty phase. (C21. 1477-78)

Foster's evidentiary hearing took place on April 26-29, 2011, where he presented members of his trial team, 6 lay witnesses, and 4 experts. Foster was

[1] Citations to the record refer to the exhibits as submitted by the Respondent–Appellee in the district court and utilize the pagination assigned by the court reporter. (Doc. 29, 93)

unable to call his lead counsel Robert Jacobs since Jacobs died in 2007. The State presented 3 witnesses.

Following the hearing, Foster filed a Notice and Motion to Reopen the Evidentiary Hearing based on evidence that trial paralegal, James Wootton, perjured himself. (C36. 3528-52) The court denied the motion but allowed letters Wootton wrote to Foster and postconviction counsel into the record as substantive evidence. (C36. 3672-73)

The court denied all of Foster's claims on July 5, 2011. (C36-37. 3674-4004) The Florida Supreme Court affirmed. *Foster v. State*, 132 So. 3d 40 (Fla. 2013).

Foster timely filed his Petition for Writ of Habeas Corpus in the district court, which he later amended. (Doc. 1, 89) Ground I of the petition maintained that Foster was denied effective assistance counsel at his penalty phase, and Ground II alleged that the trial court erred in denying the Defense's requests for change of venue and deprived Foster of his right to trial by a fair and impartial jury. Foster later amended his petition.

On October 30, 2023, the district court denied Foster's amended petition and declined to issue a COA. (Doc. 107) As to Ground I, the district court found that the Florida Supreme Court reasonably applied *Strickland v. Washington*, 466 U.S. 668 (1984). As to Ground II, the district court found that the Florida Supreme Court followed United State Supreme Court precedent in rejecting his claim that the trial

court erred in denying his change-of-venue motions.

The district court denied Foster's motion to alter and amend the judgment pursuant Federal Rule of Civil Procedure 59(e). (Doc. 110) Foster timely filed a Notice of Appeal to this Court. (Doc. 111). This Application for COA follows.

CLAIMS FOR WHICH A COA SHOULD ISSUE

GROUND I

Foster's Counsel Rendered Ineffective Assistance at the Penalty Phase of His Capital Trial. Reasonable Jurists Could Debate the District Court's Decision Denying Relief.

In Ground I of his amended habeas petition, Foster argued that he received ineffective assistance of counsel at his penalty phase in violation of the Sixth, Eighth, and Fourteenth Amendments. In denying Foster's claim, the district court found "[t]he Florida Supreme Court's determination that Foster's trial counsel was not deficient is reasonable under *Strickland*" and that the court reasonably applied the "appropriate test [for prejudice]" in that it "weighed the mitigation evidence offered at the postconviction hearing and found no reasonable possibility it would have tipped the balance of aggravating and mitigating circumstances if it had been presented at sentencing." (Doc. 107, at 31-33) "[J]urists of reason could disagree with the district court's resolution of [this] constitutional claim or . . . could conclude [at the very least that] the issue[] presented . . . [is] adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003).

A. Introduction

"Counsel . . . has a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process," and counsel's failure to fulfill this obligation deprives a defendant of his Sixth Amendment right to the effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 688 (1984).

A defendant alleging ineffective assistance must show (1) that counsel's performance was deficient and (2) that the deficiency prejudiced the defense. *Id.* at 687. To establish deficient performance, "the defendant must show that counsel's representation fell below an objective standard of reasonableness" under prevailing norms. *Id.* at 688. To prove prejudice, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694; *see also Thornell v. Jones*, 602 U.S. 154, 171-72 (2024) (emphasizing that "[t]his analysis requires an evaluation of the strength of all the evidence and a comparison of the weight of aggravating and mitigating factors").

Counsel's highest duty is to investigate, prepare, and present all reasonably available mitigation evidence because "accurate sentencing information is an indispensable prerequisite to a reasoned determination of whether a defendant shall live or die." *Gregg v. Georgia*, 428 U.S. 153, 190 (1976); *Wiggins v. Smith*, 539 U.S.

510, 524 (2003); *Williams v. Taylor*, 529 U.S. 362, 392 (2000). As such, "'strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation.'" *Wiggins*, 539 U.S. at 528 (quoting *Strickland*, 466 U.S. at 690-91). Counsel is obligated to begin investigating both phases of a capital case from the outset, which includes identifying and requesting all necessary experts as soon as possible. "[E]ven when a capital defendant's family members and the defendant himself have suggested that no mitigating evidence is available, his lawyer is bound to make reasonable efforts to obtain and review material that counsel knows the prosecution will probably rely on as evidence of aggravation at the sentencing phase of trial." *Rompilla v. Beard*, 545 U.S. 374, 377 (2005).

"In assessing the reasonableness of an attorney's investigation . . . a court must consider not only the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further." *Wiggins*, 539 U.S. at 527. In other words, counsel must conduct a complete investigation to know what evidence is available before a reasonable decision can be made whether or not to present it. When assessing prejudice, courts must conduct a "probing and fact specific analysis" and consider "'the totality of the available mitigation evidence—both that adduced at trial, and the evidence adduced in the [postconviction] proceeding—and reweig[h] it against the evidence in

aggravation.'" *Sears v. Upton*, 561 U.S. 945, 955-56 (2010) (quoting *Porter v. McCollum*, 558 U.S. 30, 41 (2009) (second alteration in original)).

Deficient performance and prejudice can still exist even when counsel presents some mitigation at trial. *Sears*, 561 U.S. at 954. Deficiency and prejudice can also be found when counsel presents "a superficially reasonable mitigation theory." *Id.* at 954-55 (citing *Williams*, 529 U.S. at 398 (remorse and cooperation with police); *Rompilla*, 545 U.S. at 378 (residual doubt); *Porter*, 558 U.S. at 32, 40-42 (diminished capacity based on drunkenness)). "[C]ounsel's effort to present *some* mitigation evidence should [never] foreclose an inquiry into whether a facially deficient mitigation investigation might have prejudiced the defendant." *Id.* at 955.

Moreover, even where the subject matter of trial and postconviction evidence overlaps to some degree, a petitioner may still establish prejudice where trial counsel failed to adequately describe "the nature and extent of the abuse petitioner suffered." *Wiggins*, 539 U.S. at 535-36; *see, e.g.*, *Williams*, 529 U.S. at 370, 398 (finding prejudice based on counsel's failure to uncover "documents . . . that dramatically described mistreatment, abuse, and neglect" petitioner suffered and present the "graphic description of [petitioner's] childhood"). Indeed, federal circuit courts have consistently granted relief where some mitigation was presented at trial, but the postconviction evidence made clear that the jury never learned the full scope of a capital defendant's life. *See, e.g.*, *Stankewitz v. Woodford*, 365 F.3d 706, 724 (9th

Cir. 2004) (finding prejudice where counsel introduced "some of the defendant's social history" but did so "in a cursory manner that was not particularly useful or compelling" (citations omitted)). This Court has explicitly recognized that:

> In the penalty phase of a trial, "[t]he major requirement . . . is that the sentence be individualized by focusing on the particularized characteristics of the individual." Therefore, "[i]t is unreasonable to discount to irrelevance the evidence of [a defendant's] abusive childhood." Background and character evidence "is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background . . . may be less culpable than defendants who have no such excuse."

Cooper v. Sec'y, Fla. Dep't of Corr., 646 F.3d 1328, 1354 (11th Cir. 2011) (internal citations omitted) (finding prejudice despite overwhelming evidence of guilt in a triple-murder case).

When reviewing a petition for writ of habeas corpus, the district court must assess the claims at issue under AEDPA and determine whether AEDPA deference applies. AEDPA mandates that:

> An application for writ of habeas corpus . . . shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of that claim--
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an

> unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d).

"Under the 'contrary to' clause [of § 2254(d)(1)], a federal habeas court may grant the writ if the state court arrives at a conclusion opposite to that reached by [the Supreme] Court on a question of law or if the state court decides a case differently than [the] Court has on a materially indistinguishable set of facts." *Williams*, 529 U.S. at 412-13. "Under the 'unreasonable application' clause, a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from [Supreme] Court[] decisions but unreasonably applies that principal to the facts of the prisoner's case." *Id.* at 413.

While AEDPA affords a presumption of correctness to state-court findings under § 2254(d)(2), that presumption can be overcome by a showing of clear and convincing evidence. 28 U.S.C. § 2254(e)(1). A faithful application of § 2254(d)(2) requires looking beneath a state court's factual findings and assessing the reasonableness of the conclusions the court reached in light of the evidence that was before it. *Miller-El*, 537 U.S. 322; *Wiggins*, 539 U.S. at 528. "[W]hen a state court's adjudication of a habeas claim 'result[s] in a decision that [i]s based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding,' [the] [c]ourt is not bound to defer to unreasonably-found facts or to the legal conclusions that flow from them." *Jones v. Walker*, 540 F. 3d 1277, 1288

n.5 (11th Cir. 2008) (en banc) (internal citation omitted) (second and third alteration in original).

When a petitioner makes a sufficient showing that AEDPA does not apply to his claims under this framework, the district court must conduct *de novo* review. This Court conducts *de novo* review of a district court's decision denying or granting habeas relief.

B. Trial Facts and Mitigation Presented

Following Foster's conviction for the murder of Mark Schwebes, a single-day penalty phase took place. The Defense called 25 witnesses who offered cursory testimony that "presented a picture of Foster as a kind and caring person." *Foster v. State*, 778 So. 2d 906, 911 (Fla. 2000). The Florida Supreme Court summarized the mitigation case:

> May Ann Robinson, Foster's neighbor, testified that he once helped her start her car and offered to let her borrow a lawn mower. Robert Moore, another neighbor, testified that Foster was well mannered and a hard worker. Shirley Boyette, found Foster to be very caring, intelligent and well-mannered. Robert Fike, Foster's supervisor at a carpentry shop, and James Vorhees, his co-worker, found him to be a reliable worker. Vorhees also testified that Foster was very supportive to Vorhees' son who suffered from and eventually died of leukemia. Similarly, Raymond and Patricia Williams testified that Foster was very nice to their son who suffered from spinal bifida. Peter Albert, who is confined to a wheelchair, related how Foster had helped Albert's mother care for him after his wife died. Foster also helped Albert in numerous other ways, including preparing his meals, fixing things around

> the house, and helping Albert in and out of his swimming pool.
>
> There was additional testimony that described Foster's involvement with foreign exchange students. Foster was also known to have given positive advice to young children. Foster's sister, Kelly Foster, testified to how he obtained his GED after dropping out of high school and that he obtained a certificate for the completion of an "auto cad" program at a vocational-technical school. Finally, Foster's mother testified that he was born prematurely and suffered from allergies, and that Foster's father abandoned him a month after birth.
>
> On cross-examination, many of the witnesses who testified to Foster's kindness admitted that they had not been in contact with him for a number of years.

Id. at 911-12. In imposing Foster's sentence, the trial court found 2 aggravating circumstances: (1) the capital felony was committed for the purpose of avoiding or preventing a lawful arrest; and (2) the capital felony was committed in a cold, calculated, and premeditated manner without any pretense or moral or legal justification. (A12. 1475-79) The court afforded each aggravator "great weight" and outright rejected or assigned each the 23 nonstatutory mitigators the Defense presented "very little weight individually and very little weight collectively." (A12. 1478-79, 1483) The court further rejected the lone statutory mitigating factor of Foster's age at the time of the offense (18), (A12. 1479-80), and rejected the superficial mitigation presentation by trial counsel, describing the mitigation as "run[ning] the gamut from the sublime to the ridiculous." (A12. 1483)

C. State Postconviction Evidentiary Hearing

The postconviction court held a 4-day evidentiary hearing in April 2011 where Foster presented members of his defense team, 6 family members, and 4 mental health experts. The State called 3 witnesses in rebuttal. Testimony from Foster's family members and expert witnesses spanned nearly 400 pages of transcript compared to the 25 mitigation witnesses at trial whose testimony covered less than 100.

1. Facts Demonstrating Deficient Performance

Marquin Rinard, second-chair trial counsel, testified that he was recruited to work on Foster's case about a month or two after Foster's arrest, and his "duties were whatever Mr. Jacobs assigned to [him]." (C28. 2231-32) Rinard recalled that both Foster and his family cooperated with the defense. (C28. 2233-24) Rinard considered himself "[a] glorified sounding board" for the lead attorney, Jacobs, who "took primary responsibility for both the guilt and the penalty phase." (C28. 2236-37) Rinard estimated that he spent 85% of his time on guilt-phase preparation." (C28. 2249) No one investigator was assigned to Foster's case from start to finish, and the team failed to hire a mitigation specialist. (C28. 2235, 2237)

Rinard explained that James Wootton was hired by the Public Defender's Office after his release from prison. Wootton was "in charge of taking all of the information that came into the office . . . and placing it in the Trial Scout system."

(C28. 2235-36) Wootton was not a trained investigator but rather a paralegal "[i]n the loosest sense of the term." (C28. 2236)

Rinard testified that the defense "knew that [it] needed to do the best that [it] could to humanize Mr. Foster" at the penalty phase; however, he could not recall for certain what Jacobs said he was looking for as evidence to support a mitigation case. (C28. 2250) Rinard was "sure that [they] talked about age" since Foster was 18 but could not remember having any evidence to support it. (C28. 2252, 2254) Rinard thought Jacobs obtained school records but was "not 100 percent sure" if they obtained Foster's medical records. (C28. 2248, 2255)

Rinard recalled that the investigator who first spoke with Foster did a brief intake interview, and there were many conversations and meetings with Foster's mother Ruby and sister Kelly. (C28. 2255-57)

Ruby was primarily responsible for putting the defense team in contact with penalty phase witnesses. Rinard could not recall relying on anyone else for information about family history. Jacobs was responsible for preparing the penalty phase witnesses. (C28. 2260-61)

Rinard recalled hearing about possible head injuries or concussions Foster suffered but did not research brain injuries. Rinard was unaware of any history of mental illness or suicide in Foster's family and never spoke to the State's investigator about Foster's demeanor when he shot himself in the stomach. (C28.

2261-63)

Rinard could not say whether the defense team investigated any physical abuse of Foster or whether Foster observed any physical abuse of his mother. (C29. 2268) He did not recall seeking any expert on the issue of organic brain damage and never noticed anything that would have indicated Foster suffered from mental health deficiencies. (C29. 2269, 2276) While Foster denied any head injuries or mental illnesses on his intake summary form, Rinard conceded that it would have been important to verify background information through an independent source. (C29. 2283) Rinard did not know whether anyone actually sought out independent information on Foster's social history; however, the mitigation witnesses the defense did speak with provided little negative background about the Foster family. (C29. 2275, 2284) Ruby resisted any attempts to discuss mental health issues; she "didn't want to engage in a discussion that showed a weakness or defect in Kevin." (C29. 2275)

Rinard recalled that psychiatrist Dr. Robert Wald was retained almost immediately upon Foster's arrest. Records indicate Dr. Wald met with Foster twice in May and June of 1996. This was before Rinard got on the case, (C28. 2240, 2243), and he never saw any written reports or documentation in the files about mental health issues. Rinard had no independent recollection about what Dr. Wald may have reported and confirmed that it was highly unlikely he had any discovery at the time

he met with Foster. (C28. 2245-26)

Lee County Public Defender Investigator Roberta Harsh testified to the work she performed on Foster's case. (C28. 2084) While she did "[b]asically anything Mr. Jacobs asked [her] to do," her duties were nothing major with the exception of driving a timeline and reporting back to Public Defender Midgley. (C28. 2083-84) Harsh confirmed that Jacobs was primarily responsible for the case. Wootton handled the Trial Scout software program and "was more involved in investigative [sic] at most of the levels. He would . . . give ideas and they'd run with it." (C28. 2084)

Harsh's one assignment with Wootton was to run a timeline of the route the co-defendants said they drove on the night of the crime. (C28. 2085-86) Harsh could not recall doing any other work with Wootton but remembered that he prepared a slideshow of photos from Foster's childhood. Wootton was the "go-to guy on [the] case" and, "for all appearances," the unofficial liaison with the family. (C28. 2087, 2089)

Harsh testified that she did not initiate any investigation on her own and did not recall going out of state for investigative purposes. She was not involved in team meetings. (C28. 2095) Jacobs had been having tremors for years at the time of Foster's case. (C28. 2091)

James Wootton, who worked on the case as a pseudo-paralegal, and who had

returned to prison on drug and robbery charges at the time of Foster's evidentiary hearing,[2] testified that he was hired by the Public Defender's Office after his release from prison in 1996.

Wootton explained that he became involved in Foster's case to control discovery using the Trial Scout program. (C28. 2109) Wootton's work on Foster's case did not begin until 1997—well after Foster was arrested—and he described the documents as "disorganized." (C28. 2110)

Wootton saw Foster at the jail "probably two, three, four times at the most." (C28. 2113-14) He "never did any travelling whatsoever," and the only investigative work he did was creating a timeline to track the co-defendants' testimony with Harsh. (C28. 2112-13)

Wootton's contact with the Foster family included sitting in on meetings and fielding calls from Ruby. (C28. 2113) "[T]he phone rang constantly," as Ruby was in contact with Jacobs "every day, multiple times a day." (C28. 2127) She attended 50% of the team meetings and "voiced her opinion." "Every bit" of discovery was provided to Ruby except the autopsy photos. (C28. 2115-16)

Wootten confirmed that Ruby "supplied the names and addresses of friends

[2] Before Wootton testified, the State disclosed that he attempted to get a Charlotte County detainer removed in exchange for favorable testimony against Foster. (C28. 2098)

and family" for the penalty phase. (C28. 2118) "She was constantly giving her opinion and what she thought was right and who we should go talk to and who we should see" and proposed questions for the attorneys to ask witnesses. (C28. 2118-19)

Wootton recalled that Foster had been taken to Naples for a mental health evaluation because there were notations in the boxes and it was talked about in the office. (C28. 2122-23) The trial attorney files, however, reflect no such notations, and the doctor's visits occurred in 1996—well before Wootton began working on Foster's case. (C22. 1512-13; C23. 1536)

Wootton testified that when Jacobs asked about mental health issues, Ruby would "get really irate." She insisted nothing was wrong with her child and that they not mention mental illness in front of her. (C28. 2124) Wootton believed that they had all school records and an abundance of medical records; however, no medical files, other than from Foster's self-inflicted gunshot wound, were present in the trial attorney files. (C28. 2125)

Wootton confirmed that Jacobs decided to present the "good kid" defense at the penalty phase. (C28. 2126) The people interviewed to build this theory had all been contacted by Ruby and either came to the office or Ruby's home. (C28. 2126-27) Wootton worked with Ruby and Kelly to compile a slideshow of photos depicting Foster as a good kid with a good upbringing. (C28. 2128-29) The slides

were published during Ruby's penalty phase testimony and consumed 85% of her direct examination. (A23. 2019-31)

Wootton denied falling asleep at counsel table and testified that he did not notice Jacobs suffering from any tremors. (C28. 2135, 2140) Wootton further denied having a personal or sexual relationship with Ruby. (C28. 2142)

After the hearing, postconviction counsel learned that Wootton had given false testimony based on a letter he wrote to Ruby and asked to reopen the proceedings. (C35. 3503-27) In this letter, Wootton told Ruby that he "damn sure missed [her]" and that he "never intended to fall in love with [her]." (C35. 3516, 3518) Wootton referenced their intimate relationship, stating: "I suffer from a guilt that it was always you satisfying me—and I feel I didn't satisfy you. You are a good girl! [smiley face]." (C35. 3519) Wootton also expressed that "Counsel fucked up" Foster's case. (C35. 3517) While the court denied Foster's request, it allowed Wootton's letter into the record as substantive evidence. (C36. 3672-73)

Kelly Foster, Kevin Foster's sister, testified that she was contacted by the defense several weeks after her brother's arrest. (C28. 2214) Jacobs asked her for "character references, a list compiled of who we knew that might could say [sic] something to [sic] Kevin." While Kelly provided what Jacobs asked for, he made her feel that she had nothing worthwhile to contribute. (C28. 2214-15) Kelly testified that Ruby reviewed almost every piece of discovery, gave suggestions to the defense

team, and went to Jacobs' office weekly to drop off material. (C28. 2216)

Kelly did not have much contact with Rinard and did not attend case meetings. She did have contact with Wootton a few times. (C28. 2217-28) Wootton and her mother had a personal and sexual relationship; their affair ended after the trial concluded. (C28. 2224-25)

Foster's biological father, Jack (Joe) Bates, Jr., testified that while he attended the trial, no one from the defense contacted him about the case, asked him about mitigating evidence, or explained to him what it was. He introduced himself to Jacobs at trial and told him what he felt needed to be asked, but he had no other encounter with the defense team. (C30. 2518, 2521)

Foster's aunt, Linda Albritton, testified that she learned Foster had been arrested in the Spring of 1996. (C29. 2301) She received a few calls from Ruby and Kelly and attended a deposition, but she did not know who set up the meeting. (C29. 2301) Linda recalled being told to go to a certain place at a certain time to give a statement, but no one discussed with her what mitigation was. After the deposition, she did not speak with any attorneys. (C29. 2302) She got a letter in the mail indicating she may be called as a witness, but nothing happened. Had she been contacted, Linda would have testified. (C29. 2302)

Candy (Albritton) Green, Foster's cousin, testified to learning that Foster had been arrested on TV. (C29. 2317) She did not speak to anyone from the legal team

until she was deposed. Candy was not notified of the deposition ahead of time. (C29. 2317) Most of the questions were about Foster's alibi, and no questions were asked about family history. After the deposition, no one from Foster's legal team called her or explained what mitigation was; she would have testified if asked. (C29. 2318)

Foster's paternal grandfather, Jack Bates, Sr., testified that he first heard Foster had been arrested when Ruby called his wife, Irene. He never had any contact with the defense and would have testified if asked. (C29. 2407)

Ron Newberry, Kelly's biological father, testified that Ruby told him Kevin had been arrested. He gave a deposition and testified at trial but did not remember being told what mitigation was and what was helpful to Foster. (C29. 2426)

2. Facts Demonstrating Prejudice

At the postconviction hearing, Foster elicited compelling testimony not presented at trial, including pertinent family history and information about Foster's life and mental health.

Foster's aunt, Linda Albritton, testified that Foster's mother Ruby was one of 8 children. (C29. 2294) Mental health issues run in the family as two of Ruby's sisters, Josephine and Ruth, suffered from severe paranoia that could be "really thick" in a room "like you could cut it with a knife." Josephine eventually committed suicide by shooting herself in the head. Ruby's brother Billy is an alcoholic who struggles with anger issues. (C29. 2297-98) Foster's cousin, Candy (Albritton)

Green, testified that her father Roy (Ruby's twin brother) struggles with depression. (C29. 2311) Ronald Newberry, Kelly's biological father, described Ruby as hyperactive and impulsive. (C29. 2414)

After graduating high school, Ruby married Ron Newberry (Husband #1). (C29. 2414) When Ron returned from Vietnam, Ruby got pregnant with Kelly. Ron suffered from post-traumatic stress disorder, had a nervous breakdown while at work one day, and woke up in a straight-jacket. (C29. 2424-25; C28. 2172) When Kelly and Kevin spent weeks with him, he would have meltdowns, which upset them. (C28. 2172-73)

Ruby and Ron divorced in 1976 when Kelly was in first grade. (C29. 2414) Ruby's father disowned her when she divorced Ron, and her name was not to be spoken at home. (C29. 2296) Ruby's father controlled her mother so that she could not see Ruby. (C29. 2296-99)

Ruby met Jack (Joe) Bates, Jr., (Husband #2) through her brother-in-law. (C30. 2506) They dated for 6 months and eloped the day after Ruby's divorce from Ron was final. The first time Joe met Ruby's parents, her father met them on the porch with a rifle in hand and threatened to kill them. (C30. 2507) One of Ruby's brothers also confronted Joe and "told [Ruby] to pack her things and leave." (C30. 2509)

Kevin was born through an emergency c-section on June 17, 1977. (C30.

2510) Northwest Texas Hospital records show he suffered from birth shock (now called perinatal asphyxia) and respiratory distress syndrome. Kevin had to be resuscitated twice. It was a week before he was weaned off the oxygen incubator and sent home. (C30. 2453; C33. 3000-3315) This is significant because it is a risk factor for brain damage.

Kevin suffered from chronic health problems. Joe described him as uncontrollable. (C30. 2511) He was developmentally slow and abnormal. (C30. 2464, 2467) His paternal grandmother thought he was autistic. (C30. 2467) Kevin was hard to feed and did not eat well. He suffered from severe allergies and was both clumsy and delayed. Ruby, however, seemed completely unaware of Kevin's health issues. (C30. 2470) Her father refused to have any relationship with Kevin and told family members Kevin should never have been born. (C30. 2466)

Joe and Ruby were married for less than two years. He divorced Ruby when she went to Dallas for 4 months and met Brian Burns (Husband #3). (C30. 2512) Joe did not approve of Ruby leaving the children for months at a time with Brian. (C30. 2514) Kelly remembered Joe "popp[ing] in every 3 or 4 years" until Kevin was 8 or 9. (C28. 2174-76) She described Joe as a "brutal man" with whom she and Kevin had no relationship. (C28. 2176) Joe went to prison at some point, and his parents, Jack and Irene Bates, were around more often. (C28. 2174-76) Jack felt Ruby "wasn't acting as a fit mother." (C29. 2407) There was no structure in the home; yet,

at other times, Ruby was overly possessive.[3] (C29. 2409)

Jack and Irene lived in Oklahoma, and the children visited them throughout their childhood. Dr. Faye Sultan, a psychologist, interviewed Irene before she died. Irene said Ruby was obsessed with her children and felt the unstable home environment led to depression in Kelly and Kevin. Kelly dragged her leg, which doctors attributed to her chaotic home life. (C30. 2466-67)

Dr. Sultan also spoke to Ruby's sister, Pauline Logsdon, who noticed Kevin was developmentally delayed. He walked later than other children and had a crooked face. (C30. 2470) He had no expression and never initiated any physical or emotional connection. Ruby, however, believed he was totally normal. (C30. 2471)

Ruby was a person of extremes. (C30. 2462) She went from being excitable to tearful very quickly. (C30. 2462-63) Kelly described Kevin and Ruby's relationship as overdependent. Because Ruby's presence in Kevin's life was erratic, ranging from periods of suffocating attention to utter absence, Kevin became too attached to her. He grieved when she was not around. (C30. 2460-61)

Ruby met Brian Burns (Husband #3) in 1978 a year after Kevin was born. They married quickly and moved from Texas to Arizona. Brian had mental disabilities, bouts of uncontrollable anger, and was violent. (C30. 2459-60) He

[3] Ruby later asked Joe if he would relinquish his parental rights so that John Foster (Husband #4) could adopt Kevin. Joe refused but learned the adoption went through without his approval in 1989. (C30. 2516)

suffered brain injuries from a car accident and has a metal plate in his head. (C30. 2460)

Living with Brian was like walking on eggshells. No one knew what would trigger an outburst or when Brian would turn violent. One night, Brian lost it and "broke the front windows of [their] rental house with his arms, tore up the house and . . . broke Ruby's nose." Both Kevin and Kelly were at home and severely traumatized. (C28. 2180-81) Dr. Sultan described Brian as explosive and unpredictable. (C30. 2460)

After school, Kevin and Kelly would walk to Ron Newberry's house. Brian would pick them up, and they would spend the night with him. Ruby was dating other men and left the children with Brian for long periods of time. (C30. 2460) Ron found it odd that she was leaving the children with Brian. (C30. 2420)

Ruby divorced Brian in 1980 because of his physical abuse and mental issues that made him incapable of showing emotional support to the children (C28. 2181-82) The family moved again from Amarillo to Missouri, where Ruby met John Foster (Husband #4) at a truck stop. Ruby went out on the road with John and left Kevin and Kelly again with Brian. The children were young and missed their mother. (C28. 2184-86) After two years in Missouri, John moved the family to Florida to avoid paying child support to his ex-wife. (C28. 2186-87)

Kevin's home life continued to be unstable and unpredictable. Ruby had been

involved with many men and dragged the children from city to city. The children changed schools frequently. Kevin had no positive, consistent male role models. When Ruby traveled with John, Kevin and Kelly were shuttled between ex-husband Ron, the Bates', or Brian. (C28. 2187) Ruby was either smothering her kids or leaving them behind.

In Florida, John worked sporadically and caused more turmoil and instability. (C28. 2189) After losing another house because of John's failure to keep a job, Ruby took the children back to Texas. In Amarillo, John bought a trailer catty-corner from Brian. (C28. 2190) In the winter, the pipes would freeze up, and they would stay at Brian's trailer.

While back in Texas, Ruby's father, who suffered extreme paranoia, began stalking their house. (C28. 2193) Over the years, he threatened Ruby and Kevin. He hated Kevin and "wanted him dead." (C28. 2193) In his eyes, Kevin was unacceptable and not his grandson. Kelly recalled playing on a chair with Kevin when her grandfather went crazy and told them he was going to kill their mother and beat them. (C28. 2194) Their grandfather's hatred affected Kevin; they knew he was unstable and feared him. (C28. 2194)

When Kelly was about to start high school and Kevin was in middle school, the family moved back to Florida. (C28. 2190) Kelly suffered from medical, mental, and emotional problems from her chaotic home life. (C28. 2192)

John was the most militaristic of Ruby's 4 husbands. In 1990, he and Ruby bought a pawn and gun shop in Fort Myers. He was a Vietnam veteran and an excellent marksman. He liked to watch violent and graphic movies about Vietnam in front of the children. A few years after buying the pawn shop, John began having several affairs, and the family deteriorated. (C28. 2197-99)

John was very critical of Kevin. He teased Kevin and called him a sissy. Kevin was very sensitive and overwhelmed by John. (C30. 2463) When Kelly and Kevin were in high school, they were constantly in the middle of their parents' fighting and "had scuffles" with John. Kevin had to pull John off his mother during violent encounters. (C28. 2199) Ruby confirmed to Dr. Sultan that both Brian and John had been physically and mentally abusive to her and the children. (C30. 2463)

Eventually, Brian moved to Florida and into their house while Ruby was still married to and living with John. (C28. 2202) Kevin was 15 or 16. He began escaping with his friends, started smoking, and acting rebellious. Kelly felt he was lost. (C28. 2202-03)

Throughout his life, Kevin was accident prone and hyper. (C28. 2210, 2213) He was clumsy and fell often. (C28. 2212) When Kevin was 5 or 6, Kelly accidentally whacked him in the head with a baseball bat causing a concussion. (C28. 2211) In Texas, Kevin was playing on a mud-scraper when he fell back and hit his head on a rock. The bottom of his skull split open (C28. 2211) Kevin and his cousin,

Candy fell when they jumped off a cliff. (C28. 2315; C29. 2318) He was constantly having accidents and getting stitches. (C28. 2211; C29. 2318).

Candy recalled growing up with Kevin and Kelly in Texas. She found it odd that Ruby was married to John since Brian seemed more like a father. Ruby was there but not watching what her kids were doing. (C29. 2311-12) Most of the time, Kelly was in charge and acted like a mother. If Candy and Kevin were doing something wrong, they would get in trouble from Kelly. (C29. 2314)

The dynamics were the same in Florida. Ruby was married to John, but Brian still lived in the house. Kelly was in charge, and Kevin did whatever he wanted while Ruby worked in the pawn shop. Kevin was "[h]yper, wild." (C29. 2316-17)

Dr. Sultan learned from test scores in Texas and Florida that Kevin was verbally competent and learned to read well, but he had motor difficulties. His non-verbal skills were deficient relative to his verbal skills. (C30. 2451) He had to repeat fifth grade. (C33. 3000-3315) Despite Kevin's high IQ scores, there were some learning difficulties or possible problems with his brain; these were red flags indicating neurological testing was necessary. (C30. 2452)

By Kevin's first year at Riverdale High School in 1993, his grade-point average had plummeted to 1.91. In tenth grade, Kevin's grade-point average dropped further to 1.28. Around this time, Kevin and Kelly's friend, Cody Voorhees, became ill with leukemia. (C28. 2202-03) Kevin's girlfriend also broke up with him, which

left him extremely depressed. (C30. 2455) On March 6, 1994, Kelly heard what sounded like glass shattering when Kevin opened the door holding his side and said he shot himself. (C28. 2202-06) Lee County Hospital records show Kevin denied it was done on purpose; however, the records also show the entry wound had multiple powder burns. (C33. 3000-3154) The police and mental health experts all believed it was a suicide attempt. (C39. 2335) In the Riverdale High School yearbook, Kevin's friends wrote that he should try not to kill himself over the summer. The entries also referred to Julie, the girl who broke up with him. Kevin's friends knew he was very depressed and tried to give him hope for the future. (C30. 2455, 2457)

While Kevin was in the hospital for the gunshot wound, Cody died. Cody was like a brother to Kevin, and his death "[d]evastated him." (C28. 2205-06) Three days after Kevin was released, he jumped off a bridge into Caloosahatchee River and got a serious staph infection.[4] (C28. 2208) Kevin missed 53 days of school and was flunking out. He dropped out of school and took the GED test, passing it on the first try. (C33. 3000-3315) At this time, Ruby and John continued their violent break-up. One time, Ruby was in the bathtub, and John attacked her to the extent Kevin had to physically pull John off of her. (C28. 2209)

Kevin got a job at Bunting Construction but still lived at home. His paychecks

[4] Kevin denied trying to commit suicide so often to Dr. Sultan that she believed he was intentionally trying to harm himself. (C30. 2454-55)

were still being endorsed by his mother. (C33. 2961-99) He was still accident prone, as he stabbed himself at work, cut off the end of his finger with a saw, nailed his fingers together with a nail gun, had a one-inch square of glass in his foot, and got hit in the head with a metal door. (C26. 1967) Because of traffic tickets, Kevin was also being driven around by his mother. Though Kevin still lived at home, he was without supervision.

Dr. Sultan found physical and mental abuse in Kevin's background. His mother had been neglectful and over-nurturing at the same time. (C30. 2470) Both Kelly and Kevin suffered significant depression. (C30. 2471) Dr. Sultan believed several life circumstances were important factors in Kevin's development, including his reaction to the emotional instability in his life and of his mother, his father's abandonment, and his mother's mental illness. (C30. 2472-73) Dr. Sultan was also concerned with Kevin's developmental delays and the overly dependent relationship with his mother. Kevin had a great deal of anger towards his mother because she saw him as the perfect son. (C30. 2473-74)

Dr. Sultan opined that Kevin suffers from a mental illness. (C30. 2474) There are periods where he is grandiose and quite expansive about his superiority followed by manic episodes. During episodes where his is extremely agitated, Kevin is extremely labile and views himself as his mother does. There are other periods where Kevin seems depressed, sleeps a lot, does not want do anything, and thinks often of

suicide. Kevin has experienced periods of extremes since childhood. (C30. 2475) Kelly believed her mother was also mentally ill and that she and Kevin suffer from mental illness. (C30. 2461)

Dr. Sultan testified that Kevin was in the midst of a severe manic episode in the weeks leading up to the crime. (C30. 2475-76) Before then, he had no criminal history or history of violence toward others. After listening to Kevin talk about his thoughts during that timeframe, Dr. Sultan opined that he was showing signs of a bipolar episode. (C30. 2475-76) The Lee County Corrections Bureau Confinement Log reflects that during the first 5 days after his arrest, Kevin did not leave his cell, bathe, or change his sheets; he did not respond to any external stimulation. (C30. 2455-56)

Dr. Sultan ultimately diagnosed Kevin with Bipolar I disorder. (C30. 2480) Dr. Sultan further concluded that Kevin "was developmentally very young" at the time of the crime. (C30. 2477) His brain at age 18 was underdeveloped with respect to decision making and impulse control. As statutory mitigation, Dr. Sultan opined that Kevin "was under the influence of a serious mental illness and potentially an organic disability at the time of the offense." (C30. 2483)

Neuropsychologist Ernest Bordini evaluated Kevin in 2006 and also found red flags that may have impacted his behavior. (C29. 2326) Because Kevin experienced anoxia at birth, frontal lobe deficits were to be expected, but Dr. Bordini was

surprised to see such poor results on the Wisconsin Card Sorting Test from someone with Kevin's IQ. (C29. 2341) Kevin's verbal IQ tested at 137, but his nonverbal IQ was 105. Only one in 200 people have such verbal/nonverbal IQ split, which is an indication of right versus left hemisphere dysfunction. (C29. 2347-48)

Dr. Bordini further concluded that Kevin has executive functioning frontal lobe deficits, which is significant for social and occupational functioning and impacts judgment and emotional maturity. (C29. 2353-54, 2360) He also observed mild memory deficits and some patterns of right hemisphere difficulties. (C29. 2359)

Dr. Bordini attributed the deficits to a combination of anoxia/hypoxic encephalopathy and felt that Kevin's history of recurrent depression may indicate Bipolar disorder. In terms of the nonverbal learning disorder, Kevin has patterns that could have created academic impairment. (C29. 2360)

Dr. Bordini believed that had Kevin been thoroughly tested at the time of the incident, his frontal lobe impairment would have been even worse. (C29. 2356- 57) Dr. Bordini's primary diagnosis was chronic anoxia/hypoxic encephalopathy and major depression recurrent with a possible nonverbal learning disorder. Based upon Kevin's history, he also diagnosed personality disorder and possible antisocial personality disorder. (C29. 2362-63)

Dr. Ruben Gur, an internationally recognized expert in brain imaging and neuropsychology, produced a map of Kevin's brain based on the raw data from Dr.

Bordini's testing. (C30. 2525-32) He verified the scoring and entered it into an algorithm to illustrate the parts of the brain that are implicated by neuropsychological deficits. (C30. 2533; C32. 2902)

Dr. Gur testified that one problem with diagnosing brain damage in someone like Kevin is that he is very smart. (C30. 2561) However, his performance IQ is only average, which calls the issue of brain damage into question. (C30. 2562) Kevin's score of two standard deviations below average on the Wisconsin Card Sorting Test strengthens this indication. (C30. 2563) The fact that Kevin could not change sets of principles within the test is a classic sign of frontal lobe damage and impairment in the decision-making context. (C30. 2564-65)

When Dr. Gur entered Dr. Bordini's test results into the neuroimaging algorithm, it showed frontal lobe damage worse on the left side than on the right. It also showed damage in the parietal area on both sides. The image looked as if Kevin was hit from the back and his brain had gone forward, crashing against the orbital bones of the face. (C30. 2567)

Dr. Gur concluded that Kevin's brain was not yet mature at the time of the crime. (C30. 2570) He opined that Kevin had executive functioning impairment and that he suffers from perceptual organization impairment and bilateral frontal and parietal dysfunction. (C30. 2571) Dr. Gur testified that the science of his behavioral imaging is relied upon generally by members of his field and that this information

was available at the time of trial. (C30. 2571-72)

Dr. Thomas Hyde, a medical doctor and expert in neurology and psychiatry, conducted a physical neurological exam of Kevin. (C31. 2723) Kevin's cranial nerve examination was notable for his fairly dramatic facial asymmetry; he also "had a subtle finding of poor complex motor sequency in the hands bilaterally," indicative of significant brain damage or disease. (C31. 2732-33) Kevin's physical evaluation was notable for high-average feet, facial asymmetry, and his right leg is slightly longer than his left. When he lifts weights or exercises his left side, it never achieves the bulk of his right side. (C31. 2733) Dr. Hyde's findings indicate right hemisphere dysfunction, which is important in understanding whether any neurological factors might have influenced Kevin's behavior and played a role in any criminal activity. (C31. 2734)

Dr. Hyde also found Kevin's birth records important and indicative of developmental issues, as Kevin went into respiratory arrest 5 minutes after he was born and had to have an endotracheal tube placed in him. (C31. 2735) Kevin was reluctant to breastfeed shortly after birth, which is common among babies with developmental brain dysfunction. (C31. 2736)

Dr. Hyde noted that Kevin developed a significant mood disorder in his teenage years with episodes of depression and hypomania—"and probably mania itself." (C31. 2736) These conclusions derived primarily from Kevin's self-report,

which is the industry standard, and supporting documentation of acute depression immediately following the offense. (C31. 2737) This was important in the context of the hypomanic symptoms Kevin reported in the days leading up to the crime. (C35. 3397-3475)

Dr. Hyde opined that Kevin's issues were the result of developmental and/or genetic factors. (C31. 2738) The multitude of minor closed-head injuries Kevin reportedly suffered could either reflect impulsive behavior or motor skill problems. (C31. 2739) Ruby told Dr. Hyde that she began premature labor 12 weeks before Kevin was born but took medication to stop it. Individuals with premature labor are more likely to give birth to individuals with some developmental anomalies. (C31. 2740)

In Dr. Hyde's experience, Kevin's gunshot wound raises red flags for an underlying mood disorder attributable to a tumultuous family background. (C31. 2740) The incident occurred during a time of great upheaval in Kevin's home and personal life, and gunshot wounds in adolescents typically deal with an extremity, not the abdomen. (C31. 2740-41). A gunshot wound in someone with a tumultuous psychosocial history like Kevin bears investigating beyond the self-report. (C31. 2741-42)

Kevin right-hemisphere dysfunction also correlates to development of a mood disorder, and there is a history of mood disorders on his mother's side. Dr. Hyde was

not surprised that Kevin met the DSM-IV diagnostic criteria for a mood disorder, most likely Bipolar. (C31. 2742-43) Dr. Hyde also found the discrepancy between Kevin's verbal and nonverbal IQ scores notable and indicative of right hemispheric dysfunction. (C31. 2745-46) Had he been retained at trial, Dr. Hyde would have told counsel about these issues of brain dysfunction and psychiatric disease that could have been used in mitigation. (C31. 2749)

The State's rebuttal case consisted of 3 mental health experts. Dr. Robert Wald, the psychiatrist who evaluated Kevin prior to trial, testified that he had no independent recollection of Foster's case or what he did for the Defense. (C31. 2632)

Dr. Leon Prockup, a neurologist, opined that Dr. Gur's behavioral map failed to pass scientific scrutiny because its last publication was in 1984; however, he pointed to no publication that found the map unscientific and did not contest that it was based on Dr. Bordini's neuropsychological test results. (C30. 2591-95) Moreover, Dr. Prockup did not meet with Kevin and conceded that he had been retained a month or two before the hearing and was provided "[v]ery little information." (C30. 2599)

The State also presented Dr. Michael Gamache, a psychologist who likewise never met with Kevin. Rather, Dr. Gamache reviewed the test results from Drs. Bordini, Hyde, and Sultan and only disagreed with those that were favorable to mitigation. While he critiqued the testing the defense experts used, Dr. Gamache

conceded that "for the most part, the tests that they relied on are generally-accepted neuropsychological measures that have been around for some time," including at the time of trial. (C31. 2709-10)

D. Postconviction Court Order

The postconviction court denied relief on all facets of Foster's ineffective assistance of counsel claim. (C36. 3674-4004)

In rejecting Foster's claim that counsel unreasonably abdicated their responsibility to prepare and present mitigation to his mother, the court found "[t]he testimony introduced at the hearing shows that Defendant and Mr. Jacobs made the decisions regarding the case, and that [Ruby] Foster merely provided contact information for possible penalty phase witnesses, lists of what she believed were inconsistencies in the evidence, or questions she believed should be asked of witnesses." (C36. 3680) The court found counsel was not ineffective for failing to call any of the family witnesses Foster presented in postconviction because the court found no reasonable probability their testimony would have outweighed the aggravating circumstances presented at trial. (C36. 3685)

Moreover, Ruby and Kelly "had ample opportunity to inform the defense about any negative mitigating information, yet provided none," and no family members contacted by the defense shared any either. (C36. 3684-85) "In [this] circumstance, it was [therefore] not unreasonable for the defense to rely on an

attempt to humanize [Foster] to the jury." (C36. 3685) The court additionally found the postconviction testimony did not reveal "significant mitigation leads," and "[t]estimony [Foster] was born prematurely or did not have his father as a constant figure in his life would have been cumulative" to the penalty-phase evidence. (C36. 3686-87)

In rejecting Foster's arguments concerning counsel's failure to present mental health mitigation, the court found the State's experts more credible than Drs. Bordini, Sultan, Gur, and Hyde because their testimony and/or opinions were speculative, limited, biased, or cumulative. (C36. 3690-94) The court therefore found any contention of organic brain damage not credible and that Foster failed to demonstrate the pretrial evaluations he underwent "uncovered . . . any significant mental health mitigation, which trial counsel failed to present." (C36. 3690, 3699) The court specifically relied on Wootton's testimony that "had any potential mitigating mental health information been received, trial counsel would have followed up on it," and cited "the denials of any mental health issues by [Foster] and his family." (C36. 3699-70) As such, "counsel is not ineffective for relying on the utter lack of any negative mitigating evidence and not investigating deeper." (C36. 3700)

On Foster's claim that his defense team was impaired, the court found Wootton and Rinard's testimony that "Jacobs was not trembling or confused to be

more credible than those of other witnesses who were not in close proximity to Mr. Jacobs during the trial, or who have a motive for bias against Mr. Jacobs in favor of [Foster's] motion." (C36. 2687-88) The court also pointed to Wootton's testimony refuting any suggestion he slept during the trial. (C36. 3687) While the court acknowledged Wootton's letter conflicted with his testimony about his relationship with Ruby, the court declined to "find that the contradicted testimony . . . had any probability of changing the outcome" and that the fact they had a relationship "does not change the substance of the rest of his testimony regarding [Foster's] case." (C36. 3688) The court additionally found Wootton's statement in the letter that "[c]ounsel fucked up" to be "less than credible." (C26. 3688)

E. Florida Supreme Court Findings

On appeal, the Florida Supreme Court found that "nothing presented by Foster undermines . . . confidence in the outcome the [his] penalty phase proceedings," and all of the circuit court's findings are supported by competent, substantial evidence. *Foster v. State*, 132 So. 3d 40, 54, 57, 61 (Fla. 2013). The court therefore said it could not "conclude there is a reasonable probability that the balance of aggravating and mitigating circumstances would have been different or that counsel's deficiencies, if any, substantially impair confidence in the outcome of the proceeding." *Id.* at 61.

On Foster's claim that counsel abdicated his responsibility for mitigation to

Foster's mother, the Florida Supreme Court agreed with the circuit court's determination that counsel did no such thing. Rather, "Foster and lead counsel Jacobs made the decisions regarding mitigation strategy for the case." *Id.* at 54. Ruby "merely provided contact information for possible penalty phase witnesses, suggestions of inconsistencies in the evidence, and questions that she believed should be asked of witnesses." *Id.* The court noted that "'[c]ompetent defendants who are represented by counsel maintain the right to make choices in respect to their attorneys' handling of their cases,' which 'includes the right to either waive presentation of mitigation evidence or to choose what mitigation evidence is introduced by counsel.'" *Id.* at 54-55 (quoting *Hojan v. State*, 3 So. 3d 1204, 1211 (Fla. 2009) (alteration in original)). In that vein, "[t]he favorable, humanizing mitigation presented in the penalty phase was the only mitigation that Foster and his counsel determined should be presented." *Id.* at 54. The court further emphasized that "[n]one of the negative aspects of the family background evidence [testified to at the evidentiary hearing] was reported to the defense team at the time of trial." *Id.*

On Foster's claim that the defense team was impaired and disorganized, the court pointed to Wootton's and Rinard's testimony that Jacobs was not adversely impacted by his Parkinson's tremors and found it to be more credible than information from Greenhill's book, which went unsubstantiated at the hearing, and testimony from Foster's biological father, which was not admitted given the State's

objection to speculation. *Id.* at 55. The court also found that any testimony from Wootton about disorganization referred to documents in the case—not the defense team—and asserted that it would "not second-guess the circuit court on its findings based on this evidence or on the court's credibility determinations." *Id.* at 55-56.

On Foster's claim of deficient investigation and presentation of background and mental health mitigation, the Florida Supreme Court found:

> Trial counsel was never given any indication by Foster, his mother, his half-sister, or any of the other relatives or friends who testified at the penalty phase or at the postconviction evidentiary hearing that Foster had a difficult childhood, was a witness to any abuse in the home, had a history of mental illness in the family, was suicidal, or had a history of head trauma.

Id. at 60. The court further found that Dr. Wald's evaluation yielded no indicia of mental health issues, and "[n]either Rinard nor Wootton detected any obvious mental problems in their interactions with Foster." *Id.* at 59. Moreover, "[n]othing in the medical or school records trial counsel reviewed indicated that further mental health evaluation was necessary." *Id.* The court additionally relied on the notion that "Foster and his family denied there were any mental problems, depression, or suicidal ideations." *Id.* In addition, "[n]othing in the records presented at the evidentiary hearing substantiated the claim that red flags were raised indicating Foster might have brain damage or other mental impairments." *Id.* at 60.

F. District Court Ruling

In habeas proceedings, the district court found that "[t]he Florida Supreme Court's determination that Foster's trial counsel was not deficient is reasonable under *Strickland*" and that the court reasonably applied the "appropriate test [for prejudice] under *Strickland*." (Doc. 107, at 31-33)

To reject Foster's claim that the Florida Supreme Court unreasonably applied *Strickland*, the district court found that testimony from "witnesses with personal knowledge of the innerworkings of the defense team refuted [the] characterization" that "Jacobs turned the investigation over to Ruby Foster and allowed her to dictate the mitigation strategy and evidence." (Doc. 107, at 27-28) As support, the court pointed to Harsh's testimony that trial counsel "were totally on this case" and that she could not "think of anything else we would have done." (Doc. 107, at 28 quoting C28. 2093) The court likewise relied on Wootton's testimony that "Jacobs was running [the] case" and "had the ultimate say so in everything that went down." (Doc. 107, at 28 quoting C28. 2132)

The court emphasized that "[n]o witness testified that Ruby Foster dictated mitigation strategy" and attributed testimony to Kelly Foster that "while Jacobs relied on Ruby for information about potential character witnesses, he ignored Ruby's input and considered her a nuisance." (Doc. 107, at 28 citing C28. 2214) The court further indicated that Kelly "believed Jacobs decided what evidence would be

presented at the penalty phase." (Doc. 107, at 28 citing C28. 2221) In sum, the court construed the record to reflect that "[e]very witness agreed that Jacobs was in charge" and that "[t]he Florida Supreme Court reasonably rejected Foster's claim that his mother improperly controlled the mitigation case." (Doc. 107, at 28)

As for Foster's argument that the Florida Supreme Court unreasonably relied on Wootton's testimony in light of his post-hearing letter, the district court noted that the state courts found Wootton credible, and "[t]here is no evidence Wootton lied about anything but his relationship with Ruby Foster." (Doc. 107, at 28-29)

The district court dismissed Foster's reliance on *DeBruce v. Comm'r, Ala. Dep't of Corr.*, 758 F.3d 1263 (11th Cir. 2014), where this Court found deficient performance under *Strickland* because DeBruce's counsel only spoke to his mother and him in preparing for his penalty phase and never reconciled the "grossly inaccurate testimony" DeBruce's mother provided with the information counsel had gleaned from his limited investigation. (Doc. 107, at 30) The district court found that "[t]he mitigation investigation in Foster's case stands in stark contrast to *DeBruce*" because Foster's defense team spoke to "many more than two" witnesses in preparation for the penalty phase; "Jacobs [also] used his office's investigation division to gather information, and he obtained school and medical records." (Doc. 107, at 30-31) Therefore, "[u]nlike in *DeBruce*, the record here shows that Fosters' defense team conducted a thorough mitigation investigation and chose the strategy

most supported by the available evidence." (Doc. 107, at 31)

In rejecting Foster's argument that "Jacobs relied too heavily on Foster's self-reporting about his mental health and family history and that Jacobs should have pursued additional neuropsychological testing," the district court agreed that "'[n]othing in the records presented at the evidentiary hearing substantiated the claim that red flags were raised indicating Foster might have had brain damage or other mental impairments.'" (Doc. 107, at 31 quoting *Foster*, 131 So. 3d at 60 (alteration in original)) The court noted that Foster's postconviction experts' "largely based their opinions on self-reports from Foster that contradicted what he told his trial counsel" and that "Foster has not shown that his trial counsel could have developed the evidence presented at the postconviction hearing without Foster's cooperation." (Doc. 107, at 31) Moreover, the court agreed with the "significant weaknesses in the conclusions reached by Foster's experts" identified by the Florida Supreme Court. (Doc. 107, at 31-33)

The district court ultimately block-quoted the Florida Supreme Court's prejudice analysis, which stated, *inter alia*, that "[t]he nature of the mitigation presented at the evidentiary hearing was not such that it would alter the balance of the aggravating and mitigating factors in any manner that undermines confidence in the result." (Doc. 107, at 32 quoting *Foster*, 132 So. 3d at 61)

G. The District Court's Resolution of this Claim is Debatable Among Reasonable Jurists.

The district court's rejection of Foster's ineffective assistance of counsel claim is debatable among reasonable jurists because it relied upon the Florida Supreme Court's unreasonable application of clearly established federal law and unreasonable determinations of fact. The district court "was not bound to defer to unreasonably-found facts or to the legal conclusions that flow[ed] from them," *Jones v. Walker*, 540 F. 3d 1277, 1288 n.5 (11th Cir. 2008) (en banc), and should have reviewed the record *de novo* rather and engaged in the fact-specific analysis required for ineffective assistance of counsel claims. *McGahee v. Ala. Dep't of Corr.*, 560 F. 3d 1252 (11th Cir. 2009); *see also Cooper v. Sec'y, Fla. Dep't of Corr.*, 646 F.3d 1328, 1353 (11th Cir. 2011) ("When a state court unreasonably determines facts relevant to a claim, 'we do not owe the state court's findings deference under AEDPA' and we 'apply the pre-AEDPA *de novo* standard of review' to the habeas claim." quoting *Jones*, 540 F.3d at 1288 n.5). The district court's reliance on the Florida Supreme Court's decision, without squarely addressing those portions of the record that demonstrate an unreasonable determination of facts, deprived Foster of the meaningful review to which he was entitled.

The record of Foster's penalty phase and evidentiary hearing establish that counsel did not conduct a reasonable investigation in accord with *Strickland* and its progeny. As a result, significant mitigation was never uncovered or presented, and

Foster's jury had an inaccurate, incomplete picture of his life when it recommended he be sentenced to death by a vote of 9–3. Counsel's decisions were not based upon a reasonable strategic decision but rather inattention, lack of preparation, and wholesale acquiescence to Foster's mother. "Although counsel nominally put on a case in mitigation in that counsel in fact called witnesses to the stand after the prosecution rested, the record leaves no doubt that counsel's investigation to support that case was an empty exercise." *Andrus v. Texas*, 590 U.S. 806, 815 (2020); *see also DeBruce v. Comm'r, Ala. Dep't of Corr.*, 758 F.3d 1263 (11th Cir. 2014) (finding that counsel's investigation fell below objective standards of reasonableness and prejudiced petitioner where "adequate investigation would have enabled counsel to correct a positively misleading sentencing profile . . . and to present 'a vastly different picture . . . than that created' by the actual trial testimony" quoting *Williams v. Allen*, 542 F.3d 1326, 1342 (11th Cir. 2008) (alteration in original)); *Johnson v. Sec'y, Fla. Dep't of Corr.*, 643 F.3d 907, 936 (11th Cir. 2011) (finding counsel ineffective where "[t]he description, details, and depth of abuse in [defendant's] background that were brought to light in . . . the state collateral proceeding far exceeded what the jury was told").

The evidence presented at Foster's penalty phase was investigated and vetted by his mother. It was Ruby who decided that a "good kid" defense was the only acceptable theory. It was Ruby who conducted the investigation. Ruby contacted the

defense witnesses, provided the witness lists and questions to be asked, and, in conjunction with James Wootton, developed the story presented to Foster's jury. Because counsel failed to conduct a competent, independent investigation, counsel could not have made a reasonable strategy decision. "By choosing to rely entirely on [Ruby's] account, trial counsel obtained an incomplete and misleading understanding of [Foster's] life history." *Williams v. Allen*, 542 F.3d 1326, 1340 (11th Cir. 2008). There is no indication in the record that counsel sought any of the extensive mitigation that exists in Foster's background. As evidenced by the files and Marquin Rinard's testimony, counsel did not investigate any mitigation independently and instead relied on Ruby to supply witnesses and information. Thus, counsel was incapable of explaining other mitigation possibilities to Foster, and it is improper to blame Foster for the limited investigation when counsel failed to inform himself of other evidence. Had counsel reviewed the school and medical records in his file, he would have seen the red flags indicating Ruby's information was not accurate. *See Wiggins v. Smith*, 539 U.S. 510, 527 (2003) (assessing the reasonableness of trial counsel's investigation requires the court to consider "not only the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further").

The Florida Supreme Court's finding that "[t]rial counsel was never given any indication by Foster, his mother, his half-sister, or any of the other relatives or friends

who testified at the penalty phase or at the postconviction evidentiary hearing that Foster had a difficult childhood, was a witness to any abuse in the home, had a history of mental illness in the family, was suicidal, or had a history of head trauma" constitutes an unreasonable determination of fact in light of the evidence presented in state-court proceedings. *Foster v. State*, 132 So. 3d 40, 60 (Fla. 2013). There is no support in the record or the lower court's order for this finding, and the record further belies any notion that Foster precluded defense counsel from conducting any investigation independent of Ruby. Contrary to the opinions below, counsel failed to investigate and prepare for Foster's capital sentencing in contravention of the Sixth Amendment.

Foster's sister Kelly testified that trial counsel "basically asked [Ruby and her] for character references." (C28. 2214) While they provided everything he asked for, trial counsel "made [them] feel like [they] did not have anything to contribute to anything." (C28. 2214) She felt "kind of railroaded" prior to her deposition, which mostly focused on guilt-phase issues. (C28. 2221-22)

Foster's aunt Linda Albritton, cousin Candy (Albritton) Green, biological father Joe Bates, Jr., and grandfather Jack Bates, Sr., also testified to their lack of contact with Foster's defense team and having their depositions taken by the State without any preparation or understanding of what mitigation evidence was. Kelly's biological father Ron Newberry also expressed that while he remembered giving a

deposition and testifying before a jury, his understanding was just that Foster "was going to trial and that's all [he] knew." (C29. 2426)

"The function of the sentencing phase is to provide the jury with *all mitigating evidence* concerning the convicted defendant and the crime so that it can render an individualized sentence." *Hardwick v. Crosby*, 320 F.3d 1127, 1189 (11th Cir. 2003). As such, capital counsel have an obligation to conduct a thorough investigation for all reasonably available mitigating evidence. *Wiggins*, 539 U.S. at 524. A reasonable investigation under prevailing professional standards in Foster's case would have included developing thorough and accurate life history information and interviewing people aside from Foster and his mother. Reasonably competent counsel would have also obtained available records that could reveal mitigation or contain other investigative leads, like those from Northwest Texas Hospital that corroborated Foster's difficult, "premature birth" and "birth shock" that nearly caused him to die twice. (C34. 3193-3252) Foster's school records from Texas and Florida, medical records from Northwest Texas Hospital and Lee Memorial Hospital, and Confinement Log from the Lee County Jail were admitted at the evidentiary hearing but overlooked by the Florida Supreme Court.

The record plainly shows that trial counsel failed to conduct any independent life history investigation. Aside from failing to obtain the birth records, counsel seemingly failed to read the school and jail records in their own files and further

failed to interview witnesses outside of Ruby's purview. Moreover, counsel failed to provide any of these important, unbiased records to a mental health expert—save those generated by the prosecution three months after Foster's arrest—which resulted in an uninformed opinion concerning Foster's mental health.

Contrary to the district court's order, Foster's case is analogous to the facts of *DeBruce* and additionally resembles the "cursory investigation" this Court deemed deficient in *Hardwick* where trial counsel only interviewed Hardwick's mother, brother, and wife. 320 F.3d at 1180. Any reasonable capital defense lawyer would have recognized that he was not being fed accurate information from the client's mother who insisted that her son had no weaknesses or deficits. (C28. 2124) Instead, counsel accepted the witnesses Ruby handed to him at face value when the records in his possession were rife with red flags that cried out for further independent investigation and "would have destroyed the benign conception" of Foster's upbringing and mental health. *Rompilla v. Beard*, 545 U.S. 374, 391 (2005).

Counsel was obligated to investigate regardless of Foster or his mother's wishes and make a reasoned professional judgment on the course of action *after* reviewing the evidence. Contrary to the Florida Supreme Court's decision, this was not an instance where a competent defendant, advised of all available mitigation, made an informed choice to forgo mitigation in whole or in part. While a competent defendant maintains the right to make choices about his attorney's handling of the

case, that does not obviate counsel of his obligation to first conduct a timely and thorough investigation and then advise his client of the substance and scope of the mitigating evidence available. *See Blanco v. Sec'y, Fla. Dep't of Corr.*, 943 F.2d 1477, 1503 (11th Cir. 1991).

The Florida Supreme Court found that defense counsel's strategy was to humanize Foster and that counsel's acquiescence to his 18-year-old client's wishes about the mitigation presentation was reasonable. However, that finding presupposes that a timely and thorough mitigation investigation was performed, and testimony elicited in postconviction established that defense counsel failed Foster in this regard. *See Wiggins*, 539 U.S. at 528 (reiterating that limitations on investigation are only reasonable to the extent they are supported by reasonable professional judgment); *see also Sears*, 561 U.S. at 954 n.10 (noting that "the reasonableness of [trial counsel's] theory is not relevant when evaluating the impact of evidence that would have been available and likely introduced, had counsel completed a constitutionally adequate investigation before settling on a particular mitigation theory").

The Florida Supreme Court erroneously found that Foster and lead counsel made the decisions about mitigation strategy for the case and that Ruby "merely provided contact information for possible penalty phase witnesses, suggestions of inconsistencies in the evidence, and questions that she believed should be asked of

witnesses." *Foster*, 132 So. 3d at 54. This finding is not supported by the evidence adduced at the hearing and should not have been entitled to any deference.

To reach this conclusion, the Florida Supreme Court relied upon testimony of 4 witnesses: Roberta Harsh, Marquin Rinard, Dr. Robert Wald, and James Wootton. However, their testimony proved counsel failed to conduct any meaningful investigation into Foster's background and instead demonstrated that counsel relied exclusively on Ruby for penalty phase evidence.

By way of example, the Florida Supreme Court unreasonably rubberstamped the circuit court's reliance on Harsh's testimony that the defense team "pulled out all the stops" and "used everything [they] had at [their] disposal" to represent Foster. (C36. 3678) In direct conflict with that statement, Harsh said that she was never called upon to conduct any out-of-state investigation into Foster's background, (C28. 2095); that Wootton was, "for all appearances," the liaison between defense counsel and the family, (C28. 2089); that Wootton picked the pictures for the penalty phase slideshow, (C28. 2092); and that Wootton was the "go-to guy on the case." (C28. 2087) Harsh's involvement in the case was minimal, (C28. 2084), and if her testimony established anything, it was that counsel abdicated their responsibility to investigate Foster's background to his mother and a convicted felon who was having a sexual relationship with a capital defendant's mother prior to and during trial.

Rinard's testimony established that the mitigation was shaped and limited by

Ruby. Rinard testified that Ruby had an unusual amount of input or involvement, and that the defense team's investigation relied heavily upon Foster, Ruby, and Kelly for family history information. (C28. 2255-57, 2260) The team did not investigate any weaknesses or frailties in Foster because Ruby would not entertain it. Ruby's refusal to address any weaknesses or deficits in her son should have been a glaring red flag to investigate further. *See Rompilla*, 545 U.S. 374.

In addition, Rinard's testimony that Foster made all the decisions about the case only underscores Foster's claim that defense counsel abdicated their responsibility. (C28. 2274) Leaving decisions about investigating and presenting mitigation in a capital case to the whims of an 18-year-old flouts the mandates of both *Wiggins* and the ABA Guidelines. By Rinard's own admission, he was not positive about the specific mitigation they unearthed and spoke in "general terms as to what one would normally look at." Rinard was only "sure" that they discussed Foster's age. (C28. 2252)

Rinard's testimony that no witnesses provided information about mental health problems further highlights the prejudice Foster suffered due to counsel's investigative limitations. While Rinard testified that attempts to speak with family and friends were fruitless, (C29. 2275, 2284), other evidence reflects that counsel did not go beyond cursory, initial questioning.

The Florida Supreme Court additionally mischaracterized the purpose and

scope of the State's depositions of Foster's relatives in Texas and inappropriately relied upon them as evidence that these individuals failed to offer any relevant family history or mental health information at the time of trial. *Foster*, 132 So. 3d at 54-55. Neither Jacobs nor Rinard attended these depositions and instead sent another attorney from their office with no connection to the case to cover them. These depositions, conducted by the State Attorney, centered on guilt-phase issues, and the covering attorney did not ask a single question concerning mitigation either before, during, or afterward. The onus was on defense counsel—not the lay witnesses—to investigate and elicit relevant information. It was not the witnesses' responsibility to supply or identify mitigation testimony. Indeed, a lay witness would not even know what was relevant to defend a capital case.

The Florida Supreme Court likewise unreasonably relied on Wootton's testimony in finding that counsel did not abdicate their responsibility to investigate. Wootton himself admitted that he was not a trained investigator; he was a paralegal "[i]n the loosest sense of the term" and should have never been the "go-to guy on [the] case." (C28 2087, 2089, 2236) Further, Wootton, a convicted felon, perjured himself, and the court chose only part of Wootton's post-hearing letter to believe, namely that Wootton had a sexual relationship with Ruby during trial, discounting his statement that trial "[c]ounsel fucked up." (C35. 3503-27) Wootton's perjured testimony and the court's selective adoption of parts as true cannot be "competent

and substantial evidence" sufficient to warrant deference by the Florida Supreme Court.

Wootton's testimony does not support the Florida Supreme Court's determination that counsel conducted a reasonable investigation. He was not qualified to conduct a mitigation investigation and was a convicted felon and drug addict when he began working on Foster's case. He started sleeping with Foster's mother before and during trial and using drugs to the extent that he was arrested and ultimately asked to resign from the Public Defender's office. Wootton lied to Jacobs about having an inappropriate relationship with Ruby, lied about using drugs, and further lied to the court at the evidentiary hearing that defense counsel conducted a mitigation investigation. Neither Rinard's testimony nor the Trial Scout records supported Wootton's claim. There cannot be a reasonable application of clearly established federal law when any findings about Wootton's testimony are contrary to the record.

The Florida Supreme Court therefore improperly relied upon Wootton's testimony that Foster had been evaluated by Dr. Wald early in the case and that there was a discussion amongst the defense team about whether Foster was mentally ill or abused but family input indicated there was nothing wrong with him. *Foster*, 132 So. 3d at 53-55. No other witness made such sweeping statements about what occurred even after reviewing the files or Dr. Wald's billing records. Thus, the

people most informed about what was going on in the case—the doctor and co-counsel—were apparently less reliable than the convicted felon/paralegal who perjured himself. Wootton's testimony that the decision was made to forgo any further mental health evaluations since nothing supported any mental health mitigation was additionally refuted by evidence and other witnesses at the hearing. (C28. 2153-54) Nothing in the Trial Scout program or State Attorney files listed anything regarding mental health mitigation.

Dr. Wald's billing invoice indicated only 2.5 hours of work three months after Foster was arrested. (C33. 2958-2959) Rinard testified that it was "highly unlikely" documents had been gathered yet or discovery completed on Foster's case at this point. (C28. 181) Rinard was unable to recall what type of evaluations, if any, had been done or what the results were. (C28. 179-80) Dr. Wald testified that based upon his review of the invoice, he could not offer much other than suggest he most likely conducted a cursory competency/sanity evaluation. He could only testify about what he usually did, not what he had actually done here. Dr. Bordini testified that it would be impossible to conduct a complete neuropsychological battery of tests in the limited time span Dr. Wald spent with Foster. (C29. 2326)

The Florida Supreme Court also improperly relied upon Wootton's testimony that school records failed to show any significant mitigating evidence when the records admitted at the postconviction hearing show Foster had serious academic

difficulties, including repeating fifth grade. (C33. 3087-3154) The school records were "'red flags' pointing up a need to [investigate] further," *Rompilla*, 545 U.S. at 392 (internal citation omitted), that any competent defense attorney would recognize and "could not reasonably have ignored." *Id.* at 392 n.8. Wootton's testimony illustrates that he had no idea what information constituted mitigating evidence.

Contrary to Wootton's testimony, Dr. Bordini found that school records, in conjunction with medical records and neuropsychological testing, supported his conclusions that Foster's frontal lobe and memory deficits and brain dysfunction affected his ability to regulate behavior, judgment, and emotions. (C29. 2359) Dr. Wald did not have access to these records or perform this type of testing. He only relied on the self-report of 18-year-old Foster and his mother. Had Dr. Wald thoroughly evaluated Foster at the time of the incident, his frontal lobe impairment would have been even worse than what Dr. Bordini found. (C29. 2356-57)

The Florida Supreme Court noted that Wootton was a "defense" witness at the postconviction evidentiary hearing as if that somehow negates the impact of Wootton's perjured testimony. Wootton played to whatever audience he believed could benefit him. The only fact to draw from Wootton's testimony was that he is unreliable and incompetent, and any state court credibility determinations are due no deference where Foster's life hangs in the balance. Reliance on Wootton's testimony to rebut Foster's claims in any way was unreasonable, contrary to clearly

established federal law, and simply wrong.

The evidence of Foster's chaotic upbringing and mental health issues would have changed the balance of mitigating and aggravating factors, and the fact that Foster presented 25 witnesses at his penalty phase does not preclude a finding of deficient performance or prejudice. *See Sears*, 561 U.S. at 954 (emphasizing that both prongs of *Strickland* can be met where trial counsel presented "a superficially reasonable mitigation theory"); *see also, e.g.*, *Collier v. Turpin*, 177 F.3d 1184, 1200-04 (11th Cir. 1999) (finding counsel ineffective where they traveled out of state to interview witnesses, subpoenaed 14 of those interviewed, and called 10 to testify but failed to elicit all the mitigating information from them). Foster's "[c]ounsel presented no more than a hollow shell of the testimony necessary for a 'particularized consideration of relevant aspects of [his] character and record,'" *Id.* at 1201-02 (quoting *Woodson v. North Carolina*, 428 U.S. 280, 303 (1976)), and deprived him of the individualized sentencing determination to which he is entitled. *Armstrong v. Dugger*, 833 F.2d 1430, 1433 (11th Cir. 1987).

The 25 witnesses counsel presented at trial provided so little substance in support of defense counsel's efforts to humanize Foster, which fueled the State's cross examination. Their testimony lasted only minutes and consisted of isolated references to good deeds Foster performed, such as mowing the lawn, helping to start a car, or meeting people on a cruise and helping their disabled son. Support for

how lacking the defense case was at trial is substantiated by the trial court's Sentencing Order rejecting the mitigation as "sublime" and "ridiculous." (A12. 1483)

None of the witnesses shed light on who Foster really was during the time leading up to the crime. Because counsel acquiesced to Ruby's wishes and failed to conduct an independent investigation, the penalty-phase testimony presented the ridiculous illusion that Foster was a normal child from a stable home and loving family. This directly fed into the State's argument that Foster was a privileged child who had "every advantage" to succeed in life and was "attempt[ing] to escape accountability." (A23. 2056-58) The additional mitigating evidence presented in postconviction changed the character of Foster's case for life and cannot be "discount[ed] to irrelevance." *Porter v. McCollum*, 558 U.S. 30, 43 (2009); *Cooper*, 646 F.3d at 1354 ("Background and character evidence 'is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background . . . may be less culpable than defendants who have no such excuse.'" quoting *Johnson*, 643 F.3d at 936). Given that 3 jurors "were inclined to mercy" even with the superficial mitigation presented, there is a reasonable probability that but for counsel's failings, the result of the proceeding would have been different. *Blanco*, 943 F.2d at 1505; *Strickland*, 466 U.S. at 694; *Porter*, 558 U.S. at 43 (finding that the Florida Supreme Court unreasonably applied

clearly established federal law when it "discount[ed] to irrelevance the evidence of Porter's abusive childhood . . . when that kind of history may have particular salience for a jury").

In addition, the Florida Supreme Court unreasonably relied upon the circuit court's finding that Foster failed to establish his defense team was impaired, disorganized, or confused. In reaching this determination, the state courts each relied heavily on Wootton's perjured testimony, which is conclusively refuted by both the trial and postconviction record. The court likewise failed to consider the totality of circumstances when rubberstamping the circuit court's conclusion on this issue. Wootton testified that the files and records were "disorganized" when he first started working on Foster's case. (C28. 2110) Joe Bates, Jr., observed the trial and stated that trial counsel appeared confused. (C30. 2519) Harsh, who knew Jacobs for years, saw him struggle with tremors. (C28. 2091) Jurors, who were in close proximity to Jacobs throughout the trial, likewise noticed his tremors and moments of confusion. *See* Greenhill, Jim, *Someone Has to Die Tonight*, at 386. The Florida Supreme Court's finding that Foster was incapable of proving his defense team was unprepared and disorganized because Wootton was more credible than other witnesses is unsupported by the trial or postconviction record.

Based on the foregoing, Foster submits that he has made "a substantial showing" of the denial of his Sixth Amendment right to the effective assistance of

counsel, 28 U.S.C. § 2253(c)(2), and that "jurists of reason could disagree with the district court's resolution of [this] constitutional claim or conclude that the issue[] presented [is] adequate to deserve encouragement to proceed further." *Miller-El*, 537 U.S. at 326 (citing *Slack*, 529 U.S. at 484). Foster is entitled to a COA under this "threshold inquiry" so that he can fully brief the merits of his claim and entitlement to relief. *Slack*, 529 U.S. at 485.

GROUND II

The Trial Court Erred in Denying Foster's 17 Motions to Change Venue, and Reasonable Jurists Could Debate the District Court's Denial of Relief.

In Ground II of his amended habeas petition, Foster argued that the trial court erred in denying his 17 motions to change venue due to prejudicial publicity that infected the venire from which his jury was chosen in violation of the Sixth, Eighth, and Fourteenth Amendments. In denying relief, the district court found that "[t]he Florida Supreme Court's rejection of this claim follow[ed] Supreme Court precedent," that "Foster fail[ed] to demonstrate . . . the venue of his trial made it fundamentally unfair," and that "[t]he record show[s] . . . the trial court empaneled an impartial jury." (Doc. 107, at 38-39) "[J]urists of reason could disagree with the district court's resolution of [this] constitutional claim or . . . conclude [at the very least that] the issue[] presented . . . [is] adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003).

A. Introduction

The Sixth Amendment guarantees to every person charged with a crime a fair trial, free of prejudice. *Murphy v. Florida*, 421 U.S. 794 (1975); *Sheppard v. Maxwell*, 384 U.S. 333 (1966); *Estes v. Texas*, 381 U.S. 532 (1965); *Rideau v. Louisiana*, 373 U.S. 723 (1963); *Irvin v. Dowd*, 366 U.S. 717 (1961). This "constitutional standard of fairness requires that a defendant have a 'panel of impartial, "indifferent" jurors,'" *Murphy*, 421 U.S. at 799 (quoting *Irvin*, 366 U.S. at 722), as "'[a] fair trial in a fair tribunal is a basic requirement of due process.'" *Irvin*, 366 U.S. at 722 (quoting *In re Murchison*, 349 U.S. 133, 136 (1955)). While "[q]ualified jurors need not . . . be totally ignorant of the facts and issues involved" in the case, it is axiomatic that a juror's "verdict must be based [solely] upon the evidence developed at trial. This is true, regardless of the heinousness of the crime charged, the apparent guilt of the offender or the station of life which he occupies." *Irvin*, 366 U.S. at 722 (internal citation omitted).

When ruling on a motion for change of venue, a court must therefore determine:

> 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 on the evidence presented in the courtroom.

McCaskill v. State, 344 So. 2d 1276, 1278 (Fla. 1977) (quoting *Kelley v. State*, 212

So. 2d 27, 28 (Fla. 2d DCA 1968)). "[J]ury exposure to news accounts of the crime with which a defendant is charged does not presumptively deprive the defendant of due process"; rather, "the defendant must show inherent prejudice in the trial setting or facts which permit an inference of actual prejudice from the jury selection process in order to merit a change of venue." *Id.* (citing *Murphy*, 421 U.S. 794). To establish presumed prejudice, the defendant must present "evidence of inflammatory, prejudicial pretrial publicity that so pervades or saturates the community as to render virtually impossible a fair trial by an impartial jury drawn from the community." *Mayola v. Alabama*, 623 F.2d 992, 997 (5th Cir. 1980). When a defendant satisfies this burden, "there is no further duty to establish bias." *Coleman v. Kemp*, 778 F.2d 1487, 1490 (11th Cir. 1985) (quoting *Mayola*, 623 F.2d at 997).

As indicated in Ground I(A) *supra*, when a petitioner makes a sufficient showing that AEDPA does not apply to claims in his federal habeas petition, the district court must conduct *de novo* review. This Court conducts *de novo* review of a district court's decision denying or granting habeas relief.

B. Factual Background and Claim History

The murder of Mark Schwebes and ensuing prosecution of Foster and other members of the Lords of Chaos ignited a media frenzy. Due to the massive pretrial publicity, Foster's defense team filed 17 motions for change of venue in the 2 years leading up to his trial and immediately before his penalty phase, asserting that a fair

and impartial trial could not be held in Lee County or the Twentieth Judicial Circuit as a whole. (A1. 15-220; A2. 221-421; A3. 426-531, 537-48; A4. 584-612, 618-46, 681-765; A5. 766-99, 803-26, 841-83; A6. 887-928, 962-67; A7. 1026-28, 1032-40; A9. 1157-78, 1187-96, 1202-10; A10. 1226-30; A11. 1325-1448) In each motion, Foster meticulously documented the pervasive and prejudicial media coverage that preceded his trial, which included extensive newspaper and television coverage not only throughout Lee County and Florida, but also nationally. The coverage was not merely factual, but also rife with inflammatory opinion pieces, much of it predetermining Foster's guilt and sentence.

For example, on May 5, 1996, just two days after Foster's arrest, the Fort Myers News-Press ran a story detailing alleged plans by the Lords of Chaos to commit "a mass murder of black people" at Disney World. (A1. 39) The article quoted Foster as telling "his comrades": "We'll just go around shooting every [n****r] we see." (A1. 39) A second story published by the News-Press that same day outlined other charges filed against Foster in addition to his indictment for first-degree murder. (A1. 43)

On May 7, 1996, another article about the Disney World plot appeared in the News-Press wherein co-defendant Peter Magnotti stated that Foster "wanted to go on a racist killing spree at the park." According to the article, Foster "talked up a plan to mug Disney characters, steal their costumes and roam the park with a silenced

gun shooting blacks." (A1. 47)

On May 6, 1996, the News-Press ran a front-page story with the headline, "Lee checks racist gang's links to militia groups." In the article, members of the Lords of Chaos were portrayed as being members of a "racist and homophobic 'militia'" with possible ties to other groups around Florida and the rest of the United States. (A1. 89)

On May 9, 1996, a piece published in the same newspaper referred to Foster as "head of pack" and called him a "psychopath," an "Opie with a gun," and "a Jekyll-and-Hyde character—a polite, respectful young man with a searing dark side." (A1. 66-73, 107-08) The article featured various pictures, including one of Foster holding an AR-15 semiautomatic rifle, and emphasized a quote from a local teacher comparing Foster to Adolf Hitler. (A1. 107-08)

Several stories in the May 2, 1996 edition of the News-Press focused on the loss to Riverdale High School students as a result of Schwebes' death. (A1. 122-24) The May 18, 1996 News-Press featured a front-page story headlined, "Riverdale students heal with poetry," and included poems written in tribute to Schwebes. (A1. 99-104) Some of the poems' titles and language also depicted Foster and members of the Lords of Chaos as "Sons of the devil," "evil to the core," having "brains . . . filled with the darkness of evil," and "hounds of Hell." (A1. 101)

Articles that appeared in the June 6, 1996 Tampa Tribune and the June 14,

1996 Ocala Star-Banner again detailed the alleged plans to shoot Black tourists at Disney World. (A3. 444, 447)

On June 30, 1996, an article in the News-Press described the Lords of Chaos as a "cult." The article read that Foster was a "psychotic" who was "consumed with anarchy, the Ku Klux Klan and satanism" and compared the Lords of Chaos to Hitler "with a delusional vision . . . to rule through terror, [and] 'lay waste to the populace.'" (A3. 428) The article also included a drawing of Ku Klux Klan members and swastikas allegedly attributable to Foster, stating that the drawing "is indicative of the hatred Foster had for blacks and of his neo-Nazi leanings." (A3. 431)

There was also simultaneous television coverage and articles in the June 21, 1997 and September 27, 1997 News-Press about the plea agreements entered into by the other members of the Lords of Chaos involved in Schwebes' killing. (A6. 889-901, 904-15) These articles perpetuated the image of Foster as the ringleader and opined that the plea agreements "bolster[ed] the prosecution's chances of putting Foster in Florida's electric chair." (A6. 889) The September 27th article specifically commented on Foster's culpability and included a quote from prosecutor Randall McGruther that the State did "'not intend to offer him a plea.'" (A6. 890)

The media frenzy continued as Foster's trial approached. For example, a News-Press column headlined, "Old Sparky's hot jolt may await Foster," appeared on March 1, 1998—just two days before his trial commenced—and described Foster

as "one twisted kid" and "a redneck, racist, pyromaniacal, gun-crazed punk" with "crazed green eyes and Manson-like tendencies" for whom "Hell is waiting." (A7. 1038) The column also referred to other crimes allegedly committed by the Lords of Chaos in a "spree" that "graduated from vandalism to vehicle thefts to robbery to arson to murder." (A7. 1038)

In the next day's Naples Daily News, an article once again referenced crimes attributed to the Lords of Chaos, including: "sett[ing] fire to a historic Fort Myers Coca-Cola bottling plant"; "conduct[ing] an armed robbery and carjacking outside a restaurant"; sett[ing] fire to a Baptist church"; and "setting fire to a thatched-roof aviary outside a tropical-themed restaurant, then watching as the exotic birds inside burned to death." (A7. 1034-35)

It is difficult to imagine more inflammatory, persistent, and pervasive rhetoric than what was widely broadcast and disseminated in the time running up to Foster's trial; yet, the court denied every single one of Foster's change-of-venue motions, determined to seat a jury and try the case in Lee County.

Indicative of the degree to which the publicity saturated the Fort Myers community, almost all of the prospective jurors on Foster's venire had read or heard something about the case. In fact, only 2 of the first 35 jurors questioned about publicity said they had not heard or read anything about it; the others had varying degrees of familiarity with it, and most had read or heard Foster's name and the

Lords of Chaos group. (A13. 11-A14. 339) Given the "far too pervasive publicity" to which the jurors had been exposed, the Defense twice more moved for change of venue at the end of voir dire and jury selection and stated that it was not accepting the panel. (A17. 959, 967) Notwithstanding the Defense's objection, trial continued, and Foster was convicted and sentenced to death.

Foster challenged the trial court's denial of his motions for change of venue on direct appeal where the standard of review was abuse of discretion. *Gaskin v. State*, 591 So. 2d 917 (Fla. 1991). In applying this standard, the trial court's rulings on the motions should have been far from determinative, as "appellate tribunals have the duty to make an independent evaluation of the circumstances" to ascertain whether a defendant has been presumptively prejudiced by pretrial publicity. *Sheppard*, 384 U.S. at 362.

In light of the extent and nature of the pretrial publicity in this case to which most of the jurors were exposed, the Florida Supreme Court should have found that the trial court deprived Foster of his right to a fair trial by refusing to grant a change of venue. *See* Const. amend. VI and XIV; Art. I, §§ 9 and 16, Fla. Const. However, the court denied Foster's claim relying heavily on *Rolling v. State*, 695 So. 2d 278, 284 (Fla. 1997), and finding that the "mere existence of some pretrial publicity does not necessarily lead to an inference of partiality." *Foster v. State*, 778 So. 2d 906, 912-13 (Fla. 2000). The court also relied on *United States v. Lehder-Rivas*, 955 F.2d

1510, 1524 (11th Cir. 1992), where this Court found that that calling a defendant a "drug kingpin, narcoterrorist" who was fascinated with the Third Reich was unfavorable but did not reach the "extreme levels" required to trigger a finding of presumed prejudice." *Id.*

Foster argued in the district court that the publicity in *Lehder-Rivas* did not compare to the viciousness and prejudicial vitriol that was present in his case and that the Florida Supreme Court's decision was contrary to and an unreasonable application of clearly established federal law in that he was not tried by a fair and impartial jury guaranteed to him under the Sixth and Fourteenth Amendments. *See Murphy*, 421 U.S. 794; *Sheppard*, 384 U.S. 333; *Estes*, 381 U.S. 532; *Rideau*, 373 U.S. 723; *Irvin*, 366 U.S. 717. Foster also pointed to evidence of actual prejudice that came to light in postconviction proceedings when Jim Greenhill, a reporter who covered Foster's case from the outset, wrote a book about the trial and the events preceding it. *See* Greenhill, *Someone Has to Die Tonight*, at 372, 383, 392, 413-16. In his book, Greenhill included interviews with several jurors that reflected various instances of juror misconduct. While Foster filed a motion to interview jurors in state court, the trial court denied the request and prevented Foster from fully investigating and pleading actual prejudice. (C21. 1415-26, 1448-52)

C. The District Court's Resolution of this Claim is Debatable Among Reasonable Jurists.

In denying relief, the district court acknowledged that "Foster's trial received

a lot of publicity in the national and local media." (Doc. 107, at 33) However, notwithstanding this press coverage, "[t]he Florida Supreme Court's rejection of [Foster's] claim follow[ed] Supreme Court precedent," (Doc. 107, at 38), and "Foster fail[ed] to demonstrate that the venue of his trial made it fundamentally unfair." (Doc. 107, at 39) To reach this conclusion, the district court block quoted the entirety of the Florida Supreme Court's opinion on this issue, supplied scant analysis, and improperly abdicated "its duty to make an independent evaluation of the circumstances" at hand. *Sheppard*, 384 U.S. at 362.

The setting of Foster's trial was inherently prejudicial. The highly sensational publicity concerning Foster and his case permeated the Lee County area and entire Twentieth Judicial Circuit well beyond the initial time period surrounding the homicide. Contrary to the Florida Supreme Court's assertion, the vast majority of coverage did not consist of mere factual renditions of the events leading up to trial; rather, the publicity reflected heightened tensions, inflammatory opinions, and public outrage that continued unabated through Foster's sentencing. In this vein, the Florida Supreme Court's assessment of the extent and nature of the publicity in Foster's case and its conclusion "that the media coverage as a whole did not reach such an inflammatory level to have irreversibly infected the community so as to preclude an attempt to secure an impartial jury" is belied by the record. *Foster*, 778 So. 2d at 913; (Doc. 107, at 36).

Nonetheless, the district court found that "[t]he record of voir dire here shows the trial court selected an impartial jury" and that "[t]he jurors who knew of the charged crime stated they could set that knowledge aside." (Doc. 107, at 38) However, "such assurances are not dispositive" of impartiality or proof that an unbiased panel was successfully selected. *Rolling*, 695 So. 2d at 285; *Murphy*, 421 U.S. at 800; *Irvin*, 366 U.S. at 723 (recognizing that the rule concerning the sufficiency of jurors' statements that they can set aside prior knowledge and be fair and impartial "'cannot foreclose inquiry as to whether, in a given case, the application of that rule works a deprivation of the prisoner's life or liberty without due process of law'" quoting *Lisenba v. California*, 314 U.S. 219, 236 (1941)). Indeed, the nature of the publicity in this case, in conjunction with the evidence of juror misconduct that came to light in postconviction, refutes this conclusion here.

The misconduct most germane to this claim concerns Juror M. During voir dire, the State specifically asked Juror M if she had acquired knowledge of the case from local news media or another source. Juror M said she had learned about the case from the newspapers and television but believed she would be capable of setting aside what she read and basing her verdict solely on the evidence or lack of evidence presented in the courtroom. (A13. 71-72) However, when the State introduced photographs depicting various pieces of evidence and the victim during its case in chief, Juror M recalled thinking that the photos detailed more than what was in the

paper. *See* Greenhill, *Someone Has to Die Tonight*, at 365. Thus, despite her answers to the contrary during voir dire, Juror M considered and weighed everything she had read about the case prior to being empaneled on the jury—the very thing she was instructed not to do. (A17. 971) This is precisely the type of extrinsic influence that a change of venue would have prevented and bolsters the notion of inherent prejudice resulting from the publicity in this case.

Foster had a constitutional right to a fair and impartial jury under both the Sixth and Fourteenth Amendments, and the Florida Supreme Court erroneously applied clearly established federal law in denying him relief. As illustrated above, Foster's counsel meticulously documented the degree to which publicity saturated the community at the local, state, and national level and established that "'the populace from which his jury was drawn was widely infected by a *prejudice* apart from mere familiarity with the case." *Devier v. Zant*, 3 F.3d 1445, 1462 (11th Cir. 1993) (quoting *Mayola*, 623 F.2d at 999). Evidence of actual misconduct from one of Foster's jurors supports this conclusion and demonstrates the impact the publicity had on his trial and the fundamental fairness of the proceeding.

Because the Florida Supreme Court unreasonably applied clearly established federal law and made unreasonable determinations of fact in light of the state court record, AEDPA deference does not apply, and the district court should have reviewed the claim *de novo*. S*ee Cooper v. Sec'y, Fla. Dep't. Of Corr.*, 646 F.3d

1328 (11th Cir. 2011); *Jones v. Walker*, 540 F. 3d 1277, 1288 n.5 (11th Cir. 2008) (en banc). Foster faces the ultimate penalty of death and submits that he has made a "substantial showing of the denial of a constitutional right" to this Court. 28 U.S.C. § 2253(c)(2). "[J]urists of reason could disagree with the district court's resolution of [this] constitutional claim or . . . could conclude [at the very least that] the issue[] presented . . . [is] adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003). A COA is warranted.

CONCLUSION

WHEREFORE, based on the foregoing arguments and the record in this case, Foster, through counsel, respectfully moves this Court to issue a COA on Grounds I and II of his Amended Petition for Writ of Habeas Corpus.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Petitioner–Appellant certifies that this Application for Certificate of Appealability contains 18,065 words, excluding the parts of the document exempted by Fed. R. App. P. 32(f), which is not in compliance with the type-volume limit of Fed. R. App. P. 32(a)(7) and 11th Cir. R. 22-2. Petitioner has simultaneously filed with this document an unopposed motion to exceed word limit.

CERTIFICATE OF TYPE SIZE AND STYLE

Petitioner–Appellant certifies that the size and style of type used in this Application for Certificate of Appealability is Time New Roman, 14-point, in compliance with the requirements of Fed. R. App. P. Rule 32(a)(5).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY, that on December 12, 2024, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system which sent a notice of electronic filing to: Stephen Ake, Senior Assistant Attorney General, *Stephen.Ake@myflorida.legal.com*.

/s/ Courtney M. Hammer
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***** CAPITAL CASE *****

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

KEVIN DON FOSTER,

Petitioner,

v.

SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

APPENDIX F

Petitioner–Appellant's Motion for Independent Reconsideration of Application for Certificate of Appealability, Filed in the Eleventh Circuit Court of Appeals, No. 24-12953, April 11, 2025 (without attachments)

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

CASE NO. 24-12953

KEVIN DON FOSTER,

Petitioner–Appellant,

vs.

SECRETARY,
Florida Department of Corrections,

Respondent–Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
DISTRICT COURT CASE NO.: 2:14-cv-00597-JES-KCD

PETITIONER–APPELLANT'S MOTION FOR INDEPENDENT RECONSIDERATION OF APPLICATION FOR CERTIFICATE OF APPEALABILITY

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CERTIFICATE OF INTERESTED PERSONS

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and Rule 26.1-1 of the Rules of the Court of Appeals for the Eleventh Circuit, Petitioner–Appellant Kevin Don Foster, hereby discloses the following interested persons:

Ahlbrand, Mark W. – Former Counsel for Co-Defendant Magnotti

Ake, Stephen D. – Senior Assistant Attorney General, State of Florida, Counsel for Respondent–Appellee

Anderson Jr., Isaac – Former Circuit Court Judge, Twentieth Judicial Circuit

Anstead, Harry Lee – Former Justice, Florida Supreme Court

Backhus, Terri L. – Former Assistant CCRC, Capital Collateral Regional Counsel – South Office

Barfield, Danielle – Former Staff Attorney, Capital Collateral Regional Counsel – South Office

Black, Christopher P. – Co-Defendant

Bondi, Pamela Jo – Former Attorney General, State of Florida

Burnett, Christopher T. – Co-Defendant

Butterworth, Robert A. – Former Attorney General, State of Florida

Canady, Charles T. – Justice, Florida Supreme Court

Chappell, Sheri Polster – United States District Court Judge, Middle District of Florida

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Crews, Michael D. - Former Secretary, Florida Department of Corrections

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D'Alessandro, Joseph P. – Former State Attorney, Twentieth Judicial Circuit

Dixon, Ricky D. – Secretary, Florida Department of Corrections

Doran, Richard E. – Former Attorney General, State of Florida

Dudek, Kyle C. – United States District Court Magistrate Judge, Middle District of Florida

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McCollum, Bill – Former Attorney General, State of Florida

McCoy, Mac R. – United States District Court Magistrate Judge, Middle District of Florida

McGruther, Randall – Former Assistant State Attorney, Twentieth Judicial Circuit

Midgley, Douglas – Former Public Defender, Twentieth Judicial Circuit

Moeller, Robert – Former Assistant Public Defender, Tenth Judicial Circuit

Moody, Ashley – Attorney General, State of Florida

Moorman, James Marion – Former Public Defender, Tenth Judicial Circuit

Nelson, William J. – Former Circuit Court Judge, Twentieth Judicial Circuit

Pariente, Barbara – Former Justice, Florida Supreme Court

Parmer, Marie-Louise Samuels – Special Assistant CCRC, Capital Collateral Regional Counsel – South Office, Counsel for Petitioner–Appellant

Perry, James E. C. – Former Justice, Florida Supreme Court

Plattner, Lise C. – Former Assistant State Attorney, Twentieth Judicial Circuit

Polston, Ricky – Former Justice, Florida Supreme Court

Quince, Peggy – Former Justice, Florida Supreme Court

Rinard, Marquin – Former Assistant Public Defender, Twentieth Judicial Circuit

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Russell, Stephen B. – Former State Attorney, Twentieth Judicial Circuit

Schwebes, Mark – Victim

Shaw, Leander – Former Justice, Florida Supreme Court

Shields, Derek – Co-Defendant

Smith, Kathleen A. – Public Defender, Twentieth Judicial Circuit

Starnes, Hugh E. – Former Circuit Court Judge, Twentieth Judicial Circuit

Steele, John E. – Senior United States District Court Judge, Middle District of Florida

Torrone, Thomas – Co-Defendant

Veleanu, Leor – Former Assistant CCRC, Capital Collateral Regional Counsel – South Office

Volz, Jr., Edward – Former Circuit Court Judge, Twentieth Judicial Circuit

Wells, Charles T. – Former Justice, Florida Supreme Court

No publicly traded company or corporation has an interest in the outcome of this appeal.

MOTION FOR INDEPENDENT RECONSIDERATION OF APPLICATION FOR CERTIFICATE OF APPEALABILITY

COMES NOW THE PETITIONER–APPELLANT, KEVIN DON FOSTER, by and through undersigned counsel, and herein respectfully moves this Court for independent reconsideration by a three-judge panel of Petitioner's application for a Certificate of Appealability (COA) in the above-captioned capital case.

RECITATION OF PRIOR ACTIONS

Petitioner–Appellant Foster is a death-sentenced inmate in the state of Florida who sought to appeal the denial of his Amended Petition for Writ of Habeas Corpus by a Person in State Custody pursuant to 28 U.S.C. § 2254. (Doc. 89) On January 31, 2014, the Florida Supreme Court denied Foster's motion to set aside his sentence of death. *Foster v. State*, 132 So. 3d 40 (2013) (Attachment B) The United States District Court for the Middle District of Florida issued its order denying Foster's petition on October 30, 2023, and declined to issue a COA on any claims. (Doc. 107; Doc. 108) (Attachment C)

Foster filed a timely notice of appeal from the final order denying habeas relief on September 9, 2024, (Doc. 111), and, on December 13, 2024, timely filed his application for COA to this Court. (Doc. 14) (Attachment A) On March 21, 2025, a single judge, the Honorable William H. Pryor, Jr., denied Petitioner's Application. (Doc. 17) (Attachment D)

RECONSIDERATION BY COURT OF ORDER ISSUED BY SINGLE JUDGE

Fed. R. App. Pro. 22(b)(2) allows "a" circuit judge to rule on a COA application. 11th Cir, R. 22-1(c) provides that an application for a COA "may be considered by a single circuit judge," and the denial of the application by a single circuit judge "may be the subject of a motion for reconsideration." Fed. R. App. Pro. 27(d) provides that while a single "circuit judge may act alone on any motion," a single circuit judge "may not dismiss or otherwise determine an appeal or other proceeding." 11th Cir. R. 27(d) similarly provides that "a single judge may, subject to review by the court, act upon any request for relief that may be sought by motion, except to dismiss or otherwise determine an appeal or other proceeding." Because a denial of a COA acts to "dismiss or otherwise determine an appeal," the denial of a COA by a single judge is subject to review by a three-judge panel of this Court. Foster seeks independent review by the three-judge panel as a single judge on a reviewing panel can grant a COA allowing his case to proceed, but only a panel can "determine" this capital appeal.

STANDARD GOVERNING ISSUANCE OF A COA

A. The Standard for Issuing a COA is Less Than That Needed to Prevail on Appeal.

As noted in Foster's COA application, the COA standard is low and especially in a capital case, a reviewing court should err on the side of the petitioner. A

petitioner–appellant seeking a COA need only demonstrate "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); *see also Buck v. Davis*, 580 U.S. 100, 115 (2017); *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003); *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). "A petitioner satisfies this standard by demonstrating that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Miller-El*, 537 U.S. at 326 (citing *Slack*, 529 U.S. at 484).

Since its inception, this standard has remained a "threshold inquiry," *Slack*, 529 U.S. at 485, requiring a court to conduct a mere "overview of the claims in the habeas petition and general assessment of their merits" *without* "full consideration of the factual or legal bases adduced in [their] support." *Miller*-El, 537 U.S. at 336; *see also Buck*, 580 U.S. at 115. The Supreme Court has specifically determined that the statute forbids a merits analysis at this stage. *Miller-El*, 537 U.S. at 336; *Buck*, 580 U.S. at 116. Thus, a petitioner need not show—nor must a court be convinced—that "the appeal will succeed" for a COA to issue. *Id*. at 337. "Indeed, a claim can be debatable even though every jurist of reason might agree, after the COA has been granted and the case has received full consideration, that [the] petitioner will not prevail." *Id.* at 338.

The requirement that petitioners seek a COA is not meant to foreclose all

appellate review in the federal system. Notwithstanding the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) and its requirement that federal courts accord substantial deference to state-court factual determinations, courts are not permitted to simply rubberstamp state court action. "'Even in the context of federal habeas, deference does not imply abandonment or abdication of judicial review,' and 'does not by definition preclude relief.'" *Brumfield v. Cain*, 576 U.S. 305, 314 (2015) (quoting *Miller-El*, 537 U.S. at 340).

B. The Nature of the Penalty Weighs in Favor of Granting a COA

Death penalty cases require unique and heightened constitutional protections to ensure courts reliably identify those defendants who are both guilty of a capital crime and for whom execution is the appropriate punishment. *See Hall v. Florida*, 572 U.S. 701, 724 (2014). While the severity of the penalty does not warrant automatic issuance of a COA, "[i]n a capital case, the nature of the penalty is a proper consideration in determining whether to issue a certificate of probable cause." *Barefoot v. Estelle*, 463 U.S. 880, 893 (1983); *see also Mills v. Comm'r, Ala. Dep't of Corr.*, 102 F.4th 1235, 1241 (11th Cir. 2024) (Abudu, J. concurring) ("[I]t is of vital important to the defendant and to the community that any decision to impose the death sentence be, and appear to be, the consequence of scrupulously fair procedures.'" quoting *Sawyer v. Whitley*, 505 U.S. 333, 361 (1992) (Stevens, J., concurring)). "[A]ny doubt as to whether a COA should issue in a death-penalty case

must be resolved in favor of the petitioner." *Pippin v. Dretke*, 434 F.3d 782, 787 (5th Cir. 2005) (citing *Medellin v. Dretke*, 371 F.3d 270, 275 (5th Cir. 2004)).

ARGUMENT

As seen in the attached application for COA, Foster has met the threshold standard and made a "substantial showing" of the denial of his Sixth Amendment right to the effective assistance of counsel, 28 U.S.C. § 2253(c)(2), such that jurists of reason could disagree with the district court's resolution of his constitutional claim or conclude that the issue[] presented is adequate to deserve encouragement to proceed further." *Miller-El*, 537 U.S. at 326 (citing *Slack*, 529 U.S. at 484). Foster is entitled to a COA under this "threshold inquiry" so that he can fully brief the merits of his claim and entitlement to relief. *Slack*, 529 U.S. at 485.

Foster has identified with particularity the claims warranting the granting of a COA: trial counsel's ineffectiveness at the penalty phase of his trial and the trial court's denial of his change-of-venue motions. Particularly as to his claim regarding trial counsel's failure to adequately investigate his childhood trauma and brain damage, this Court has *granted relief in similar cases*, particularly where as here, the Florida Supreme Court made unreasonable factual determinations in denying Foster's claim or unreasonably applied clearly established federal law. *See Blanco v. Sec'y, Fla. Dep't of Corr.*, 943 F.2d 1477, 1500-03 (11th Cir. 1991); *Hardwick v. Crosby*, 320 F.3d 1127, 1162-89 (11th Cir. 2003); *DeBruce v. Comm'r, Ala. Dep't*

of Corr., 758 F.3d 1263, 1270-78 (11th Cir. 2014); *Cooper v. Sec'y, Fla. Dep't of Corr.*, 646 F.3d 1328, 1349-56 (11th Cir. 2011).

By way of example, it was objectively unreasonable for the Florida Supreme Court to rely on Wootton's testimony[1] that the school records failed to show any significant mitigating evidence when the records themselves (admitted in evidence at the postconviction hearing) show Foster had serious academic difficulties, including repeating fifth grade. (C33. 3087-3154) The school records were red flags that a reasonably competent capital defense attorney would recognize as a basis to further investigate their client's background and mental health. It was equally unreasonable for the Florida Supreme Court to reduce the mitigation presented at the post-conviction hearing about Foster's childhood trauma and mental health testimony to irrelevance, and to fail to properly assess the evidence presented at trial against the overwhelming mitigation presented at the post-conviction proceeding. Foster has set out in detail in his Petition multiple examples of counsel's unreasonable investigation and resulting prejudice.

Further, the Supreme Court of the United States has repeatedly recognized the importance of trial counsel's duty to investigate a capital defendant's background and criticized state courts, including the Florida Supreme Court, for failing to

[1] Wooten was a convicted felon and drug addict who was engaged in a sexual relationship with Foster's mother leading up to and during the trial, as set out in Foster's COA application and the record. (C36. 3528-52)

adequately weigh and consider mitigation presented in post-conviction proceedings and accurately assess the reasonableness of counsel's investigation. *Williams v. Taylor*, 529 U.S. 362, 392 (2000); *Wiggins v. Smith*, 539 U.S. 510, 524 -28 (2003); *Rompilla v. Beard*, 545 U.S. 374 (2005); *Porter v. McCollum*, 558 U.S. 30, 39-44 (2009); *Sears v. Upton*, 561 U.S. 945, 946-56 (2010). These cases provide additional support for the threshold determination needed to grant a COA.

Accordingly, this Court should independently review the attached COA application and grant a COA in this matter. As established in his COA application, the Florida Supreme Court unreasonably applied clearly established federal law and made unreasonable determinations of fact as shown by the state-court record, thus reasonable jurists could debate the district court's conclusions on the issues presented or at least find that they deserve encouragement to proceed further.

CONCLUSION

WHEREFORE, based on the foregoing arguments and the record in this case, Foster, through counsel, respectfully moves this Court to issue a COA on Grounds I and II of his Amended Petition for Writ of Habeas Corpus.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Petitioner–Appellant certifies that this motion contains 2,652 words, excluding the parts of the document exempted by Fed. R. App. P. Rule 279b), in compliance with the type-volume limit of Fed. R. App. P. 27(d)(2)(A) and 11th Cir. R. 22-2.

CERTIFICATE OF TYPE SIZE AND STYLE

Petitioner–Appellant certifies that the size and style of type used in this application for a certificate of appealability is Time New Roman, 14-point, in compliance with the requirements of Fed. R. App. P. Rule 32(a)(5) and (a)(6).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY, that on April 11, 2025, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system which sent a notice of electronic filing to: Stephen Ake, Senior Assistant Attorney General, *Stephen.Ake@myflorida.legal.com*.

/s/ Marie-Louise Samuels Parmer
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***** CAPITAL CASE *****

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

KEVIN DON FOSTER,

Petitioner,

v.

SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

APPENDIX G

Kevin Don Foster v. State of Florida, 132 So. 3d 40 (Fla. 2013),
Florida Supreme Court Opinion Affirming Denial of Postconviction Relief

132 So.3d 40
Supreme Court of Florida.

Kevin Don FOSTER, Appellant,
v.
STATE of Florida, Appellee.

No. SC11–1761.

Oct. 17, 2013.

Rehearing Denied Jan. 31, 2014.

Synopsis

Background: After his first-degree murder conviction and death sentence were affirmed on direct appeal, 778 So.2d 906, defendant filed motion for postconviction relief. The Circuit Court, Lee County, Edward J. Volz, Jr., J., denied motion. Defendant appealed.

Holdings: The Supreme Court held that:

counsel did not render ineffective assistance of counsel in the manner in which the defense team permitted defendant's mother to assist in the preparation of mitigation evidence;

counsel did not render ineffective assistance with regard to the level of organization throughout penalty phase;

counsel did not render ineffective assistance with regard to the presentation of defendant's mental health and background mitigation;

counsel did not render ineffective assistance with regard to the manner in which the defense team challenged applicability of avoid arrest death penalty aggravator;

nondisclosure of juror's conviction by itself did not provide grounds for new trial;

State's alleged failure to disclose information relating to juror's 24-year-old conviction did not constitute a *Brady* violation; and

State's failure to correct record with regard to juror's criminal background did not constitute a *Giglio* violation.

Affirmed.

Attorneys and Law Firms

***47** Terri L. Backhus, Special Assistant CCRC–South and Scott Gavin, Staff Attorney, Fort Lauderdale, FL, for Appellant.

Pamela Jo Bondi, Attorney General, Tallahassee, FL, Stephen D. Ake, Assistant Attorney General, Tampa, FL, for Appellee.

Opinion

PER CURIAM.

Kevin Don Foster appeals an order of the circuit court denying his motion filed under Florida Rule of Criminal Procedure 3.850 to vacate the judgment of conviction of first-degree murder and sentence of death. Because the order concerns postconviction relief from a capital conviction for which a sentence of death was imposed, this Court has jurisdiction under article V, section 3(b)(1), Florida Constitution. For the reasons that follow, we affirm the circuit court's order denying postconviction relief.

FACTS AND BACKGROUND

Kevin Foster was convicted of the April 1996 first-degree murder of Mark Schwebes, the Riverdale High School band teacher, in Fort Myers, Florida. Foster, eighteen years of age, did not attend Riverdale ***48** High School at the time. However, he was the leader of a group that called itself "Lords of Chaos," which did include students from that school. In furtherance of a mission to carry out widespread vandalism in the community, Foster and five other members of the group decided to vandalize Riverdale High School and set its auditorium on fire on the night of April 30, 1996. That plan was interrupted, however, when Schwebes drove up to the auditorium and confronted two members of the group—Christopher Black and Thomas Torrone—about the vandalism. Foster was not confronted because he had run away. Later, after Black told Foster that Schwebes was planning to contact the school resource officer the next day, Foster agreed with Black that Schwebes "must die." Foster, along with Black and Lords of Chaos members Peter Magnotti and Derek Shields, went to Foster's home where Foster obtained a shotgun which he loaded with # 1 buckshot,

a map to locate Schwebes' home, gloves, and ski masks. After calling Schwebes' telephone number to confirm he was home, Foster, Black, Magnotti, and Shields went to Schwebes' home. On the way to Schwebes' home they stopped and placed a stolen license tag on Shields' vehicle. When Schwebes answered their knock on the door, Foster shot him in the face with the shotgun that he brought with him. Foster then shot Schwebes a second time in the pelvis.

After a jury trial at which the members of the Lords of Chaos who had participated in the murder and the conspiracy testified against Foster in exchange for plea deals, Foster was convicted of first-degree murder. The penalty phase resulted in a jury recommendation of death by a nine-to-three vote. After finding two aggravating factors [1] and rejecting or attaching little to no weight to the twenty-three mitigators offered by Foster, [2] the trial court sentenced Foster to death. Foster appealed and this Court affirmed in *Foster v. State,* 778 So.2d 906 (Fla.2000).

Foster raised seven issues on direct appeal: (1) his numerous pretrial change of venue motions were improperly denied; (2) the court erred in permitting the State to elicit hearsay testimony of several witnesses; (3) comments of the trial judge during the guilt phase demonstrated that the court had prejudged the case; (4) the avoid arrest aggravator should not have been submitted to the jury in the penalty phase; (5) the trial court erred in admitting charging information concerning other crimes at the *Spencer* hearing; (6) the trial court failed to properly consider the mitigating circumstances and its findings are unclear; and (7) the sentence was disproportionate in comparison to other cases. *See Foster,* 778 So.2d at 912 n. 8.

As to the motions for change of venue, this Court held that although there was a "great deal of publicity about the case in the local community," the trial court properly ***49** denied the motions for change of venue. *Id.* at 913. We concluded that "the media coverage as a whole did not reach such an inflammatory level to have irreversibly infected the community so as to preclude an attempt to secure an impartial jury." *Id.* We also noted that the jurors who were impaneled in Foster's case did not indicate they had been exposed to the "more egregious" examples of publicity cited by Foster. *Id.* at 914.

Foster raised several hearsay claims on appeal. As to the first hearsay claim, Foster contended that the trial court erred in admitting double hearsay contained in the statements of Magnotti, Shields, and another member of the group, Bradley Young, that Black told them Schwebes had threatened to go to the Riverdale High School campus police. *Id.* at 915. We held that this testimony was properly admitted to establish knowledge and motive, not the truth of the matter asserted. *Foster,* 778 So.2d at 915. Foster also contended that the testimony of Young, Magnotti, and Shields that Black said Schwebes "had to die" was inadmissible hearsay. *Id.* We held this testimony was not inadmissible hearsay because it was not admitted to prove Schwebes had to die, but was admitted to establish the conspiracy and Foster's part in it, pursuant to the hearsay exception in section 90.803(18)(e), Florida Statutes (1997). *Id.* For this same reason, other testimony about planning and carrying out the killing, such as that relating to finding Schwebes' address, replacing the birdshot in the shotgun with more lethal ammunition, and subsequent conversations about the murder, was also properly admitted. *Id.*

Foster also challenged the testimony of David Adkins, whom Schwebes had dinner with shortly after the confrontation at the auditorium. Adkins testified that Schwebes told him he planned to report the group. Although we held this testimony to be inadmissible hearsay, we concluded it was harmless. *Id.* at 916. In the next hearsay claim, Foster challenged the redirect testimony of Shields about a prior consistent taped statement he gave to law enforcement immediately after his arrest and before any plea negotiations. We held that the testimony was not improper hearsay because it was offered to rebut an express or implied charge made in cross-examination of Shields that his testimony resulted from the improper influence of his plea deal. *Id.* The last hearsay claim on direct appeal concerned the testimony of Peter Magnotti's mother, who related a telephone conversation she had with Ruby Foster, Foster's mother, in which Ms. Foster attempted to persuade Ms. Magnotti to help create an alibi for Foster. *See id.* at 917. We held that this testimony was improper hearsay but concluded that the error was harmless. *Id.* Foster's other claims on direct appeal were found to be without merit.

Because the postconviction claims for which Foster was given an evidentiary hearing concern the penalty phase of trial, we briefly review that portion of the trial proceedings next. A discussion of the defense evidence in the penalty phase of the trial is set forth in this Court's direct appeal opinion, in pertinent part, as follows:

> The defense presented numerous witnesses who presented a picture of Foster as a kind and caring person. May Ann Robinson, Foster's neighbor, testified that he once helped her start her car and offered to let her borrow a lawn mower. Robert Moore, another neighbor, testified that Foster was well-mannered and a hard worker. Shirley Boyette found Foster to be very caring, intelligent, and well-mannered. Robert Fike, Foster's supervisor at a carpentry ***50** shop, and James Voorhees, his co-worker, found him to be a reliable worker. Voorhees also testified that Foster was very supportive to Voorhees' son who suffered from and eventually died of leukemia. Similarly, Raymond and Patricia Williams testified that Foster was very nice to their son who suffered from spina bifida. Peter Albert, who is confined to a wheelchair, related how Foster had helped Albert's mother care for him after his wife died. Foster also helped Albert in numerous other ways, including preparing his meals, fixing things around the house, and helping Albert in and out of his swimming pool.
>
> There was additional testimony that described Foster's involvement with foreign exchange students. Foster was also known to have given positive advice to young children. Foster's sister, Kelly Foster, testified to how he obtained his GED after dropping out of high school and that he obtained a certificate for the completion of an "auto cad" program at a vocational-technical school. Finally, Foster's mother testified that he was born prematurely and suffered from allergies, and that Foster's father abandoned him a month after birth. On cross-examination, many of the witnesses who testified to Foster's kindness admitted that they had not been in contact with him for a number of years.

Foster, 778 So.2d at 911–12. Foster's mother also presented a lengthy photographic slide show created by her and the defense team containing photographs of Foster during his childhood and with family and friends. The photographs depicted Foster's childhood as normal and one in which he had the advantages of a loving family, vacations in America and abroad, and many friends.

After the penalty phase of trial, a *Spencer*[3] hearing was held at which the victim's sister testified to victim impact evidence. Over objection, the State also submitted a copy of the charges brought against Foster in a separate case—charging Foster with twenty-seven crimes allegedly committed by Foster and the Lords of Chaos—as evidence going toward proof of the avoid arrest aggravator. On direct appeal, we concluded that the evidence of those other unproven charges, which were not convictions of a capital or other violent felony, should not have been considered. *See Foster,* 778 So.2d at 919. However, the error was harmless because the improper evidence was submitted only to the judge at the *Spencer* hearing, there was already evidence in the record of those other crimes, and there was no indication that the trial court relied on the improper information in sentencing Foster. *See id.* The defense did not present any additional mitigating evidence at the *Spencer* hearing and Foster did not testify, although he submitted an affidavit in which he professed his innocence, complained of the media's treatment of him and his family, and further complimented his defense counsel for doing a "commendable job."

On June 25, 1998, the trial court entered the sentencing order in which Foster was sentenced to death. The court expressly rejected Foster's age of eighteen as a statutory mitigator based on the conclusion that Foster was not young emotionally or mentally, Foster had been out of school for two years, had obtained a GED, had taken other courses "in preparation for life as an adult," and had traveled abroad. On direct appeal, we held that the trial court correctly evaluated and rejected the age mitigator, and we noted that the evidence showed Foster was the leader of the ***51** group, had above-average intelligence, and "produced no evidence of any emotional or mental irregularities, chronic or otherwise, despite the availability of two mental experts." *Foster,* 778 So.2d at 921.

POSTCONVICTION PROCEEDINGS

Foster filed his initial postconviction motion under Florida Rule of Criminal Procedure 3.850 on September 27, 2001,[4] and a corrected amended motion on May 27, 2010.[5] A *Huff* hearing was held on October 22, 2010.[6] After the *Huff* hearing, the postconviction court issued an order

scheduling an evidentiary hearing only on Foster's claims that his trial counsel rendered ineffective assistance in the penalty phase of trial by abdicating the responsibility for developing mitigation to Foster's mother, by the defense team being impaired and disorganized, by failing to discover and present mental mitigation and present testimony of a neuropsychologist, and by failing to sufficiently challenge the evidence of aggravating circumstances.

At the evidentiary hearing held April 26–29, 2011, Foster presented numerous witnesses, although his lead defense counsel at trial was not available to testify because he died before the matter was heard. From the defense team, Foster presented the testimony of defense co-counsel Marquin Rinard, defense investigator Roberta Harsh, and paralegal James Wootton. In addition, Foster presented the testimony of his half-sister, Kelly Foster; his aunt, Linda Albritton; his cousin, Candy Albritton–Green; his grandfather, Jack Bates, Sr.; his biological father, Jack Bates, Jr.; his mother's first husband, Ronald Newberry; clinical psychologist ***52** Dr. Ernest Bordini; clinical psychologist Dr. Faye Sultan; neuropsychologist Dr. Ruben Gur; and neurologist Dr. Thomas Hyde. The State presented the testimony of psychiatrist and neurologist Dr. Leon Prockup, psychiatrist Dr. Robert Wald, and clinical psychologist Dr. Michael Gamache.

After hearing the evidence, Judge Edward Volz, Jr., denied Foster's motion for postconviction relief in a comprehensive order which Foster now appeals. As explained more fully below, we find no merit in Foster's claims and affirm the order denying postconviction relief.

ANALYSIS

Standard of Review

To obtain relief on claims of ineffective assistance of counsel, the defendant "must show that his attorney's performance was deficient and that the deficient performance prejudiced his defense." *Sochor v. State,* 883 So.2d 766, 771 (Fla.2004) (citing *Strickland v. Washington,* 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)). In order to establish deficient performance, the defendant must show that his attorney's representation fell below an objective standard of reasonableness by committing errors "so serious that counsel was not functioning as the 'counsel' guaranteed ... by the Sixth Amendment." *Strickland,* 466 U.S. at 687, 104 S.Ct. 2052. As to proof of prejudice where, as here, the defendant claims that counsel provided ineffective assistance in the penalty phase, "the question is whether there is a reasonable probability that, absent the errors, the sentencer ... would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." *Strickland,* 466 U.S. at 695, 104 S.Ct. 2052. "We do not require a defendant to show 'that counsel's deficient conduct more likely than not altered the outcome' of his penalty proceeding, but rather that he establish 'a probability sufficient to undermine confidence in [that] outcome.' " *Porter v. McCollum,* 558 U.S. 30, 44, 130 S.Ct. 447, 175 L.Ed.2d 398 (2009) (quoting *Strickland,* 466 U.S. at 693–94, 104 S.Ct. 2052). We defer to the postconviction court's factual findings as long as they are supported by competent, substantial evidence but review de novo the circuit court's legal conclusions. *See Johnson v. State,* 104 So.3d 1010, 1022 (Fla.2012); *Sochor,* 883 So.2d at 771–72. "[W]e apply a mixed standard of review because both the performance and the prejudice prongs of the *Strickland* test present mixed questions of law and fact." *Sochor,* 883 So.2d at 771. With these standards in mind, we turn to the claims for which an evidentiary hearing was granted.

I. CLAIMS FOR WHICH AN EVIDENTIARY HEARING WAS HELD

A. Claim that Defense Counsel Abdicated Responsibility for Mitigation

We turn first to Foster's claim that trial counsel abdicated responsibility for the investigation and presentation of mitigation to Foster's mother. Foster argues that "the entire penalty phase was presented as Ms. Foster's version of Kevin's life" and that "[c]ounsel did not question whether her version was, in fact, true." At the evidentiary hearing, Foster presented Roberta Harsh, defense investigator, who testified that the defense team "pulled out all the stops" and used everything at their disposal in representing Foster. Paralegal James Wootton testified that even before the guilt phase began, the defense team knew it had to gear up for the penalty phase due to the overwhelming ***53** amount of evidence of guilt.[7] Wootton testified that Foster had been evaluated by psychiatrist Dr. Wald early in the case.

Dr. Wald, along with neuropsychologist Dr. Masterson who was to work at Dr. Wald's direction, was appointed almost immediately after Foster's arrest. The order of appointment indicated that the experts were to assist counsel in preparing the defense and to make such examinations of Foster and such reports to defense counsel as defense counsel may direct. Wootton testified that, although there was discussion amongst the defense team about whether Foster was mentally ill or abused as a child, the answer was always that he was not. Wootton also testified that the input from the family indicated that there was nothing wrong with Foster and that he was a wholesome, healthy young man who was being framed by his codefendants. Wootton explained that although Foster's mother voiced her opinions about the defense, made suggestions concerning witnesses, and attended about half of the team meetings on the case, it was Foster himself along with lead counsel Robert Jacobs who made the decision about the theory of his defense, which was to present Foster as a good child who deserved to be saved. [8]

Foster also presented the testimony of defense co-counsel Marquin Rinard, an assistant public defender experienced in capital cases. Rinard explained that a mitigation specialist was not retained, but that the defense team compiled Foster's school records and many of his medical records. Rinard saw no written report from Dr. Wald, who later explained at the evidentiary hearing that he did not believe he was asked to prepare a written report. Dr. Wald's patient records were unavailable because they had been transferred to a doctor who purchased his practice in 2001 and were then lost. However, based on billing records Dr. Wald maintained, he testified that he did do an evaluation of Foster and, based on his normal practices, that evaluation would have attempted to discover any indication of mental or behavioral disorders. In the mental status examination, Dr. Wald testified, he would have looked for delusion patterns, indications of auditory hallucinations, paranoia, cognitive function, memory, concentration, and issues of judgment. Dr. Wald explained that his normal practice would also have been to look for indications of bipolar disorder, manic characteristics, depression, and suicidal ideations.

Foster's mother provided alibi information for the guilt phase and provided a long list of possible witnesses for the penalty phase but, Rinard testified, it was Jacobs and Foster who decided on the theory of the defense. Rinard said he felt sure he and Jacobs discussed Foster's age, emotional level, and progress in school. According to Rinard's testimony, none of the witnesses that the defense team contacted provided any information causing them to suspect that Foster had mental health problems, and neither of Foster's defense counsel noted any indication of mental health problems or depression in their encounters with Foster. In depositions taken by the State of seven of Foster's relatives in Amarillo, Texas, which were attended by a public defender on Foster's behalf, those relatives reported ***54** generally that Foster had a normal childhood with a loving mother and extended family. None testified to any abuse of Foster or to any abusive environment in his home. Rinard testified that Jacobs took primary responsibility for both phases of the trial and that, based on the information they had, defense counsel knew they must attempt to humanize Foster at the penalty phase of trial and present him in the best light possible.

In support of the effort to humanize Foster for the penalty phase jury, Rinard testified that the defense team compiled a great deal of information about Foster helping others and being a good person, which they thought was necessary to overcome the negative guilt phase evidence about Foster. The defense discovered incidences in which Foster assisted disabled people in their homes and did yard work for them, and found that Foster was closely involved with people who were terminally ill, all of which was favorable information for the jury. At the penalty phase of trial, the defense presented twenty-four witnesses who were members of Foster's family, friends of the family, childhood friends of Foster, his former employer, and neighbors. Their testimony showed that Foster was a normal and good child loved by family and friends, as well as a helpful, polite, and compassionate teenager.

At the postconviction evidentiary hearing, Foster's older half-sister, Kelly Foster, testified that she assumed lead counsel Jacobs decided what evidence was to be presented in the penalty phase. As to Foster's childhood, Kelly testified that her first stepfather, Kevin Foster's biological father, treated her roughly, but Foster's mother divorced him and the family moved soon after Foster was born. [9] She testified that the next stepfather, Brian Burns, was the father figure to her and Foster for the rest of their childhood. Although he had anger issues and had been "physical" with their mother, Burns had been a good father and remained close to the family even after the divorce. After divorcing Burns, Foster's mother married again, to truck driver John Foster, and spent a lot of time on the road with him, leaving the children with relatives. John Foster later stopped driving a truck and opened a pawn shop. Foster's mother divorced him after she and he had a few "scuffles." Kelly related that other relatives had mental problems. Other family members testified at the evidentiary

hearing that there was mental illness in the family. They also related that Foster was a hyperactive child who was clumsy and often had accidents. None of the negative aspects of the family background evidence was reported to the defense team at the time of trial.

Based on the evidence presented, the circuit court denied relief on this claim, finding that defense counsel did not abdicate their responsibility for mitigation to Foster's mother. The court concluded that Foster and lead counsel Jacobs made the decisions regarding mitigation strategy for the case and that Ms. Foster merely provided contact information for possible penalty phase witnesses, suggestions of inconsistencies in the evidence, and questions that she believed should be asked of witnesses. The favorable, humanizing mitigation presented in the penalty phase was the only mitigation that Foster and his counsel determined should be presented. We have recognized that "[c]ompetent defendants who are represented by counsel maintain the right to make choices in respect to their attorneys' handling of their cases" which "includes the right to either waive presentation of mitigation evidence ***55** or to choose what mitigation evidence is introduced by counsel." *Hojan v. State,* 3 So.3d 1204, 1211 (Fla.2009).

The court further found that Foster failed to meet his burden to establish the prejudice prong of *Strickland.* Competent, substantial evidence supports the circuit court's findings and we affirm denial of relief on this claim.

B. Claim that the Defense Team was Impaired and Disorganized

Foster next contends that his defense counsel provided ineffective assistance because the defense team was disorganized, confused, and impaired. This claim was also included within the purview of the evidentiary hearing. The circuit court found, after hearing the testimony, that the allegations were unproven. In denying relief, the court noted testimony that Jacobs, who had Parkinson's disease, was not adversely affected in his representation of Foster by his Parkinson's tremors. Wootton denied seeing any confusion on Jacobs' part and testified that Jacobs could think on his feet and do what needed to be done. He said he was around Jacobs enough to be able to say that Jacobs was not affected by the disease in any way that would have hindered his ability to defend Foster. Defense co-counsel Rinard testified that he never saw Jacobs trembling or confused. The postconviction court stated, "The Court finds their testimony that Mr. Jacobs was not trembling or confused to be more credible than those of other witnesses who were not in close proximity to Mr. Jacobs during trial, or who have a motive for bias against Mr. Jacobs and in favor of Defendant's motion."

In attempting to prove that the defense team was confused, impaired, and disorganized, Foster relies primarily on a book about the murder and trial titled *Someone Has to Die Tonight* [10] by Jim Greenhill which, Foster contends, reported that the defense appeared "confused." Foster also alleges that according to the Greenhill book, jurors who were close to Jacobs throughout trial noticed his tremors and confusion and found it "off-putting." However, Foster did not present testimony at the evidentiary hearing in support of these specific allegations. Foster did present the testimony of Jack Bates, Jr., Foster's biological father, who testified at the evidentiary hearing that Jacobs "would sometimes get I think frustrated, or somewhat confused." The State's objection that the statement called for speculation was sustained. Even if that testimony had been admitted, it would not have proven that the defense team was disorganized, confused, or impaired.

Foster also argues that paralegal Wootton characterized the defense as "disorganized." Wootton actually testified that when he first started his job with the public defender, the Foster documents were stored in a box and were "more so disorganized than organized." He explained that his job was "to put it all together to prepare—to put it into this [trial] software program." Thus, Wootton's comment about disorganization did not refer to the defense team generally, just to the documents he was given to organize and computerize for trial preparation—which he testified that he did. [11] ***56** The circuit court concluded that Foster failed to meet his burden that the defense team was in any way impaired during trial. We agree.

We reiterated in *Clark v. State,* 35 So.3d 880 (Fla.2010), that "[a]s long as the trial court's findings are supported by competent substantial evidence, this Court will not 'substitute its judgment for that of the trial court on questions of fact, likewise of the credibility of the witnesses as well as the weight to be given the evidence by the trial court.' " *Id.* at 886 (quoting *McLin v. State,* 827 So.2d 948, 954 n. 4 (Fla.2002)); *see also Bell v. State,* 965 So.2d 48, 63 (Fla.2007) ("Questions of credibility are left to the determination of the circuit court, and provided there is

competent, substantial evidence to support those credibility assessments, we will defer to that court's decision." (citing *Archer v. State,* 934 So.2d 1187, 1196 (Fla.2006) ("This Court is highly deferential to a trial court's judgment on the issue of credibility."))). The postconviction court had before it competent, substantial evidence refuting Foster's claim that the defense team was disorganized, confused, or impaired. We will not second-guess the circuit court on its findings based on this evidence or on the court's credibility determinations. For these reasons, the postconviction court did not err in denying Foster's claim and we affirm.

C. Claim of Deficient Investigation and Presentation of Foster's Background and Mental Mitigation

In Foster's next claim for which an evidentiary hearing was held, he contends that trial counsel was deficient in the investigation and presentation of Foster's mental health and background mitigation, and that counsel should have sought neuropsychological testing of Foster. The circuit court denied the claims, concluding that trial counsel cannot be found deficient in failing to present negative mitigating information about Foster when none was provided to counsel by Foster, his family, or his friends and where counsel had no reason to believe such negative information existed. The court cited denial of any mental health issues by Foster and his family, and concluded that the "subtle" or "soft" findings of mental issues by Foster's current experts do not cause the court to find any clear indication existed that Foster suffered from organic brain damage or other mental impairments such that trial counsel was obligated to seek neuropsychological testing. The court further found that the evidence and testimony presented at the hearing did not substantiate claims that Foster suffered a history of concussions, which would have been a red flag for possible brain damage or that he had an abusive or troubled childhood. The court found that defense counsel was never advised of any mitigation arising from the conditions of Foster's childhood, and disagreed that the testimony revealed "significant mitigation leads" which defense counsel should have followed. Thus, the circuit court concluded that trial counsel made a reasonable tactical decision not to pursue further mental health investigation after receiving an initial diagnosis that there were no mental health issues and after receiving no indication of mental issues or other childhood mitigation from Foster and his family. Accordingly, the court held that, under the circumstances, it was not unreasonable for counsel to rely on an attempt to humanize Foster for the jury and present only favorable mitigation.

***57** As to prejudice, the circuit court concluded that even if all the information that Foster claims should have been elicited had been presented in the penalty phase, there would be no reasonable probability that the mitigation would have outweighed the aggravation presented at trial. The court found that the expert testimony concerning mental impairments and the testimony concerning Foster's childhood and alcohol abuse, dementia, and mental illness in extended family members would not have outweighed the aggravating circumstances in this case. We agree and conclude that all the court's findings are supported by competent, substantial evidence.

Defense co-counsel Rinard testified that in 1996 a public defender investigator interviewed Foster and asked him about any suicide attempts, involuntary commitment, chronic drug or alcohol abuse, seizures, retardation, or serious head injuries. The record shows Foster's negative responses to these inquiries. The interview notes also indicate that Foster did not appear odd-acting, inattentive, hostile, or argumentative. The circuit court noted that neither Wootton nor Rinard saw any indications of depression or mental impairment during their interactions with Foster. Wootton testified that the defense team discussed whether any additional experts needed to be retained, but based on the examination that was done of Foster early in the case and based on everything else the defense team had before it, the decision was made that no further experts needed to be retained to look into mental health issues, abuse, neglect, or any other similar mitigation because there was nothing to support it. Although Foster's half-sister, Kelly, testified at the evidentiary hearing that their childhood was tumultuous, with a series of stepfathers who on occasion were angry and sometimes rough with their mother, nothing in her testimony suggested that Foster had an abusive childhood. She also described Foster as clumsy and said she had seen him depressed. Other family members testified at the hearing that Foster and his sister were often left with relatives and that their home life was unstructured. However, none of this information was provided to defense counsel at the time of trial. Rinard testified that the only information received from family members—many of whom testified at the penalty phase of trial—described Foster and his childhood in favorable terms, and that Foster and his family were resistant to discussing any other course of mitigation.

In an effort to establish that neuropsychological testing was indicated, Foster presented several experts at the evidentiary hearing. Dr. Ernest Bordini testified that he administered a number of tests to Foster, including the Halstead–Reitan Battery of tests, the Wisconsin Card Sort tests, the Stroop Interference Procedure test, the Luria Battery of tests, and the Victor Symptom Validity test for malingering. Dr. Bordini concluded that Foster has a high verbal IQ score of 137 but a lower performance IQ score of 105, which Dr. Bordini opined was indicative of right hemisphere brain weakness. Dr. Bordini also noted that Foster's birth records showed he suffered respiratory distress at birth and was hospitalized for about a week. He opined that this respiratory distress indicated that Foster was at high risk of having neurological issues. He characterized Foster's current reports of past head injuries as concussions, although Dr. Bordini did not see medical records confirming concussions suffered by Foster. Dr. Bordini also diagnosed Foster with depression occurring after incarceration based on Foster's current reports of depression to Dr. Bordini. Finally, Dr. Bordini diagnosed Foster with possible nonverbal learning disorder, possible bipolar ***58** disorder, and antisocial personality disorder. However, the State's experts, Dr. Leon Prockup and Dr. Michael Gamache, disagreed that the records showing the respiratory distress at birth were indicative of possible brain damage. Dr. Gamache testified that the hospital records showed Foster suffered common respiratory distress often seen in newborns when they lack a "surfactant" on their lungs that enables ease of breathing immediately after birth. He explained that this condition is not an indication of lack of oxygen (hypoxia) or complete lack of oxygen (anoxia). Dr. Gamache also disagreed that the variance between Foster's high verbal IQ score and his lower performance IQ score were indicative of brain damage. He testified that both scores were above average and not indicative of impairment. The circuit court found the testimony of Drs. Prockup and Gamache on these issues to be more credible.

Dr. Ruben Gur testified that he used the raw data from Dr. Bordini's neurological testing to produce a "brain map" that identified areas of Foster's brain which Dr. Gur said showed frontal lobe impairment that would affect Foster's ability to plan, to consider long-term goals, and to make reasoned decisions regarding long-term consequences. However, Dr. Prockup testified that in his opinion the brain mapping methodology is not accurate or valid and that the algorithm on which the methodology is based was created with insufficient data. Dr. Prockup discovered no publications or articles on this type of brain mapping methodology since 1990. Dr. Gamache testified that, to his knowledge, statistical brain maps such as this are not frequently used by neurologists. He opined that the mapping methodology used by Dr. Gur was not generally accepted in the field of neuropsychology. [12]

Foster also presented Dr. Thomas Hyde, who testified that Foster's facial asymmetry and asymmetrical leg length were "subtle" findings referable to brain damage even though Foster received a perfect score on the "mini" mental state test Dr. Hyde performed on him. Dr. Hyde's conclusion of possible brain damage was also based on the variance between Foster's verbal IQ score and his performance IQ score. Dr. Hyde diagnosed Foster with significant mood disorder, depression, hypomania, and mania based "primarily on self reports." The circuit court concluded that Dr. Hyde's "subtle" findings were speculative at best.

Dr. Sultan, who first evaluated Foster in 2002, diagnosed Foster with possible brain injury due to his respiratory distress at birth. In addition, she opined that Foster was significantly depressed, suicidal, and bipolar. To support her conclusion that Foster was suicidal, Dr. Sultan cited a gunshot wound Foster suffered at age sixteen. Dr. Sultan concluded that it was a suicide attempt primarily based on Foster's insistence that it was accidental while he was cleaning a gun. Similarly, she described Foster's act of jumping off a bridge shortly after release from the hospital as a possible suicide attempt, even though Foster did not describe it as a suicide attempt. The hospital records for treatment of Foster's gunshot wound indicated the wound was accidental and that upon specific inquiry of Foster and his mother by hospital staff about suicidal thoughts or depression, the response was that there were none. Nothing provided in the evidentiary hearing refuted the fact that the gunshot wound was accidental. ***59** Nor was any evidence presented to substantiate speculation that Foster's jump off a bridge soon after he was released from the hospital after his gunshot wound was a suicide attempt. The circuit court found that it "could have been merely a teenage stunt." Dr. Sultan also concluded Foster was depressed based on his reports to her that currently and in his teens he had episodes of depression. However, these self-reports of depression which Foster provided his current experts were not provided to trial counsel, who had no indication that Foster had suffered any episodes of depression. Dr. Gamache also testified that the data relied on by Dr. Sultan did not support her diagnosis that Foster suffered from bipolar disorder.

As to whether defense counsel should have suspected Foster had brain damage or mental impairment based on earlier head injuries, Rinard testified that there were no records of Foster having received concussions. Foster presented no evidence at the hearing to substantiate his experts' speculation that he had suffered concussions as a child. Even Dr. Bordini, who based much of his diagnosis on the assumption that Foster had a history of concussions, conceded on cross-examination that he saw no medical records supporting a history of concussions.

Moreover, Dr. Wald evaluated Foster prior to trial and testified that his standard practice in such examination would be to look for any signs of mental illness or impairments. Neither Rinard nor Wootton detected any obvious mental problems in their interactions with Foster. Nothing in the medical or school records that trial counsel reviewed indicated that further mental evaluation was necessary. Foster and his family members denied there were any mental problems, depression, or suicidal ideations.

In concluding that trial counsel had no basis to suspect that Foster might have mental issues that required investigation, the circuit court cited the testimony at the evidentiary hearing by Ronald Newberry, who also testified at the penalty phase of trial, that Foster was "hyper" but was "just a normal, regular kid." The circuit court also noted that certain of Foster's extended family members testified at the evidentiary hearing that Foster's grandfather may have suffered from paranoia, his grandmother had dementia, his aunt was paranoid, an uncle had trouble with alcohol, and another aunt committed suicide. However, they did not testify that they had seen any indications of these problems in Foster. The court also found no evidence to support the contention that Foster suffered mentally from the fact that his maternal grandfather essentially disowned his mother after she gave birth to him.

We explained in *Jones v. State,* 998 So.2d 573 (Fla.2008):

> While we do not require a mental health evaluation for mitigation purposes in every capital case, *Arbelaez v. State,* 898 So.2d 25, 34 (Fla.2005), and "*Strickland* does not require counsel to investigate every conceivable line of mitigating evidence ... [or] present mitigating evidence at sentencing in every case," *Wiggins* [*v. Smith*], 539 U.S. [510], 533 [123 S.Ct. 2527, 156 L.Ed.2d 471 (2003)], "an attorney has a strict duty to conduct a reasonable investigation of a defendant's background for possible mitigating evidence." [*State v.*] *Riechmann,* 777 So.2d [342], 350 [(Fla.2000)]. *Where available information indicates that the defendant could have mental health problems, "such an evaluation is 'fundamental in defending against the death penalty.' "* *Arbelaez,* 898 So.2d at 34 (quoting *Bruno v. State,* 807 So.2d 55, 74 (Fla.2001) (Anstead, J., ***60** concurring in part and dissenting in part)).

Jones, 998 So.2d at 583 (emphasis added); *see also Taylor v. State,* 87 So.3d 749, 761–62 (Fla.2012) (reiterating that when available information indicates the existence of mental health issues, an evaluation is fundamental (citing *Jones,* 998 So.2d at 583)). In this case, available information did not point to the existence of mental health issues. The Supreme Court in *Strickland* explained:

> The reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions. Counsel's actions are usually based, quite properly, on informed strategic choices made by the defendant and on information supplied by the defendant. In particular, what investigation decisions are reasonable depends critically on such information. For example, when the facts that support a certain potential line of defense are generally known to counsel because of what the defendant has said, the need for further investigation may be considerably diminished or eliminated altogether. And *when a defendant has given counsel reason to believe that pursuing certain investigations would be fruitless or even harmful, counsel's failure to pursue those investigations may not later be challenged as unreasonable.*

Strickland, 466 U.S. at 691, 104 S.Ct. 2052 (emphasis added); *see also Anderson v. State,* 18 So.3d 501, 509 (Fla.2009) (rejecting claim that counsel was deficient for

failing to uncover prior sexual abuse of defendant where defendant had denied such abuse prior to trial and described his childhood as normal (quoting *Strickland,* 466 U.S. at 691, 104 S.Ct. 2052)).

We agree that Foster did not establish that trial counsel was deficient in failing to discover the information presented at the evidentiary hearing, failing to seek further psychological testing, or failing to present this information during the penalty phase of trial. The experts presented by Foster at the hearing relied in large part on Foster's self-reports of head trauma and depression, although neither Foster nor his mother ever reported that information to the defense team at the time of trial. Nothing in the records presented at the evidentiary hearing substantiated the claim that red flags were raised indicating Foster might have brain damage or other mental impairments. Trial counsel was never given any indication by Foster, his mother, his half-sister, or any of the other relatives or friends who testified at the penalty phase or at the postconviction evidentiary hearing that Foster had a difficult childhood, was witness to any abuse in the home, had a history of mental illness in the family, was suicidal, or had a history of head trauma.

The circuit court correctly determined that under the facts of this case Foster did not establish that counsel was deficient in failing to pursue further neuropsychological evaluation of Foster and in failing to present mental mitigation at trial. The circuit court concluded that trial counsel made a reasonable tactical decision, based in part on Dr. Wald's evaluation and on other information counsel obtained at the time of trial, not to pursue further neuropsychological evaluation. The court correctly found that the decision is not rendered deficient merely because Foster has now secured other experts who give a more favorable evaluation or diagnosis. We have noted that simply because the defendant "found a new expert who reached conclusions different from those of the expert appointed during trial does not mean that relief is warranted." *Dufour v. State,* 905 So.2d 42, 59 (Fla.2005) (quoting ***61** *Cherry v. State,* 781 So.2d 1040, 1052 (Fla.2000)). Under the facts and circumstances of this case, Foster's counsel was not deficient in developing a mitigation strategy that sought to utilize the humanizing information about Foster as a smart, polite, helpful, normal youth who fell in with the wrong crowd and deserved to be spared the death penalty.

Even if counsel erred in failing to discover and present the same evidence presented at the evidentiary hearing, we cannot conclude that "absent the errors, the sentencer—including an appellate court, to the extent that it independently reweighs the evidence—would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." *Strickland,* 466 U.S. at 695, 104 S.Ct. 2052. "In assessing prejudice, 'it is important to focus on the nature of the mental health mitigation' now presented." *Dufour,* 905 So.2d at 59 (quoting *Rutherford v. State,* 727 So.2d 216, 223 (Fla.1998)). The nature of the mitigation presented at the evidentiary hearing was not such that it would alter the balance of the aggravators and mitigators in any manner that undermines confidence in the result. In sentencing, the trial court found and gave great weight to the aggravating factors that the murder was committed for the purpose of avoiding or preventing a lawful arrest and that it was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification. Even if the evidence now presented by postconviction counsel had been available to the jury and sentencing court, we cannot conclude there is a reasonable probability that the balance of aggravating and mitigating circumstances would have been different or that counsel's deficiencies, if any, substantially impair confidence in the outcome of the proceeding. *See Lukehart v. State,* 70 So.3d 503, 514 (Fla.2011).

Because nothing presented by Foster undermines our confidence in the outcome of the penalty phase proceedings, we affirm denial of relief on these claims.

D. Claim that Counsel Failed to Effectively Challenge the Avoid Arrest Aggravator [13]

Foster next contends that counsel was ineffective for failing to effectively challenge the avoid arrest aggravator. [14] The circuit court's order found that the trial transcript refutes this claim because trial counsel did challenge the aggravators. We agree. Defense counsel argued in the charging conference that "[d]uring this penalty phase the State has not offered any evidence of any aggravators, nor did it request of the court to take judicial notice, or to instruct the jurors of anything that happened during the guilt phase.... We're asking the Court at this time to instruct the jury that the only recommendation that they can come back with at this point in time is a recommendation of life, since the State has not presented any type of evidence." Defense counsel also argued to the trial court that there was no evidence ***62** presented during the guilt phase to support the avoid arrest aggravator. He argued

that the evidence only showed that Schwebes was going to report the incident to the school resource officer, not to law enforcement. Defense counsel further argued to the trial court that there was no evidence there was going to be an imminent arrest or anything other than a school reprimand.

Defense counsel argued to the penalty phase jury that the State failed to prove the avoid arrest aggravator because there was no evidence that avoiding arrest was the dominant factor in the murder, noting that it was Black and Torrone who were caught on the scene by Schwebes, not Foster, and that Schwebes only said he would contact the school resource officer. Moreover, Foster argued in his direct appeal that the trial court erred both in finding and submitting the avoid arrest aggravator to the jury. *See* *Foster,* 778 So.2d at 918. We rejected the claim, concluding that the evidence supported the avoid arrest aggravator and stating, "[T]he State established that Foster was concerned that he would ultimately be implicated should either Black or Torrone get arrested. We therefore conclude that the trial court properly submitted and relied upon this aggravator in the sentencing phase." *Id.*

Because Foster's allegations of ineffective assistance in regard to the avoid arrest aggravator are merely conclusory, are conclusively refuted by the record, and raise matters already presented on direct appeal, the postconviction court correctly denied this claim. We turn next to the postconviction claims that were summarily denied.

II. SUMMARILY DENIED CLAIMS

Standard of Review

The circuit court denied the remainder of Foster's postconviction claims without a hearing. Because a court's decision whether to grant an evidentiary hearing on a rule 3.850 motion or claim is ultimately based on written materials before the court, its ruling is tantamount to a pure question of law subject to de novo review. *See* *State v. Coney,* 845 So.2d 120, 137 (Fla.2003). Thus, this Court's review is de novo. A postconviction court may summarily deny a defendant's claim asserted in a rule 3.850 motion if "(1) the motion, files, and records in the case conclusively show that the movant is entitled to no relief, or (2) the motion or particular claim is legally insufficient." *Franqui v. State,* 59 So.3d 82, 95 (Fla.2011). Legally insufficient claims include those that are procedurally barred in collateral proceedings because they should have been raised on direct appeal. *See* *Johnson,* 104 So.3d at 1027. In establishing a prima facie case based on a legally valid claim, "mere conclusory allegations are insufficient." *Franqui,* 59 So.3d at 96; *see also* *Doorbal v. State,* 983 So.2d 464, 482 (Fla.2008).

When reviewing a circuit court's summary denial of a rule 3.850 motion or claim, the Court must accept the movant's factual allegations as true to the extent they are not refuted by the record. *See* *Nordelo v. State,* 93 So.3d 178, 184 (Fla.2012) ("[T]his Court must examine each claim to determine if it is legally sufficient, and if so, determine whether or not the claim is refuted by the record." (quoting *Hamilton v. State,* 875 So.2d 586, 591 (Fla.2004))). We turn next to Foster's claims alleging juror misconduct as a basis for postconviction relief.

A. Summary Denial of Claim of Juror Misconduct

1. Juror's Denial of Prior Conviction

Foster contends in this claim that the trial court erred in summarily denying his ***63** claim that the State committed a *Brady* violation when it failed to disclose the fact that Juror Q had been prosecuted by Lee County authorities and convicted of DUI twenty-four years earlier. *See* *Brady v. Maryland,* 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). During voir dire, the trial judge asked prospective Juror Q if he had ever been convicted of a crime or charged with a crime, to which he answered, "No, sir." Juror Q did serve on the jury. Foster contends the prejudice which flowed from this nondisclosure was that Juror Q may have decided to sentence Foster to death based on the juror's past experiences with Lee County authorities, which were unknown to counsel. Foster contends that the State had actual or constructive knowledge of this fact and failure to disclose it was a violation under *Brady.* He also contends that the State knowingly presented or failed to correct Juror Q's false testimony in violation of *Giglio v. United States,* 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972).

We explained in *Lebron v. State,* 799 So.2d 997 (Fla.2001), that "[a] juror's nondisclosure of information during voir dire warrants a new trial if it is established that the information is relevant and material to jury service in the case, the juror concealed the information during questioning, and failure to disclose the information was not attributable to counsel's lack of diligence." *Id.* at 1014. *See also De La Rosa v. Zequeira,* 659 So.2d 239, 241 (Fla.1995) (same). More recently, we held that the movant must at least allege facts establishing a prima facie basis for prejudice. *See Hampton v. State,* 103 So.3d 98, 112–13 (Fla.2012), *cert. denied,* —— U.S. ——, 133 S.Ct. 2027, 185 L.Ed.2d 892 (2013). In *Hampton,* we reiterated that the complaining party must establish "not only that the non-disclosed matter was 'relevant' ... but also that it is 'material to jury service in the case.' " *Hampton,* 103 So.3d at 112 (quoting *Roberts v. Tejada,* 814 So.2d 334, 339 (Fla.2002) (quoting *De La Rosa,* 659 So.2d at 241)).

In *Johnston v. State,* 63 So.3d 730 (Fla.2011), we explained, "There is no per se rule that [a juror's] involvement in any particular prior legal matter is or is not material. Factors that may be considered in evaluating materiality include the remoteness in time of a juror's prior exposure, the character and extensiveness of the experience, and the juror's posture in the litigation." *Id.* at 738 (citations omitted) (quoting *Roberts,* 814 So.2d at 345). Again, in this postconviction context, the movant must establish that the undisclosed information was relevant and material to jury service. *Id.* [15]

The claim filed by Foster failed to allege a prima facie basis for concluding that the undisclosed twenty-four-year-old DUI conviction, even if verified, was relevant or material to Juror Q's jury service. Just as we noted in *Johnston,* "nothing about the character and extensiveness of [the juror's] own experience" in being convicted of a nonviolent offense "suggests [the juror] would be biased against a defendant pleading not guilty in a death penalty case." *Johnston,* 63 So.3d at 739.

To the extent that Foster was denied a hearing on his *Brady* claim that the State knowingly failed to disclose this juror information resulting in prejudice, ***64** the claim was correctly summarily denied. In order to establish a *Brady* violation, the defendant must show that (1) favorable evidence—either exculpatory or impeaching, (2) was willfully or inadvertently suppressed by the State, and (3) that because the evidence was material, the defendant was prejudiced. *See Rimmer v. State,* 59 So.3d 763, 785 (Fla.2010) (citing *Strickler v. Greene,* 527 U.S. 263, 281–82, 119 S.Ct. 1936, 144 L.Ed.2d 286 (1999)). To meet the materiality prong under *Brady,* the defendant must "demonstrate a reasonable probability that had the suppressed evidence been disclosed the jury would have reached a different verdict," a reasonable probability being one sufficient to undermine confidence in the outcome. *Rimmer,* 59 So.3d at 785. Foster has not met this test. Even assuming that the State knew or had constructive knowledge of this information and should have disclosed it, the information was not related to guilt or punishment, nor was it exculpatory or impeaching, and nothing set forth in the claim demonstrates it would have been material or favorable to Foster. *See Evans v. State,* 995 So.2d 933, 951 (Fla.2008) (denying *Brady* claim where information is neither exculpatory nor impeaching); *see also Smith v. State,* 931 So.2d 790, 798 (Fla.2006) (same).

To the extent Foster makes a claim under *Giglio* that the State knowingly allowed the presentation of false testimony on voir dire, the claim was also properly summarily denied. In order to demonstrate a *Giglio* violation, "a defendant must show that: (1) the prosecutor presented or failed to correct false testimony; (2) the prosecutor knew the testimony was false; and (3) the false evidence was material." *Tompkins v. State,* 994 So.2d 1072, 1091 (Fla.2008) (quoting *Rhodes v. State,* 986 So.2d 501, 508–09 (Fla.2008)). As discussed above, Foster's claim failed to allege facts sufficient to demonstrate that the juror's false statement was material to his jury service and thus prejudicial. For these reasons, the circuit court's summary denial of this claim is affirmed.

2. Consideration of Pretrial Publicity by Juror M

In this allegation of juror misconduct, Foster contends that Juror M gave an untruthful response in voir dire about her knowledge of Foster's case gleaned from local media coverage and about her ability to be fair. He contends that despite her assurances that she could be fair, her response

was untruthful because at some unknown time she mentally compared photographs she viewed at trial with those she had seen in the newspaper before being empanelled. Foster alleged that he obtained this information from the 2006 book *Someone Has to Die Tonight.* Foster claims that the book reveals Juror M told the author that the photographs shown in court "detailed more than what was in the paper."

Foster's motion conceded that when Juror M was asked on voir dire whether she had acquired any knowledge of the case from local news media, she responded that she had learned about the case from the newspaper and television. When asked if that information would affect her impartiality, she responded that she did not think so. When asked if she could set aside the information that she may have heard or seen in the paper and base her verdict solely on the evidence or the lack of evidence at trial, she said she thought she could.

To the extent that Foster is claiming the information he learned from the book is newly discovered evidence entitling him to a new trial, the postconviction court was correct in summarily denying it. ***65** To obtain a new trial based on newly discovered evidence, the defendant must show that evidence was not known by the trial court, the party, or counsel at the time of trial and the defendant could not have known of it by use of due diligence. Second, the evidence "must be of such nature that it would probably produce an acquittal on retrial." *See Johnston v. State,* 27 So.3d 11, 18 (Fla.2010) (quoting *Jones v. State,* 709 So.2d 512, 521 (Fla.1998)). Summary denial of a postconviction motion alleging newly discovered evidence will be upheld if the motion is legally insufficient or its allegations are conclusively refuted by the record. *McLin v. State,* 827 So.2d 948, 954 (Fla.2002). The allegations in Foster's motion concerning Juror M are legally insufficient and summary denial of this claim was proper.

Even if it is taken as true that Juror M made the alleged comments to the author concerning the difference between the photographs in the newspaper and those at trial, there are no facts set forth that would suggest she made those same mental comparisons during trial or during her jury deliberations rather than at some point afterward when she was interviewed. Even if she mentally noted during trial that the trial photographs showed more than the photographs in the newspaper, such does not indicate that she relied on evidence outside of court or was not fair and impartial—or most importantly, that she lied during voir dire when she said she thought she could be fair. Finally, if she made those mental comparisons during deliberations, such would inhere in the verdict and her mental considerations are not subject to challenge. *See Reaves v. State,* 826 So.2d 932, 943 (Fla.2002). For these reasons, the trial court was correct in summarily denying this claim that Juror M lied during voir dire about her prior knowledge of the case and her ability to be fair.

Foster fails to make clear whether he is raising this claim as one of newly discovered evidence or whether he is seeking appellate review of the trial court's denial of his motion to interview jurors. To the extent that this claim is an appeal of the trial court's denial of a jury interview, we conclude that the circuit court's denial of relief was proper. Foster filed a motion for juror interview pursuant to Florida Rule of Criminal Procedure 3.575 on September 28, 2010, seeking to interview Juror M on the grounds that the Greenhill book reported Juror M's comments about the photographs. A motion for juror interview must set forth allegations that are not merely speculative or conclusory, or concern matters that inhere in the verdict. *See State v. Monserrate–Jacobs,* 89 So.3d 294, 296 (Fla. 5th DCA 2012). The postconviction court denied the motion, finding that allegations that Juror M may have compared the evidence presented at trial with her memory of prior news accounts were speculative and conclusory, or were subjective impressions after the jury was discharged, and that the allegations concerned matters that inhered in the verdict itself. The court therefore concluded that the allegations did not allege juror misconduct and the motion to interview was denied.

"A trial court's decision on a motion to interview jurors is reviewed pursuant to an abuse of discretion standard." *Anderson v. State,* 18 So.3d 501, 519 (Fla.2009). Florida Rule of Criminal Procedure 3.575 requires that a party must have reason to believe the verdict may be subject to legal challenge to warrant a juror interview. Juror interviews are not permitted as to matters which inhere in the verdict. *See Reaves,* 826 So.2d at 943. Moreover, "[i]n order to be entitled to juror interviews, [a defendant] must present ***66** 'sworn allegations that, if true, would require the court to order a new trial because the alleged error was so fundamental and prejudicial as to vitiate the entire proceedings.' " *Id.* (quoting *Johnson v. State,* 804 So.2d 1218, 1225 (Fla.2001)).

Rule 4–3.5 of the Rules Regulating the Florida Bar also sets limits on an attorney's ability to interview jurors. We

have repeatedly held that this rule does not deny a defendant the right to effective assistance of counsel in pursuing postconviction relief. *See Reese v. State,* 14 So.3d 913, 919 (Fla.2009) (noting that the Court has held that neither rule 3.575 nor rule 4–3.5 violates a defendant's constitutional rights); *Evans v. State,* 995 So.2d 933, 952 (Fla.2008) ("Without more substantial allegations of how juror Taylor's single 'yes or no' response prejudiced the entire proceeding, this appears to be a 'fishing expedition' after a guilty verdict has been returned."). Because the rules are valid, and because the postconviction motion and the argument on appeal present only speculative and conclusory allegations concerning Juror M which, on their face, fail to provide a reasonable basis for the court to conclude that the verdict was illegal and that a juror interview should have been granted, the postconviction court did not abuse its discretion in denying Foster's motion to interview jurors. For all the foregoing reasons, we affirm the circuit court's denial of this claim.

3. Jurors' Failure to Follow Jury Instructions

The circuit court also summarily denied Foster's claim that the jurors violated the trial judge's instruction that they were to draw no inference of guilt from Foster's failure to testify. Foster contends that the jury foreman was quoted in the Greenhill book as saying that Foster did not give the jury much to go on and that he "sat emotionless during the whole thing." Citing the Greenhill book, Foster contends that the jury foreman "thought" Foster should "get up there and set the record straight" and Juror Q "thought" Foster was "like a bump on a log" without emotion. Foster also contends that other jurors, including Juror M, were adamant that Foster should show remorse and that they used lack of remorse as a nonstatutory aggravator.

In the postconviction court's order denying the juror interview, the court stated:

> There does not appear to be any authority which would support Defendant's argument that a motion to interview jurors relying solely upon information culled from news articles or a true crime novel, without the support of sworn facts or record evidence, would be cognizable. There has been no demonstration that the alleged quotes from jurors in the news articles or book were accurate recollections, were the juror's complete statements, were unedited, or were not taken out of context.

For the same reasons set forth above, the circuit court did not abuse its discretion in denying juror interviews relative to this claim. Moreover, Foster's claim focuses solely on the jury's deliberations, something that we have specifically held to be impermissible. *See, e.g., Vining v. State,* 827 So.2d 201, 216 (Fla.2002) ("[T]his Court has cautioned 'against permitting jury interviews to support post-conviction relief' for allegations which focus upon jury deliberations." (quoting *Johnson v. State,* 593 So.2d 206, 210 (Fla.1992))); *Reaves,* 826 So.2d at 943 (holding that matters which inhere in the verdict and the jury's deliberations are not subject to challenge). "[A] verdict cannot be subsequently impeached by conduct which inheres in the verdict and relates to the jury's deliberations." *Johnson,* 593 So.2d at 210 (quoting ***67** *Mitchell v. State,* 527 So.2d 179, 181 (Fla.1988)). This rule of law extends even to allegations that jurors improperly considered a defendant's failure to testify, "a matter which essentially inheres in the verdict itself." *Reaves,* 826 So.2d at 943 (quoting *Sims v. State,* 444 So.2d 922, 925 (Fla.1983)).

Because the allegations were legally insufficient to require an evidentiary hearing and because the circuit court did not abuse its discretion in denying the juror interview, we affirm the circuit court's summary denial of this claim.

B. Summary Denial of Claim of Failure to Impanel an Impartial Jury

Foster next contends that defense counsel was ineffective in failing to secure a change of venue due to his deficient questioning of prospective jurors concerning their knowledge of pretrial publicity in the case. Foster notes that defense counsel filed seventeen amendments to his initial motion for change of venue. During jury selection at trial, the court denied the motions for change of venue, but conducted separate voir dire with the prospective jurors prior to the guilt phase concerning their familiarity with the news coverage and its effect on their potential jury service. Prior to the

penalty phase, after Foster had been found guilty and that fact had been reported in the news, the trial court did not allow individual voir dire to determine if any jurors had seen or heard the coverage, but asked the panel as a whole if anyone had been exposed to the media coverage. No jurors indicated that they had.

On direct appeal, we affirmed the trial court's denial of a change of venue, holding in pertinent part:

> Foster provided voluminous records of various newspaper articles and television news accounts of pretrial publicity....
>
> In contrast to the above-cited articles, most of the articles relied upon were not inflammatory. Instead, they reported on the stages and activities of the prosecution and on plea agreements entered into by the other members of the Lords of Chaos. In fact, in one of the articles, Foster's defense counsel was quoted as saying that he had expected the plea agreements and had been preparing for them all along. Some articles focused on Schwebes' life and his contribution to the community. Still, others focused on students' reaction to and coping with the incident and on the state of various programs dealing with teenagers. Many others simply commented on and updated the proceedings in the case. We conclude that the media coverage as a whole did not reach such an inflammatory level to have irreversibly infected the community so as to preclude an attempt to secure an impartial jury.

Foster, 778 So.2d at 913. Foster essentially reargues the merits of the trial court's denial of his motions for change of venue, a matter which was raised and decided on direct appeal. We have made clear that "[a]llegations of ineffective assistance cannot be used to circumvent the rule that postconviction proceedings cannot serve as a second appeal." *Medina v. State,* 573 So.2d 293, 295 (Fla.1990), *quoted in* *Cherry v. State,* 659 So.2d 1069, 1072 (Fla.1995).

Foster also claims that trial counsel was ineffective because he failed to convince the trial court to allow individual "questionnaires" of the prospective jurors. However, he does not explain how the questionnaires would have differed from the individual voir dire of the jurors that did take place. He also complains that counsel was ineffective because he could not convince the trial court to allow individual questioning of the jurors about media coverage just before the penalty phase ***68** began. However, he alleges no facts to indicate that the jurors, who were under the court's directive not to read, watch, or listen to anything about the case, were not being truthful with the court when they indicated upon the court's inquiry prior to the penalty phase that they had not been exposed to any media reports.

As an element of this postconviction claim, Foster also argues that the rules prohibiting counsel from interviewing jurors prevented his postconviction counsel from adequately exploring possible juror biases and juror misconduct. As noted earlier, we have repeatedly held that the rules prohibiting juror interviews do not impair postconviction counsel's ability to pursue claims. *See, e.g.,* *Evans,* 995 So.2d at 952. Because Foster's contentions of ineffective assistance of counsel are conclusory and because the record refutes the allegation that proper inquiry was not made of the jurors concerning the effect of media coverage on their potential jury service, the postconviction court properly summarily denied these claims.

C. Summary Denial of Claims of Ineffective Assistance of Counsel

1. Failure to Challenge the State's Ballistics Expert and Evidence

Foster next contends that the postconviction court erred in summarily denying his claim that trial counsel was ineffective for failing to present an expert to challenge the State's ballistics expert, Bill Hornsby, a firearm and tool mark examiner. Foster contends trial counsel should have challenged Hornsby as to why he did not perform standard firing comparisons generally performed in the field of ballistics when he tested the shotgun.

At trial, Hornsby explained that the barrels of shotguns and those of rifles and pistols are different because shotgun barrels are "smooth bore" and do not have the grooves and imperfections, called "rifling," which appear in the barrels of rifles and pistols and which allow testing to determine if a particular projectile traveled through a particular barrel. Hornsby testified that based on the testing he could perform, he could say that the two fired shotgun shells found at the scene had previously been chambered in and extracted from the Mossberg shotgun which he had been provided for testing. This conclusion was based on testing he performed by firing several shotgun shells from that same shotgun and, using a comparison microscope, comparing the ejector marks on both

sets of shells. He also compared the striations made on the shells by the extractor, which is the device that pulls the shell from the chamber prior to ejection. Finally, he compared the stop marks on both sets of shells, which are marks made on the shell when the slide moves the shell up into the chamber to be fired. Hornsby conceded that he could not say the two shotgun shells found at the scene were "fired" from the Mossberg shotgun, only that at one time they had been chambered and ejected from that shotgun. He also conceded that he could not say whether the shotgun pellets taken from Schwebes' body came from a 12–gauge or some other gauge shotgun shell. However, Hornsby was certain that the 12–gauge three-inch # 1 buckshot fired shotgun shells found at the scene had been cycled through the Mossberg shotgun.

Foster's motion did not specify how his hypothetical expert would raise doubts about the testing Hornsby did. Even if defense counsel could have presented expert testimony that other tests existed which could have been performed, Foster's allegations do not explain how those other tests would have resulted in a conclusion that the shells found at the scene were not at one time chambered in and ejected from ***69** Foster's shotgun. Finally, even if trial counsel were somehow deficient in failing to present its own ballistics expert, Foster has not explained what prejudice flows from that deficiency. As noted earlier, in order to prove prejudice under the second prong of *Strickland,* a defendant must show that, but for counsel's deficiency, there is a reasonable probability that there would have been a different outcome, a reasonable probability being one sufficient to undermine confidence in that outcome. *See Simmons v. State,* 105 So.3d 475, 487–88 (Fla.2012). In this case, the facts set forth by Foster in his motion and in his claim on appeal fail to show that, but for trial counsel's alleged deficient conduct in failing to present a ballistics expert, there is a reasonable probability of a different outcome such that our confidence is undermined. Thus, the circuit court correctly denied this claim.

2. Failure to Challenge Admissibility of Scientific Evidence

Foster also contends that the postconviction court erred in summarily denying his claim that trial counsel was ineffective for failing to request a *Frye* hearing to test the expert ballistic testimony concerning the source of the spent shotgun shell casings found at the scene. The court in *Frye v. United States,* 293 F. 1013, 1014 (D.C.Cir.1923), held that before scientific evidence is generally admissible, it must be based on methodology that is sufficiently established to have gained general acceptance in the particular field in which it belongs. *See id.* at 1014.

There is no question that "tool-mark identification in the context of ballistics has been used in the criminal context since at least 1929, and in Florida since at least 1937." *King v. State,* 89 So.3d 209, 228 (Fla.2012). In *King,* we held that tool mark examination in ballistics has been a well-documented methodology over the last century and is not new or novel. *Id.* We also note that in *Commonwealth v. Whitacre,* 878 A.2d 96 (Pa.Super.Ct.2005), the Superior Court of Pennsylvania was presented with the issue of tool mark testimony concerning spent shotgun shells found at the scene of a crime, which were then compared with test-fired shotgun shells. In that case, a *Frye* hearing was held on the evidence presented by the firearm and tool mark examiner, who had determined by use of a comparison microscope that the spent shells had been discharged from a particular shotgun. *Id.* at 100–01. The appellate court concluded that the comparison methodology used on the shotgun shells had been in use since the 1930s, is a methodology that is accepted by the Association of Firearm and Tool Mark Examiners, and was neither new nor original. *Id.* at 101.

Because tool mark examination in ballistics, which was employed by the State's expert in this case, is not a new or novel methodology, Foster's trial counsel was not deficient in failing to demand a *Frye* hearing before admission of the testimony. In addition, because Foster's claim is conclusory and unspecific, and fails to allege any facts that support his allegation that the tool mark and firearms testimony by Hornsby was unreliable, the postconviction court did not err in summarily denying this claim.

3. Failure to Object to Non–Expert Testimony

Foster's next claim concerns defense counsel's alleged failure to object to the testimony of the lead forensic crime scene investigator Richard Joslin when he commented on the nature of the wounds suffered by Schwebes and on the origin of a piece of paper he found at the scene. As to Schwebes' wounds, Joslin testified that in his experience he had seen other wounds consistent with the injuries he saw ***70** on Schwebes and that in his experience those were consistent with shotgun injuries. He also testified that he found small metallic objects in the wall of Schwebes' home that looked consistent with

pellets from a shotgun cartridge. Joslin was present at the autopsy and observed the chief medical examiner remove "some small metallic items consistent with pellets from the victim's pelvic region, and also from his head," and Joslin took possession of the pellets at that time. Joslin also testified that he found a small disk of paper at the crime scene consistent with the inner makings of a shotgun cartridge. On cross-examination, defense counsel elicited testimony from Joslin that there was no physical evidence that connected Foster with the crime scene, and he agreed there were no fingerprints on the shotgun shell casings found at the scene.

Foster contends that if defense counsel had objected to Joslin's testimony in which he said that, in his experience, the wounds looked consistent with other wounds he had seen in the past caused by shotgun pellets, and his testimony that the paper disk found on the scene looked consistent with wadding that comes out of shotgun shells, there is a probability that the outcome of this trial would have been different. As noted above, Foster is not required to show that counsel's deficient conduct more likely than not altered the outcome of the proceeding, but instead must only establish a probability sufficient to undermine confidence in that outcome. *See Simmons,* 105 So.3d at 487. We first note that Foster's trial counsel did object that Joslin was not qualified to testify about whether in his experience he had observed other wounds in the past that were consistent with the wounds he observed on Schwebes. However, Joslin was not testifying as a ballistics expert but only testifying from his experience as a crime scene investigator that certain things appeared consistent with his experience. Further, other testimony and evidence established beyond any doubt that the wounds were in fact shotgun pellet wounds and that spent shotgun shells that had been cycled through Foster's shotgun were in fact found at the scene. Thus, counsel's error, if any, does not undermine this Court's confidence in the outcome. The postconviction court did not err in summarily denying this claim.

4. Trial Counsel's Alleged Failure to Challenge Hearsay

The next subject of Foster's claim that trial counsel was ineffective concerns whether trial counsel "effectively" challenged the hearsay testimony of codefendants Young, Shields, and Magnotti. Foster also contends that trial counsel was ineffective for failing to "properly object" to David Adkins' testimony that Schwebes told him he intended to report Black and Torrone to the school resource officer. We find no merit in these claims.

Taking Adkins' testimony first, Foster contends in this appeal that "[c]ounsel's failure to raise a contemporaneous objection to or effectively challenge Adkins' hearsay testimony rendered his assistance ineffective." However, defense counsel not only objected to the testimony during trial, he filed a pretrial motion in limine to prevent the hearsay testimony of Adkins from being presented. Thus, the trial court correctly summarily denied the claim as it pertained to Adkins' testimony—it was conclusively refuted by the record. Moreover, the predicate for the claim—that Adkins' hearsay testimony was inadmissible—was raised on direct appeal and the testimony was found to be inadmissible but harmless. *See* *Foster,* 778 So.2d at 916. Thus, the claim is procedurally barred.

***71** As to the hearsay testimony of Foster's codefendants Young, Shields, and Magnotti concerning what Black said about Schwebes' threat to report Black and Torrone to the school resource officer, the postconviction court also correctly summarily denied this claim. The claim is both procedurally barred and conclusively refuted by the record. Trial counsel did object to this hearsay testimony and on direct appeal we held:

> Foster argues that the statements of Magnotti, Young, and Shields, which repeated what Black had told them regarding Schwebes' statement to Black and Torrone about reporting them to campus authorities, constituted hearsay within hearsay and, therefore, were not admissible. We conclude that the trial court properly admitted these statements to establish both knowledge and motive, rather than to establish the factual truth of the contents of the statements. Specifically, these statements were introduced to show, first, that Foster and the rest of the group members present had knowledge of the statement made by Schwebes.

Foster, 778 So.2d at 915. Even though counsel did object and we ruled on the issue on direct appeal, Foster now contends that trial counsel was ineffective for failing to move in limine to exclude that hearsay testimony. Foster may not use the claim of ineffective assistance of counsel in an attempt to circumvent the procedural bar presented by this Court's ruling on direct appeal. *See* *Gore v. State,* 846 So.2d 461, 466 n. 4 (Fla.2003) ("Gore cannot now attempt to resurrect these issues as ineffective assistance of counsel claims on appeal to this Court by making conclusory allegations of counsel's ineffectiveness.").

Moreover, "a defendant may not simply file a motion for postconviction relief containing conclusory allegations ... and then expect to receive an evidentiary hearing. The defendant must allege specific facts that, when considering the totality of the circumstances, are not conclusively rebutted by the record...." *Allen v. State,* 854 So.2d 1255, 1258–59 (Fla.2003) (quoting *Kennedy v. State,* 547 So.2d 912, 913 (Fla.1989)). Because the claim that trial counsel failed to object to this testimony is conclusively rebutted by the record and procedurally barred, the postconviction court correctly summarily denied this claim.

D. *Brady/Giglio* and Newly Discovered Evidence Claims that the Forensic Science Evidence at Trial is Invalid

Although Foster characterized this issue on appeal as both a newly discovered evidence claim and a *Brady*/*Giglio* claim, he fails to make any argument as to the forensic evidence that the State knowingly presented false testimony or evidence, or that it withheld any exculpatory or impeaching evidence. In a brief conclusory argument, he also contends that trial counsel was ineffective in failing to challenge the forensic evidence, based in large part on the same criticisms and concerns expressed in a 2009 report issued by the National Academy of Sciences Committee on Identifying the Needs of the Forensic Sciences Community titled *Strengthening Forensic Science in the United States: A Path Forward.* [16]

In order to make a newly discovered evidence claim, Foster first must allege sufficient facts showing that the evidence was unknown by the trial court, the party, or his counsel, and that his counsel ***72** could not have known of it by use of due diligence. Second, if the evidence is newly discovered, it must be such that on retrial the defendant would probably be acquitted. *Johnston v. State,* 27 So.3d 11, 21 (Fla.2010) (citing *Jones v. State,* 709 So.2d 512, 521 (Fla.1998)). This Court held in *Johnston* that the same 2009 report cited by Foster does not meet the test for newly discovered evidence. We explained:

> First, we note that the report cites to existing publications, some of which were published even before Mary Hammond's [1983] murder. The majority of the remaining publications were published during the years when Johnston was pursuing postconviction relief. Therefore, we decline to conclude that the report is newly discovered evidence. Moreover, even if the report were newly discovered evidence, we conclude that the report lacks 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.... Nothing in the report renders the forensic techniques used in this case unreliable, and we note that Johnston has not identified how the article would demonstrate, in any specific way, that the testing methods or opinions in his case were deficient.

Johnston, 27 So.3d at 21–22 (bracketed material added). Similarly in this case, the report cites to existing publications, some of which were published before Schwebes' murder and many of which were published during the years when Foster was pursuing postconviction relief. Most importantly, new research studies are not recognized as newly discovered evidence. *See* *Schwab v. State,* 969 So.2d 318, 325 (Fla.2007) (holding that "new opinions" or "new research studies" contained in journal articles are not newly discovered evidence); *see also* *Rutherford v. State,* 940 So.2d 1112, 1117 (Fla.2006) (holding American Bar Association report published in 2006 was not newly discovered evidence because it was "a compilation of previously available information related to Florida's death penalty system").

Finally, just as we noted in *Johnston,* "[n]othing in the report renders the forensic techniques used in this case unreliable" and Foster "has not identified how the article would demonstrate, in any specific way, that the testing methods or opinions in his case were deficient." *Johnston,* 27 So.3d at 21–22.

As to Foster's conclusory claim of ineffective assistance of counsel in failing to challenge all the forensic evidence, the claim was also properly summarily denied. For all these reasons, we affirm the postconviction court's summary denial of this claim.

E. Summary Denial of Lethal Injection Claim

Foster next contends that the postconviction court erred in summarily denying his claim that Florida's lethal injection procedure violates the Eighth Amendment to the Constitution, although he concedes that this Court has repeatedly rejected challenges to Florida's lethal injection protocol. Foster contends that the Department of Corrections (DOC) protocol now calling for the substitution of pentobarbital for the sodium thiopental that had previously been used in the procedure renders the lethal injection procedure unconstitutional. He bases this claim primarily on the allegation that in 2011 the Danish pharmaceutical company Lundbeck, Inc., which then held the license to produce pentobarbital in this country, sought to stop the United States from using the drug to execute prisoners.

We made clear in *Pardo v. State,* 108 So.3d 558 (Fla.2012), in rejecting Pardo's constitutional challenge to the use of ***73** pentobarbital, that to raise a successful Eighth Amendment challenge, the defendant must demonstrate that "the conditions presenting the risk must be *'sure or very likely* to cause serious illness or needless suffering,' and give rise to 'sufficiently *imminent* dangers.' " *Id.* at 562 (quoting *Baze v. Rees,* 553 U.S. 35, 49–50, 128 S.Ct. 1520, 170 L.Ed.2d 420 (2008) (quoting *Helling v. McKinney,* 509 U.S. 25, 34–35, 113 S.Ct. 2475, 125 L.Ed.2d 22 (1993))). We also rejected this same challenge to the use of pentobarbital in *Valle v. State,* 70 So.3d 530, 540–41 (Fla.), *cert. denied,* —— U.S. ——, 132 S.Ct. 1, 180 L.Ed.2d 940 (2011), where an evidentiary hearing was held and expert testimony presented. We held in *Valle* that "[t]o the extent Valle asserts that the use of pentobarbital creates a risk of serious harm in light of the fact that it may be from a foreign source or lacks FDA approval for use in lethal injections, we reject these claims, as other courts have similarly done." 70 So.3d at 541 n. 13 (citing *Brewer v. Landrigan,* —— U.S. ——, 131 S.Ct. 445, 445, 178 L.Ed.2d 346 (2010)). We also held in *Valle* that the facts that Lundbeck sent letters to the DOC and the Governor stating that the use of pentobarbital in lethal injection was outside the approved label and that Lundbeck could not assure the safety and efficacy of its use in executions—and requesting that it not be used in executions—do not establish a substantial risk of serious harm. *Id.* at 542. Similarly, in *Ferguson v. Warden,* 493 Fed.Appx. 22 (11th Cir.), *cert. denied,* —— U.S. ——, 133 S.Ct. 498, 184 L.Ed.2d 334 (2012), an unpublished opinion, the Eleventh Circuit Court of Appeals rejected a challenge to the use of pentobarbital in the lethal injection sequence. *See Ferguson,* 493 Fed.Appx. at 25 (citing *Valle v. Singer,* 655 F.3d 1223, 1225 (11th Cir.2011)).

Foster attempts to distinguish his claim from those in prior cases by contending that if granted an evidentiary hearing, he would call witnesses from Lundbeck, Inc., to testify about the properties of the drug, and that he would call witnesses to testify about how the DOC is obtaining the drug and whether that process is in compliance with state and federal regulations, given that pentobarbital is a schedule II regulated substance under section 893.03(2), Florida Statutes (2012). Foster also contends that *Baze* left open the question of the constitutionality of lethal injection where it is not carried out as written and that Florida's history of deviating from execution procedures is relevant to that inquiry. This allegation relies on the conclusory and speculative assertion that Florida will not adhere to its execution procedures. However, we held in *Pardo* that in making such a challenge, the defendant cannot rely on conjecture or speculation. 108 So.3d at 565. Because these asserted reasons for holding an evidentiary hearing in this case are either based on conjecture and speculation or pertain only to matters that are unrelated to whether use of the drug would constitute cruel and unusual punishment, denial of relief on this claim was proper.

F. Summary Denial of Newly Discovered Evidence Claim that Foster's Death Sentence Constitutes Cruel and Unusual Punishment

Foster's next claim concerns the American Bar Association Death Penalty Moratorium Implementation Project and

the Florida Death Penalty Assessment Team report titled *Evaluating Fairness and Accuracy in the State Death Penalty Systems: The Florida Death Penalty Assessment Report,* September 17, 2006. Foster contends that the conclusions in the report show that the death penalty ***74** system in Florida is seriously flawed and that the problem areas identified in the report demonstrate the State's inability to produce a reliable result in a capital case. For this reason, he urges the Court to find Florida's death penalty violates the constitution. However, this Court has rejected identical claims based on the 2006 ABA report in a number of prior cases. *See, e.g., Seibert v. State,* 64 So.3d 67, 83–84 (Fla.2010) (rejecting claim based on the ABA report and reiterating that nothing in the report would cause the Court to recede from its past decisions upholding the constitutionality of the death penalty); *Tompkins v. State,* 994 So.2d 1072, 1082–83 (Fla.2008) ("[T]his Court has repeatedly rejected the claim that the ABA Report in question is newly discovered evidence."); *Power v. State,* 992 So.2d 218, 222 (Fla.2008) (reiterating that nothing in the report would cause the Court to recede from past decisions holding the death penalty constitutional and finding that "Power has 'not allege[d] how any of the conclusions in the report would render his individual death sentence unconstitutional.' " (quoting *Rolling v. State,* 944 So.2d 176, 181 (Fla.2006))); *Rutherford v. State,* 940 So.2d 1112, 1118 (Fla.2006) ("[N]othing therein would cause this Court to recede from its decisions upholding the facial constitutionality of the death penalty."). We also held in *Walton v. State,* 3 So.3d 1000, 1013 (Fla.2009), that although Walton attempted to allege that the ABA report's conclusions rendered his individual death sentence unconstitutional, the allegations related only to generalities that were noted in the report and did not relate in any specific way to the defendant's death sentence.

For these reasons, we find that this claim is without merit and affirm the postconviction court's summary denial.

G. Claim that Cumulative Error Requires a New Trial

In Foster's cumulative error claim he contends that he did not receive the fundamentally fair trial to which he was entitled under the Eighth and Fourteenth Amendments and that due process was violated by the "sheer number and types of errors involved in his trial, when considered as a whole." As grounds for this claim, he cites only "flaws in the system that convicted Mr. Foster" which have been "pointed out throughout not only this pleading, but also in Mr. Foster's direct appeal and his 3.850 Motion." We explained in *Troy v. State,* 57 So.3d 828 (Fla.2011), that where multiple errors are discovered, even if each standing alone is considered harmless, the cumulative effect of such errors may deny the defendant a fair trial. *Id.* at 844 (citing *McDuffie v. State,* 970 So.2d 312, 328 (Fla.2007)). "However, where the allegations of individual error are procedurally barred or meritless, a claim of cumulative error also fails." *Id.* (citing *Israel v. State,* 985 So.2d 510, 520 (Fla.2008)); *see also Delhall v. State,* 95 So.3d 134, 166 (Fla.2012); *Rogers v. State,* 957 So.2d 538, 554 (Fla.2007); *Parker v. State,* 904 So.2d 370, 380 (Fla.2005); *Wright v. State,* 857 So.2d 861, 871 (Fla.2003); *Downs v. State,* 740 So.2d 506, 509 n. 5 (Fla.1999). On direct appeal, this Court did find several errors in improper admission of hearsay, which we held were harmless. However, because we find no error has been demonstrated in this appeal that can be considered cumulatively with any other errors, relief is denied on this claim.

H. Summary Denial of Claim that Death Sentence Violates the Constitutional Prohibition Against Cruel and Unusual Punishment

Foster next contends the postconviction court erred in denying his claim that his death sentence is unconstitutional ***75** because Standard Jury Instruction (Crim.) 7.11, which instructs jurors on their role in the penalty phase of trial, failed to provide the jury with a clear understanding of its role in sentencing. Foster's substantive challenge to the standard jury instruction in this appeal is procedurally barred. *See, e.g., Stewart v. State,* 37 So.3d 243, 262 (Fla.2010) ("Stewart's substantive challenge to the [penalty phase] jury instructions is procedurally barred because it could have been raised on direct appeal.").

Moreover, even if not barred, Foster's claims are without merit. In *Patrick v. State,* 104 So.3d 1046 (Fla.2012), *cert. denied,* —— U.S. ——, 134 S.Ct. 85, 187 L.Ed.2d 65, 2013 WL 1915248 (2013), we reiterated that the claim that the standard jury instructions impermissibly dilute the jury's sense of responsibility is without merit. "[T]he standard penalty phase jury instructions fully advise the jury of the importance of its role, correctly state the law, do not denigrate the role of the jury, and do not violate

Caldwell v. Mississippi. [17] " *Patrick,* 104 So.3d at 1064 (citation omitted) (quoting *Jones v. State,* 998 So.2d 573, 590 (Fla.2008)); *see also* *McCray v. State,* 71 So.3d 848, 879 (Fla.2011) (rejecting ineffective assistance of counsel claim because there was no error in giving Standard Jury Instruction 7.11 (Penalty Proceedings—Capital Cases)); *Smithers v. State,* 18 So.3d 460, 472 (Fla.2009) (rejecting claim that counsel was ineffective for failing to litigate the sufficiency of the jury instructions that were virtually identical to Jury Instruction 7.11). We also made clear in *Chavez v. State,* 12 So.3d 199, 214 (Fla.2009), that the claims Foster raises are without merit. We stated:

> This Court has repeatedly rejected claims that the standard jury instructions impermissibly shift the burden to the defense to prove that death is not the appropriate sentence or that these instructions unconstitutionally denigrate the role of the jury in violation of *Caldwell v. Mississippi,* 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985). *See, e.g., Taylor v. State,* 937 So.2d 590, 599 (Fla.2006) (citing *Elledge v. State,* 911 So.2d 57, 79 (Fla.2005); *Mansfield v. State,* 911 So.2d 1160, 1180 (Fla.2005); *Sweet v. Moore,* 822 So.2d 1269, 1274 (Fla.2002)); *Carroll v. State,* 815 So.2d 601, 622–23 (Fla.2002); *Rutherford v. Moore,* 774 So.2d 637, 644 & n. 8 (Fla.2000); *Downs v. State,* 740 So.2d 506, 517 n. 5 (Fla.1999); *San Martin v. State,* 705 So.2d 1337, 1350 (Fla.1997); *Shellito v. State,* 701 So.2d 837, 842 (Fla.1997); *Sochor v. State,* 619 So.2d 285, 291 (Fla.1993); *Turner v. Dugger,* 614 So.2d 1075, 1079 (Fla.1992); *Combs v. State,* 525 So.2d 853, 855–58 (Fla.1988).
>
> *Chavez,* 12 So.3d at 214.

Foster also argued in the postconviction proceeding below that counsel was ineffective for failing to request the trial court to advise the jury that its recommendation would carry great weight and only be overridden in circumstances where no reasonable person could disagree. However, the record reflects that trial counsel did request the court to instruct the jury that it is a co-sentencer with the court and that the court must give the jury's recommendation great weight. Foster's trial counsel also specifically requested and was denied ***76** various other special jury instructions concerning the jury's role in recommending a sentence and the weight that would be given the jury's recommendation. [18] Therefore, counsel was not deficient in failing to request additional special instructions on the jury's role in sentencing. Because Foster's claims concerning the penalty phase jury instructions are procedurally barred, without merit, and conclusively refuted by the record, we affirm the court's summary denial of relief.

I. Summary Denial of Claim that the Burden of Proof was Shifted to Foster in the Penalty Phase

Finally, in a related claim, Foster contends that the trial court erred in summarily denying his claim that the trial court impermissibly shifted the burden to Foster to prove that the mitigators outweighed the aggravators by the instructions given concerning aggravating and mitigating factors. The instruction about which Foster complains is the trial court's instruction at the penalty phase advising the jury that it must decide whether sufficient aggravating circumstances exist that would justify imposition of the death penalty and whether there are mitigating circumstances sufficient to outweigh the aggravating circumstances.

To the extent that Foster is attempting to make a substantive challenge that the instructions shifted the burden, separate and apart from any claim of ineffective counsel, that claim is barred in postconviction proceedings. *See Stewart,* 37 So.3d at 262 ("Stewart's substantive challenge to the jury instructions is procedurally barred because it could have been raised on direct appeal."). [19] As noted above, we held in *Chavez* that the claim of burden shifting that Foster raises here is without merit. *See Chavez,* 12 So.3d at 214; *see also* *Serrano v. State,* 64 So.3d 93, 115 (Fla.2011) ("This Court has also rejected the claim that the jury instructions unconstitutionally shift the burden of proof."); *Schoenwetter v. State,* 931 So.2d 857, 876 (Fla.2006) ("This Court and the United States Supreme Court have repeatedly found that the standard jury instructions, when taken as a whole, do not shift the burden of proof to the defendant."). For these reasons, the postconviction court correctly denied this claim.

CONCLUSION

For the foregoing reasons, we affirm the denial of Foster's rule 3.850 motion for postconviction relief.

It is so ordered.

All Citations

132 So.3d 40, 38 Fla. L. Weekly S756

*77 POLSTON, C.J., and PARIENTE, LEWIS, QUINCE, CANADY, LABARGA, and PERRY, JJ., concur.

Footnotes

1 The aggravating factors were (1) the capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody; and (2) the capital felony was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification.

2 The trial court expressly rejected a number of proffered mitigators. The court did not reject the mitigators that Foster was helpful to neighbors, was a nice young man, was a good worker, was polite, and had good character, according to over twenty witnesses. The trial court did not state what, if any, weight was given to these mitigators. Other mitigators not rejected but expressly given little to no weight were that he was a premature baby and was abandoned by his father at one month of age, and that he will adjust well to prison. The trial court expressly rejected Foster's age of eighteen as a statutory mitigator.

3 *Spencer v. State,* 615 So.2d 688 (Fla.1993) (allowing for a hearing before only the judge at which additional evidence may be presented before sentencing).

4 Foster's motion was filed under rule 3.850 because the current version of the postconviction rule for capital cases, Florida Rule of Criminal Procedure 3.851, applies to postconviction motions filed on or after October 1, 2001. *See* *Franqui v. State,* 59 So.3d 82, 95 n. 13 (Fla.2011); Fla. R.Crim. P. 3.851(a).

5 In his amended motion, Foster raised the following postconviction claims: (1) Foster was deprived of his right to a fair and impartial jury due to juror misconduct and ineffective assistance of counsel during voir dire; (2) Foster is being denied his constitutional rights in that rules prohibiting his lawyers from interviewing jurors to determine if constitutional error was present are unconstitutional under the unique circumstances of this case; (3) Foster was denied effective assistance of counsel at the penalty phase in that trial counsel failed to investigate and prepare mitigating evidence and failed to adequately challenge the State's aggravating circumstances such that no adversarial testing could occur; (4) counsel rendered deficient performance in failing to effectively object to the avoid arrest aggravating circumstance at penalty phase; (5) Foster was denied effective assistance of counsel pretrial and at the guilt phase of his capital trial; (6) newly discovered evidence shows that the forensic science used to convict Foster was neither reliable nor valid, thus depriving him of his constitutional rights; (7) the existing procedure that the State of Florida utilizes for lethal injection constitutes cruel and unusual punishment in violation of the Eighth Amendment to the United States Constitution; (8) newly discovered empirical evidence demonstrates that Foster's conviction and sentence of death constitutes cruel and unusual punishment; (9) Foster's trial was fraught with procedural and substantive errors which cannot be harmless when viewed cumulatively; (10) Foster's death sentence constitutes cruel and unusual punishment in violation of the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution; and (11) Foster's death sentence violates the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution because the law and jury instructions shifted the burden to Foster to prove that death was inappropriate.

6 *Huff v. State,* 622 So.2d 982, 983 (Fla.1993) (holding that in all capital cases the judge must allow the attorneys an opportunity to be heard on an initial postconviction motion for the purpose of determining whether an evidentiary hearing is required and to hear legal argument relating to the motion).

7 Wootton testified that his main responsibility was to organize all the trial documents and computerize them into a trial program called "Trial Scout," which ultimately contained thousands of pages of documents.

8 Because Foster's lead defense counsel at trial, Robert Jacobs, died in 2007, his testimony about what mitigation was investigated and how strategic decisions were made concerning the penalty phase was unavailable.

9 Kelly Foster's biological father was Ronald Newberry, Ruby Foster's first husband.

10 Jim Greenhill, *Someone Has to Die Tonight* (2006).

11 Foster contends that Wootton's testimony was not competent because evidence supplemented into the record after the hearing—a letter written by Wootton—showed that he had a sexual relationship with Foster's mother, Ruby Foster, and told her in the letter that "counsel fucked up." Regardless of the fact that Wootton may have had a relationship with Ruby Foster during the trial and may not have been truthful about that fact when he testified at the hearing, the circuit court correctly found that the totality of the evidence supported the conclusion that the defense team was not confused, disorganized, or impaired.

12 The brain map which is the subject of Dr. Gur's testimony, based on statistical data and data derived from psychological testing, is to be distinguished from structural or functional brain imaging from an MRI, fMRI, or PET scan of an individual's brain.

13 Section 921.141(5)(e), Florida Statutes (Supp.1996), sets forth the "avoid arrest" aggravator as follows: "The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody."

14 In his postconviction claim below, Foster contended that trial counsel was ineffective in failing to adequately challenge the aggravating factors. On appeal, Foster contends that the trial court improperly applied the aggravating factor of "avoid arrest" and that the postconviction court denied Foster a hearing on this claim. The circuit court's order granting an evidentiary hearing did include the claim that trial counsel inadequately challenged the aggravating factors. The court noted in its final order that Foster presented no evidence to demonstrate how trial counsel was inadequate.

15 The postconviction court denied Foster's separate motion to interview Juror Q, finding that "[t]he alleged fact that Mr. [Q] was a defendant in a misdemeanor DUI case would not be material to his service as a juror in a murder trial.... Mr. [Q's] prior criminal case is also not material because it is too remote in time as, according to Defendant, it was 24 years prior to the juror's service."

16 *See* Nat'l Research Council, *Strengthening Forensic Science in the United States: A Path Forward* (2009), *available at* https://www.ncjrs. gov/pdffiles1/nij/grants/228091.pdf.

17 In *Caldwell v. Mississippi,* 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985), the Supreme Court held that it is "constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere." *Id.* at 328–29, 105 S.Ct. 2633.

18 Foster's trial counsel requested the following special instructions: that in order to recommend death, the juror must find that the aggravating circumstances outweigh the mitigating circumstances beyond all doubt; that although the jury's recommendation is considered to be advisory, the jury's recommendation of death is entitled to great weight; that if the juror finds that aggravating circumstances exist, the juror must determine whether the aggravating circumstances outweigh the mitigating circumstances beyond and to the exclusion of every reasonable doubt in deciding whether the sentence should be life or death; that mitigating circumstances need only be proven by the fair weight of the evidence; that any one mitigating factor standing alone may support the conclusion that death is not the appropriate penalty; and that to impose death, the juror must be convinced beyond a reasonable doubt that the totality of the aggravating circumstances outweighs the totality of the mitigating circumstances.

19 Foster's brief does not allege ineffective assistance of counsel in this claim, but had he done so it would lack merit. Our precedent is clear that counsel cannot be deemed ineffective for failing to raise a meritless claim. *See, e.g.,* *Troy v. State,* 57 So.3d 828, 843 (Fla.2011).

***** CAPITAL CASE *****

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

KEVIN DON FOSTER,

Petitioner,

v.

SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

APPENDIX H

State of Florida v. Kevin Don Foster, Case No. 1996-CF-1362B,
Circuit Court of the Twentieth Judicial Circuit in and for Lee County, Florida,
Final Order Denying Postconviction Relief (July 5, 2011) (without attachments)

IN THE CIRCUIT COURT FOR THE TWENTIETH JUDICIAL CIRCUIT IN AND FOR LEE COUNTY, FLORIDA

STATE OF FLORIDA,
Plaintiff,

vs. **CASE NO: 96-CF-1362B**

KEVIN DON FOSTER,
Defendant.
_____/

FINAL ORDER DENYING MOTION FOR POSTCONVICTION RELIEF

THIS CAUSE comes before the Court on Defendant's "Motion to Vacate Judgments Of Conviction And Sentence With Special Request For Leave To Amend," filed on September 27, 2001, and "Amended Motion To Vacate Judgment Of Conviction And Sentence With Special Request For Leave To Amend," filed May 27, 2010. The State filed a response to the amended motion on July 21, 2010. An evidentiary hearing was held on April 26-29, 2011. Being otherwise fully advised, the Court finds as follows:

1. The facts of this case are outlined in the initial Florida Supreme Court opinion on direct appeal, Foster v. State, 778 So.2d 906 (Fla. 2000).

> The evidence presented at trial established that in early April of 1996, a few teenagers organized a group called the "Lords of Chaos." The original membership of the group was made up of Foster, Peter Magnotti and Christopher Black, the latter two of whom were attending Riverdale High School ("Riverdale") at the time. Foster, the leader of the Lords of Chaos, was not a student. The group eventually grew to later include among other Riverdale students, Derek Shields, Christopher Burnett, Thomas Torrone, Bradley Young, and Russell Ballard as additional members. Each member of the Lords of Chaos had a secret code name. Foster's code name was "God." The avowed purpose of the group was to create disorder in the Fort Myers community through a host of criminal acts.
>
> On April 30, 1996, consistent with its purpose, the group decided to vandalize Riverdale and set its auditorium on fire. Foster, Black, and Torrone entered Riverdale and stole some staplers, canned goods, and a fire extinguisher to enable them to break the auditorium windows. Leading the group, Foster carried

a gasoline can to start the fire in the auditorium while the other group members, Shields, Young, Burnett, Magnotti, and Ballard, kept watch outside.

The execution of the vandalism was interrupted at around 9:30 p.m., when, to the teenagers' surprise, Riverdale's band teacher, Mark Schwebes, drove up to the auditorium on his way from a school function nearby. Upon seeing the teacher, Foster ran, but Black and Torrone were confronted by Schwebes who seized the stolen items from them. Schwebes told them that he would contact Riverdale's campus police the next day and report the incident. Schwebes then left to have dinner with a friend, David Adkins. [*1]

*1: Adkins testified that he saw Schwebes' vehicle parked at the spot where Black and Torrone were caught by Schwebes at about 9:30 p.m. He also saw someone running from the general location of Schwebes' vehicle.

When Black and Torrone rejoined the others, Black declared that Schwebes "has got to die," to which Foster replied that it could be done and that if Black could not do it, he would do it himself. Foster was apparently concerned that the arrest of Black and Torrone would lead to exposure of the group and their criminal activities.

Subsequently, Black suggested that they follow Schwebes and make the killing look like a robbery. However, upon further discussion, the group decided to go to Schwebes' home and kill him there instead. Foster then told the group that he would go home and get his gun. They obtained Schwebes' address and telephone number through a telephone information assistance operator, and confirmed this information by calling and identifying Schwebes' voice on his answering machine. They then went to Foster's home where they obtained a map to confirm the exact location of Schwebes' address, and procured gloves and ski masks in preparation for the killing. Foster decided to use his shotgun for the killing, and replaced the standard birdshot with #1 buckshot, a more deadly ammunition. The group also retrieved a license tag they had stolen earlier to use during the crime.

Black, Shields, Magnotti, and Foster agreed to participate in the murder, and at 11:30 p.m., drove to Schwebes' home. Shields agreed to knock at the door and for Black to drive. When the group finally arrived there, Foster and Shields walked up to Schwebes' door, and as Shields knocked, Foster hid with the shotgun. As soon as Schwebes opened the door, Shields got out of the way, Foster stepped in front of Schwebes and shot him in the face. As Schwebes' body was convulsing on the ground, Foster shot him once more.

Although there were no other eyewitnesses, two of Schwebes' neighbors heard the shots and a car as it left the scene. [*2] Paramedics arrived at the scene almost immediately and declared Schwebes dead. The medical examiner

confirmed that Schwebes died of shotgun wounds to his head and pelvis, and that Schwebes would have died immediately from the shot to the face.

*2: The two witnesses testified to hearing a car with a loud muffler leaving immediately after the two shots. Shield's car had a bad muffler. One testified to seeing a car drive away.

On the way to Foster's home after the killing, the group stopped to remove the stolen tag, and Foster wiped off the tag to remove any fingerprints before discarding it. Once home, the four of them got into a "group hug" as Foster congratulated them for successfully sticking to the plan. Foster then called Burnett and Torrone and boasted about how he blew off part of Schwebes' face and to watch for it in the news. The next day, on May 1, 1996, while at Young's apartment, the six o'clock news reported the murder, and Foster continuously laughed, hollered, and bragged about it. Young testified that Foster said that he looked Schwebes right in the eyes before shooting him in the face and then watched as this "red cloud" flowed out of his face.

The police found Foster's shotgun, a ski mask, gloves, and a newspaper clipping of the murder in the trunk of Magnotti's car. According to Burnett, he was directed by Foster to put those items in Magnotti's trunk. Foster's fingerprint was found on the shotgun, the latex gloves, and the newspaper. Burnett and Magnotti's prints were also found on the newspaper.

Foster's mother, Ruby Foster ("Ms. Foster"), testified on direct examination that Foster called her from home at about 4:30 p.m. on the day of the murder. When she got home that night, at 9 p.m., Foster was there. She later left the house at about 9:45 p.m., but found Foster home when she returned a little past 11 p.m. She made another trip to the Circle K store and returned at about 11:20 p.m. once again to find Foster where she had left him. On cross-examination, however, Ms. Foster admitted that she merely assumed Foster was at home when he called her. Additionally, all of the participants in the conspiracy and the murder testified that when they met at Foster's home on the night of the murder, no one was in the home and Foster had to disable the alarm apparatus upon entering.

All the members of the Lords of Chaos who participated in the murder and the conspiracy cooperated with the State through various plea agreements [*3] and testified to the above facts at trial against Foster with regard to the make-up of the group, Foster's leadership role in the group, criminal acts committed by the group prior to the murder, and his leadership and mastermind role in the conspiracy and the ensuing murder. Foster was convicted for the murder of Schwebes.

Foster, 778 So.2d at 909-912 (some footnotes omitted).

2. A jury convicted Defendant of first-degree murder and recommended a sentence of death by a vote of nine to three. The Court followed the recommendation, and sentenced Defendant to death. The Court found two aggravating factors, and found that the mitigating factors did not outweigh the aggravating factors. His convictions and sentences were affirmed on direct appeal by the Florida Supreme Court. *See* Foster v. State, 778 So.2d 906 (Fla. 2000). The Defendant did not file a petition for writ of certiorari with the United States Supreme Court.

3. Defendant raised eleven (11) claims in his motion for postconviction relief. On October 22, 2010, a hearing was held in accordance with Huff v. State, 622 So.2d 982 (Fla. 1993). In the order setting evidentiary hearing, this Court denied all grounds except Claims III(a) and (b). That order is hereby incorporated by reference. The evidentiary hearing was held on April 26-29, 2011. Defendant was present and represented by counsel at the evidentiary hearing. At the conclusion of the evidentiary hearing, the parties were directed to submit written closing arguments to the Court. Defendant's written closing arguments were filed on June 28, 2011. The State's written closing arguments were filed on June 29, 2011.

4. According to Strickland v. Washington, 466 U.S. 668 (1984), a claim of ineffective assistance of counsel requires that the defendant show, first, that counsel's performance was deficient and, second, that the deficient performance prejudiced the defense. Furthermore, with "regard to the required showing of prejudice, the proper standard requires the defendant to show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 669.

5. **As to Claim III(a),** Defendant argues counsel was ineffective during the penalty phase for failure to investigate and prepare mitigating evidence. Defendant argues counsel failed to obtain mental health records, which would have provided "significant mitigation leads." Defendant believes counsel abdicated his responsibility to prepare mitigation evidence to Defendant's mother. Defendant further argues counsel failed to have Defendant evaluated by a neuropsychologist, failed to present evidence of depression and organic brain damage, failed to present evidence of Defendant's emotional maturity, and failed to present evidence of nonstatutory mitigation.

Abdication Of Responsibility To Prepare Mitigation Evidence

6. Roberta Harsh, who was an investigator with the Public Defender's office, testified that trial counsel, Robert Jacobs, was the driving force on this case (Evidentiary hearing transcript p. 20). She stated that the paralegal, James Wootton, showed her the photographs selected for a slideshow prepared for the penalty phase, and she did not notice anything that Mr. Wootton did that was very relevant to the penalty phase (Evidentiary hearing transcript pp. 21-22; 28). Ms. Harsh said that the Public Defender's office "pulled out all the stops" with this case, and she could not think of anything else they could have done (Evidentiary hearing transcript p. 28). Mr. Rinard, co-counsel for Defendant, testified that Mr. Jacobs took primary responsibility for both phases of the trial (Evidentiary hearing transcript p. 172). He stated that no mitigation specialists were retained, and did not believe there were such specialists at that time (Evidentiary hearing transcript p. 172). Mr. Rinard testified that school records were obtained (Evidentiary hearing transcript p. 183). The defense did the best to humanize Defendant to the jury, "based on the information we had" and thought it was important to get positive

information about Defendant "in front of the jury as opposed to the infamous picture of him holding the submachine gun with a grin on his face" (Evidentiary hearing transcript pp. 185-186). While he did not recall specific mitigation evidence, he was sure that he and Mr. Jacobs discussed Defendant's age and maturity, progress in school, and work history (Evidentiary hearing transcript p. 187). Mr. Rinard testified that Mrs. Foster provided alibi information, information on the co-defendants and their families, and witnesses for mitigation (Evidentiary hearing transcript p. 192). Mr. Rinard recalled that Defendant, not his mother, made all decisions about his case (Evidentiary hearing transcript p. 206). Regarding the decision to go with humanizing Defendant, rather than other mitigation strategies, Mr. Rinard said "we went with what we had" (Evidentiary hearing transcript p. 207). He recalled that Mrs. Foster did not want to engage in any discussion that showed a weakness or deficit in Defendant (Evidentiary hearing transcript p. 207). Kelly Foster, Defendant's sister, indicated she did not have much contact with Mr. Jacobs or Mr. Rinard (Evidentiary hearing transcript p. 150). She was in Mr. Jacobs' office every week dropping off papers her mother drafted detailing what Mrs. Foster believed were inconsistencies in the case (Evidentiary hearing transcript pp. 150-151). She assumed that Mr. Jacobs made the decision for what mitigation to present (Evidentiary hearing transcript p. 157).

7. Mr. Wootton testified that part of his job was to operate a new software program, and that Defendant's case was the first to be used with that software, in which every document received in the case was scanned into the program (Evidentiary hearing transcript pp. 40-41; 44). He indicated that Defendant's mother, Ruby Foster, was present for approximately half of the team meetings (Evidentiary hearing transcript p. 50). Ruby Foster voiced her opinion, and she was listened to, Mr. Wootton testified, but she did not accept reality, and thought that Defendant

could not have committed the murder and had been framed by his friends (Evidentiary hearing transcript p. 52). Ruby Foster supplied contact information for character witnesses, and sometimes gave them proposed questions for trial witnesses (Evidentiary hearing transcript p. 53). Mr. Wootton stated that there was overwhelming evidence against Defendant, both physical and eyewitness evidence, that they prepared for the penalty phase early on in the case, and that Ruby Foster was upset that they were doing so (Evidentiary hearing transcript pp. 54-55; 57). The defense had Defendant's school and medical records, and there was nothing significantly mitigating in those records (Evidentiary hearing transcript p. 60). Mr. Wootton testified that the opinion of the defense was to portray Defendant as a good kid gone bad, and try to convince the jury not to put him to death (Evidentiary hearing transcript p. 61). To show that Defendant had a good upbringing, they obtained photographs from Ruby Foster to use in a slideshow (Evidentiary hearing transcript p. 63). He testified that Mr. Jacobs put a tremendous amount of work into Defendant's case, and that all decisions on trial strategy were Defendant and Mr. Jacobs' (Evidentiary hearing transcript pp. 81-82). Mr. Wootton said the defense did not depend on Ruby Foster for information, and they had "sharp" investigators "who did a lot of outreach work" (Evidentiary hearing transcript p. 67). He stated that "our office did our job" and represented Defendant "to the best of our ability with what we had to work with" (Evidentiary hearing transcript p. 76). The testimony introduced at the evidentiary hearing shows that Defendant and Mr. Jacobs made the decisions regarding the case, and that Mrs. Foster merely provided contact information for possible penalty phase witnesses, lists of what she believed were inconsistencies in the evidence, or questions she believed should be asked of witnesses. Therefore, Defendant has failed to meet his burden of proof to demonstrate either prong of Strickland, and has not

established that Mr. Jacobs abdicated his responsibility to prepare mitigation evidence.

Depression And Mental Mitigation

8. Mr. Wootton explained that Mr. Jacobs handled mostly murder cases during that time period, and that some of the other cases had mental health issues (Evidentiary hearing transcript p. 80). Mr. Wootton recalled that when Mr. Jacobs asked about mental illness, Ruby Foster "exploded," saying there was nothing wrong with her son (Evidentiary hearing transcript pp. 58-59). Based on the mental health evaluations that had been done, Mr. Wootton testified that the decision was made that no further experts needed to be hired, because there was nothing in the evaluations to support mental health issues or abuse, and that all information from Defendant and his family was that Defendant came from a healthy, wholesome family (Evidentiary hearing transcript pp. 88-89). He stated that the defense received no negative information about the family from the family they contacted, and no other family members ever came forward (Evidentiary hearing transcript p. 90). Mr. Wootton recalled that the defense was never given any information that the gunshot to Defendant's abdomen prior to the offense was intentionally inflicted, and that Defendant told them it was an accident (Evidentiary hearing transcript pp. 94-97). Mr. Wootton reiterated that the defense looked for "anything and everything" that could be used for mitigation, and that he was aware of everything that came in on this case from discovery, investigator notes, or meetings (Evidentiary hearing transcript pp. 99-100).

9. Kelly Foster, Defendant's sister, testified as to the family's background and her mother's four husbands. She testified that her father, Ronald Newberry, had emotional issues from Vietnam (Evidentiary hearing transcript p. 107). She described Defendant's father, Jack Bates as a brutal man, but did not recall him hurting anyone (Evidentiary hearing transcript p.

109). Ms. Foster stated that Brian Burns was physical with her mother and had anger issues, such that he had broken windows and once broke her mother's nose (Evidentiary hearing transcript pp. 113; 115). Finally, she testified that there was turmoil in the house when they lived with John Foster, who adopted Defendant, that Mr. Foster argued with their mother, and that Defendant sometimes intervened in fights between Mr. Foster and their mother (Evidentiary hearing transcript pp. 123-124; 134). Ms. Foster indicated that Defendant acted out as a teen (Evidentiary hearing transcript pp. 137-138). She testified that Defendant was notorious as a child for getting into accidents, and described him as clumsy and hyper, and sometimes depressed (Evidentiary hearing transcript pp. 145; 147). Ms. Foster admitted she never told the defense team that Mr. Burns or Mr. Foster were abusive to her mother (Evidentiary hearing transcript p. 161).

10. Defense experts Dr. Wald and Dr. Masterson were appointed almost immediately upon Defendant's arrest, but Mr. Rinard did not remember if the experts filed reports, or what they reported (Evidentiary hearing transcript pp. 174-175; 180). He recalled a mention of Defendant receiving a concussion, but based on what was presented at trial, Mr. Rinard indicated he would have to say they did not have any information about head injuries or trauma for Defendant (Evidentiary hearing transcript pp. 196-197). He testified that Defendant and Mrs. Foster denied any history of depression, and that Defendant, Mrs. Foster, and Ms. Foster were all adamant that the self inflicted gun shot wound to Defendant's abdomen before the offense was an accident (Evidentiary hearing transcript pp. 198-199).

11. Mr. Rinard testified that the defense experts reviewed Defendant's medical records, though he did not know what records were reviewed (Evidentiary hearing transcript p. 201). He

stated that Mr. Jacobs only handled the large cases, and had worked on previous cases where a mental health issue was presented (Evidentiary hearing transcript p. 205). Mr. Rinard did not observe any mental health issues or depression in Defendant, and described Defendant as one of the least depressed clients he had ever met, based on the amount of time Defendant had spent in jail (Evidentiary hearing transcript p. 208). Mr. Rinard testified that Defendant denied any psychological or mental health issues for himself or his family, and denied any head injuries (Evidentiary hearing transcript pp. 211-212).

12. Defendant also presented testimony by Defendant's aunt, Linda Ahlbritton, his cousin, Candy Green, his grandfather Jack Bates, Ron Newberry, and his father Jack Bates. Ms. Ahlbritton admitted she had no relationship with Mrs. Foster or Defendant after Mrs. Foster's divorce from Ron Newberry (Evidentiary hearing transcript p. 227). While she stated that she believed Defendant's grandfather suffered from paranoia, that his grandmother had dementia, his aunt was paranoid, an uncle "had trouble with alcohol," and another aunt committed suicide, she testified that she never saw Mrs. Foster depressed (Evidentiary hearing transcript pp. 227-230). She had no observations regarding Defendant. Ms. Green testified that she thought their grandmother, grandfather, and an uncle were paranoid, that she believed her father had undiagnosed depression, and that an aunt had committed suicide (Evidentiary hearing transcript pp. 242-243). She never observed any displays of temper from Mr. Burns or Mr. Foster (Evidentiary hearing transcript pp. 244-245). She described Defendant as hyper and wild (Evidentiary hearing transcript pp. 246; 248-249). Ms. Green testified that Defendant was accident prone, and described a fall they took where Defendant may have hit his head (Evidentiary hearing transcript p. 247). She stated that neither she nor Defendant went to the

hospital after the fall (Evidentiary hearing transcript p. 252). Defendant's grandfather Jack Bates, Sr. testified that he had not had contact with Defendant after age 8 or 9 (Evidentiary hearing transcript p. 337). He described Defendant as hyper (Evidentiary hearing transcript p. 337).

13. Ron Newberry testified that Defendant was hyper, but was "just a normal, happy kid" (Evidentiary hearing transcript p. 355). He never noticed Defendant being depressed, but did describe Defendant as clumsy (Evidentiary hearing transcript pp. 355; 360). He indicated that he suffered a nervous breakdown after he returned from Vietnam, and saw a psychologist for six months, but after that, he suffered no effects (Evidentiary hearing transcript pp. 356-357). Mr. Newberry did testify at the penalty phase (Evidentiary hearing transcript pp. 360-361). Defendant's father, Jack Bates, Jr., testified that Defendant was in the hospital briefly after he was born for breathing problems (Evidentiary hearing transcript pp. 438-439). He described Defendant as hyper and active (Evidentiary hearing transcript p. 439). He indicated he saw Defendant every month or so after the divorce (Evidentiary hearing transcript p. 441). He testified that he attended the trial, spoke to Mr. Jacobs about questions he had regarding some of the testimony, and that Mr. Jacobs took his advice (Evidentiary hearing transcript pp. 445-446).

14. While much was made by postconviction counsel regarding Defendant's grandfather's alleged disowning of Mrs. Foster and Defendant following Mrs. Foster's divorce from Ron Newberry, where the grandfather allegedly stated that Defendant should never have been born, there was no testimony that Defendant was in any way affected. The accounts of this one incident indicate that Defendant was very young, and afterwards, there was no contact with the grandfather or little contact with other members of Mrs. Foster's family. The Court finds

counsel was not ineffective for failing to call any of these witnesses, or presenting this testimony. Mrs. Foster and Ms. Foster had ample opportunity to inform the defense about any negative mitigating information, yet provided none. Defendant, Mrs. Foster, and Ms. Foster all soundly declared to trial counsel that the gun shot wound to Defendant's abdomen prior to the murder was an accident. Indeed, all the testimony indicates Defendant was clumsy. While Ms. Foster mentioned that Defendant also jumped from a bridge into the river, this incident was not elaborated upon, and taken in light of Defendant's multiple criminal activities at the time with the Lords of Chaos, could have been merely a teenage stunt, rather than evidence of severe depression as postconviction counsel contends. Mr. Rinard was not asked whether Defendant or his family mentioned this incident to the defense team. None of the family members contacted by the defense team provided any negative information. Trial counsel cannot be found ineffective for failing to present negative mitigating information, when none was provided to him by Defendant, his family, or friends, and where counsel had no reason to believe such negative information existed. Anderson v. State, 18 So.3d 501, 510 (Fla. 2009); Henyard v. State, 883 So.2d 753 (Fla. 2004). In such a circumstance, it was not unreasonable for the defense to rely on an attempt to humanize Defendant to the jury. Even had all the information been elicited during the penalty phase that Defendant argued in his motion and written closing argument should have been elicited, the Court finds that the mitigating evidence that Defendant's friend died of cancer, the gun shot wound, the jump off the bridge, the break up with the girlfriend, and his mother's divorce would not have any reasonable probability of changing the outcome of the trial, as this mitigating evidence would not have outweighed the aggravating factors presented at trial. The record shows that Defendant planned the murder of the victim in retaliation for the group being

prevented from vandalizing the school gym and the group being potentially discovered, that Defendant shot the victim in the head at point blank range with a shotgun, and that the Defendant bragged about it afterwards. The alleged depression and upheaval Defendant now urges the Court to consider as mitigation would not in any way have outweighed those facts, as established at trial and the Florida Supreme Court opinion.

15. The evidentiary hearing testimony likewise reveals no "significant mitigation leads," as Defendant argued in his motion. Rather, the testimony reveals that most of these witnesses were extended family members who had limited contact with Defendant, or no contact with Defendant beyond about age 8. According to the testimony, Defendant was a normal, active child, if hyper and clumsy. The testimony revealed no abuse, no concussions, and only one recall of a possible head injury. Although Ms. Foster testified that their mother may have been struck by, or got into mutual fights with, two of her husbands, there was no testimony regarding abuse to Defendant. Alleged abuse of the mother would not be significantly mitigating for Defendant, in that evidence of this during the penalty phase would not have substantially outweighed the aggravating circumstances. Of the alleged mental health issues attributed to the extended family, there was no testimony of any diagnoses by an expert, but merely the witness' belief that certain members of the family became paranoid or suffered dementia as they got older, which is not an uncommon occurrence. That certain other extended family members had issues with alcohol or depression would also not be significantly mitigating for Defendant, and evidence of such conditions in extended family members, with whom Defendant had no contact, would not have substantially outweighed the aggravating circumstances. Testimony that Defendant was born prematurely or did not have his father as a constant figure in his life would have been cumulative

to the testimony of Mrs. Foster at trial. Foster, 778 So.2d at 911-912; (Penalty phase transcript p. 130). Even if alternate witnesses could provide more detailed testimony, trial counsel is not ineffective for failing to present cumulative evidence. Darling v. State, 966 So.2d 366 (Fla. 2007). Further, Defendant has failed to demonstrate any prejudice from these witnesses not being called at trial, or the testimony being presented, as none of the testimony presented resulted in any mitigation evidence that would outweigh the aggravating factors.

Allegations Of Impairment Of Defense Team

16. To the extent that Defendant argues that his defense was impaired due to Mr. Jacobs' Parkinson's disease, the paralegal "snoozing" during the penalty phase, or alleged misconduct by co-counsel Mr. Rinard on unrelated cases, these claims fail. The allegations regarding Mr. Rinard were ruled irrelevant by the Court (Evidentiary hearing transcript pp. 203-204). As it relates to the allegation in Defendant's motion that Mr. Wootton slept during trial, Mr. Wootton stated that he did not (Evidentiary hearing transcript p. 74). Ms. Harsh testified that Mr. Jacobs had tremors for years, which were noticeable to her (Evidentiary hearing transcript p. 26). Mr. Wootton testified that he worked with Mr. Jacbos every day and knew he had the disease, but never saw tremors, and that "Mr. Jacobs was not effected by that disease in any fashion or form that would have hindered his ability to defend Kevin" (Evidentiary hearing transcript pp. 74-76). Mr. Rinard testified that, aside from being tired at the end of the day like they all were, he never saw Mr. Jacobs trembling or confused (Evidentiary hearing transcript p. 201). Jack Bates, Jr. testified that he believed Mr. Jacobs was frustrated or confused during trial (Evidentiary hearing transcript p. 447). Both Mr. Wootton and Mr. Rinard were sitting at the defense table with Mr. Jacobs during the trial, and the Court finds their testimony that Mr. Jacobs was not trembling or confused to be

more credible than those of other witnesses who were not in close proximity to Mr. Jacobs during the trial, or who have a motive for bias against Mr. Jacobs and in favor of Defendant's motion. The Court finds that Defendant has failed to meet his burden of proof that the defense team was in any way impaired during the trial.

17. On June 28, 2011, Defendant filed a motion to reopen the evidentiary hearing or supplement the record with a letter from Mr. Wootton to Mrs. Foster, received by postconviction counsel after the evidentiary hearing, and a comparison letter from Mr. Wootton to counsel. Copies of the letters are attached. By order rendered July 5, 2011, the record was supplemented to include the letters. The letter to Mrs. Foster appears to indicate they did have a personal relationship, contradicting Mr. Wootton's testimony at the evidentiary hearing. However, the Court does not find that the contradicted testimony regarding the relationship, has any reasonable probability of changing the outcome. That Mr. Wootton did have a relationship with Mrs. Foster does not change the substance of the rest of his testimony regarding Defendant's case. In one portion of the letter, Mr. Wootton tells Mrs. Foster that 'Counsel f***d up.' From the context of the letter, it is unclear whether Mr. Wootton refers to Defendant's case, or Mrs. Foster's case, as Mr. Wootton then goes on to discuss her arrest, plea bargain, and incarceration.[1] Even if Mr. Wootton did refer to Defendant's trial counsel, the Court finds this statement less than credible. The letters reveal that Mr. Wootton, incarcerated in prison and isolated from female company, was somewhat overly affectionate in his writings to both Mrs. Foster and postconviction counsel. It is not inconceivable that Mr. Wootton would tell Mrs. Foster what he thought she wanted to

[1] Ruby Foster was convicted of conspiracy to commit murder in Lee Case No. 00-CF-2609A, after she and Defendant attempted to solicit James Greenhill in a plot to murder three witnesses who had testified against Defendant. Mr. Greenhill was a former reporter for the News-Press, and was writing a true crime book about Defendant's case. The Court presumes the statement in the letter that Mr. Wootton did not know "why you ever trusted (if you did) that clown" and that "we know how the press convicts those it goes after" refer to Mr. Greenhill

hear. The Court finds Mr. Wootton's testimony, under oath, at the evidentiary hearing, where the Court was able to observe him and assess his demeanor, to be more credible than the letters.

Failure To Call Neuropsychologist

18. As it relates to Defendant's arguments regarding counsel's failure to call a neuropsychologist, Defendant called four experts to testify at the evidentiary hearing. Dr. Bordini testified that he evaluated Defendant in 2006 (Evidentiary hearing transcript p. 257). He reviewed records, conducted a clinical interview with Defendant, and performed a battery of neuropsychological tests (Evidentiary hearing transcript pp. 260-261; 263; 268-270). Dr. Bordini found it significant that Defendant had lost oxygen at birth, believing this put Defendant at high risk for neurological issues (Evidentiary hearing transcript pp. 264-265).[2] He testified that the tests revealed "soft" neurological signs of issues, and that there was a significant discrepancy between Defendant's verbal and nonverbal scores on the IQ test which could impact behavior (Evidentiary hearing transcript pp. 271; 278). However, he stated that Defendant's high verbal IQ score of 137 put him in the gifted range, and that his lower nonverbal score of 105 was average (Evidentiary hearing transcript pp. 278-279). Dr. Bordini diagnosed Defendant as having difficulties with executive function, and stated Defendant had depression, a nonverbal learning disorder, and possibly had bipolar disorder (Evidentiary hearing transcript pp. 290-291).

19. Regarding the gunshot wound to the abdomen, Dr. Bordini testified that Defendant told him it was an accident, and he did not have any emotional problems when discussing it (Evidentiary hearing transcript p. 301). He stated that none of the possible head injuries

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and the conspiracy case.

[2] To the extent that postconviction counsel repeatedly argues in her written closing argument that Defendant "nearly died" at birth and trial counsel ignored this evidence, the hospital records do not support this argument. Rather, the records show that, while Defendant was ill for a day or two due to respiratory distress syndrome, he recovered quickly, was deemed healthy enough to have a circumcision surgery, and was discharged six days after his birth.

reported would fall into the range of severe head injuries (Evidentiary hearing transcript p. 293). Dr. Bordini believed that those possible head injuries could have exacerbated any existing difficulties (Evidentiary hearing transcript pp. 293-294). This portion of the testimony is pure speculation. He opined that Defendant was very invested in appearing superior to others, downplayed any issues he was having, had low self awareness, was grandiose, and did not pick up on social cues (Evidentiary hearing transcript pp. 282-283). Dr. Bordini testified that Defendant tended to *minimize* his difficulties and that "he's not giving it to me" (Evidentiary hearing transcript pp. 291-292). If Defendant did not share information that might be mitigating with Dr. Bordini ten years after trial, and did not share such information with defense counsel before trial, counsel cannot be ineffective for not following up on mental health mitigation that was not disclosed. On cross-examination, Dr. Bordini testified that he could not diagnose Defendant with depression before his arrest, and that any depression existed subsequent to Defendant's arrest (Evidentiary hearing transcript pp. 316-317). The Court finds that Dr. Bordini's "soft" findings of possible neurological issues is speculative. Given that Defendant possesses a gifted verbal IQ and an average nonberbal IQ, even after 15 years of incarceration, the Court finds the contention that Defendant has organic brain damage to be not credible.

20. Defendant then called Dr. Sultan. Dr. Sultan testified that she has seen Defendant about ten times between 2002 and the present (Evidentiary hearing transcript p. 371). She is a psychologist, and was retained to evaluate Defendant for any mental defects that may have existed at trial, and for mitigation evidence (Evidentiary hearing transcript p. 370). Dr. Sultan stated that Defendant was immature, that he was obviously psychologically disturbed, that Defendant was initially hostile and reluctant to share any negative information, and that he spoke

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Copies of relevant portions of the birth records are attached.

only about how wonderful his family and mother were (Evidentiary hearing transcript pp. 371-372). She believed that over time in prison, Defendant "matured" and was able to reveal more (Evidentiary hearing transcript p. 372). Dr. Sultan reviewed records, and believed that while she thought Defendant was born with deficiencies, the oxygen he received at birth also caused deficiencies (Evidentiary hearing transcript pp. 380-381). She testified regarding the gunshot wound to the abdomen that Defendant repeatedly stated the gun discharged accidentally, and that he had not intended to harm himself (Evidentiary hearing transcript pp. 381-382).

21. Dr. Sultan also interviewed members of Defendant's family (Evidentiary hearing transcript p. 386). The Court finds the testimony of Dr. Sultan regarding her interviews with the family to be cumulative to the testimony provided by the various family members during the evidentiary hearing. Further, Defendant and his family adamantly denied any negative mitigation evidence at the time of trial. That Defendant and his family have, 15 years later, after repeated questioning by psychologists and psychiatrists retained by the defense, changed their stories, does not alter the fact that it was not unreasonable for trial counsel to have relied on the information provided by Defendant and his family at that time. Dr. Sultan diagnosed Defendant with bipolar 1 disorder (Evidentiary hearing transcript p. 405). She testified that she found the statutory mitigators that Defendant was under the influence of mental illness, and "possibly" organic disorder (Evidentiary hearing transcript p. 411). On cross-examination, Dr. Sultan admitted she did not speak to the codefendants or review their testimony, and did not speak to anyone about Defendant other than Defendant's family (Evidentiary hearing transcript pp. 416-417). Thus, the only information Dr. Sultan obtained was information from persons who have a bias in favor of Defendant. While she testified that an 18 year old boy's brain was immature, and would result in

an inability to engage in logical planning.(Evidentiary hearing transcript p. 406), this testimony is contradicted by the trial record, which indicates that Defendant planned the murder to the extent of looking up the victim's address in the directory, calling the victim's phone to ensure he had the right address, obtaining masks, changing the license plate, and choosing a firearm from his mother's pawn shop that he believed could not be traced with forensics. The Court finds Dr. Sultan's testimony less than credible.

22. The defense next called Dr. Gur, a neuropsychologist. Dr. Gur testified that he received the results of the 2006 evaluation conducted by Dr. Bordini, and entered those results into an algorithm that creates an image of the brain (Evidentiary hearing transcript pp. 461-462). This algorithm was developed from weights derived by four leading experts in the field that were part of a university group (Evidentiary hearing transcript p. 498). The algorithm was patented by the university, and later sold to a company called Biologic (Evidentiary hearing transcript p. 506). Dr. Gur believed the patent had since expired, such that the algorithm was available to the public (Evidentiary hearing transcript p. 507). The algorithm has not been updated since it was developed (Evidentiary hearing transcript p. 503). Dr. Gur opined that Defendant is highly intelligent, near genius range for his verbal IQ score, and that his performance, or nonverbal, IQ score is average (Evidentiary hearing transcript pp. 489-490). He believed that this discrepancy is a strong indication of brain damage, and showed impaired executive functions (Evidentiary hearing transcript pp. 491; 494). Dr. Gur conceded that none of the testing performed on Defendant examined the subcortical structures, so the image was limited (Evidentiary hearing transcript p. 496).

23. The final defense expert was Dr. Hyde, who was admitted as an expert in neurology

and psychiatry (Evidentiary hearing transcript pp. 650-651). Dr. Hyde testified he was retained by postconviction counsel to evaluate Defendant in 2010 (Evidentiary hearing transcript p. 651). He reviewed documents, and interviewed Defendant and his mother (Evidentiary hearing transcript pp. 651-652). Dr. Hyde testified that Defendant scored perfectly on neurological and cognitive tests (Evidentiary hearing transcript p. 656). However, Defendant had some facial asymmetry, and mirrored movement of his left hand with his right hand, which Dr. Hyde believed were "subtle findings" that "may be" referable to right hemisphere dysfunction (Evidentiary hearing transcript pp. 656-658). He further believed the respiratory distress at birth reflected developmental dysfunction (Evidentiary hearing transcript p. 659). Dr. Hyde believed there was some supporting evidence of depression after Defendant's arrest (Evidentiary hearing transcript pp. 660-661). He did not feel the reported minor head injuries caused any brain damage to Defendant, but was rather a reflection of impulsive behavior or being clumsy (Evidentiary hearing transcript pp. 662-663). Dr. Hyde testified that Defendant met the symptoms of bipolar disorder, and that Defendant's symptoms were not consistent with narcissistic disorder (Evidentiary hearing transcript pp. 667-668). He stated that he had found the statutory mitigating factors of brain dysfunction and psychiatric disease (Evidentiary hearing transcript p. 673).

24. On cross-examination, Dr. Hyde acknowledged that he had evaluated Defendant 12 years after trial, and that Defendant and his mother reported no abuse in the home (Evidentiary hearing transcript pp. 674; 676; 679-680). Dr. Hyde called Dr. Gur's brain imaging method "recent" (Evidentiary hearing transcript p. 683). He testified that respiratory distress at birth was definitely not hypoxia, contrary to Dr. Bordini's testimony (Evidentiary hearing transcript pp.

684-685). Dr. Hyde conceded that he has testified 100% for defense, and is opposed to the death penalty in all cases except genocide (Evidentiary hearing transcript p. 686). The Court finds Dr. Hyde's "subtle findings" speculative at best. Considering Dr. Hyde's stated bias against the death penalty, and given that his bias could potentially have influenced his findings, his testimony in this capital case is less than credible.

25. The State called Dr. Wald, who evaluated Defendant prior to trial, and two experts. Dr. Prockop was admitted as an expert in neurology (Evidentiary hearing transcript pp. 517-518). He testified that he reviewed the abstracts and articles by Dr. Gur, as well as Dr. Gur's deposition, and it was his opinion that the brain image produced by Dr. Gur was inaccurate and invalid (Evidentiary hearing transcript p. 519). He stated that this brain imaging has not held up to scientific scrutiny, that no physicians or experts in the field have used it, and no scientific articles have cited the procedure (Evidentiary hearing transcript p. 519). Dr. Prockop testified that he had searched for any articles citing the brain imaging method, and found none (Evidentiary hearing transcript pp. 522-523). He only found abstracts published by Dr. Gur and his group (Evidentiary hearing transcript p. 523). Dr. Prockop questioned the defense experts' opinions that oxygen at birth could cause brain damage, indicating that the only danger he was aware of was that oxygen at birth could cause eye damage, and that the procedure had been phased out in recent years due to that problem (Evidentiary hearing transcript p. 525). On cross-examination, Dr. Prockop reiterated that the brain image method was inaccurate because the population control of 17 people cited in abstracts by Dr. Gur was too small (Evidentiary hearing transcript pp. 520-521). "The range of normal is very broad, and to assess what is normal, you need a lot of normals" (Evidentiary hearing transcript p. 530). He also testified that the results of

the testing done by Dr. Bordini were considered soft data, the interpretation of which depends on the perspective of the individual (Evidentiary hearing transcript pp. 535-536). Dr. Prockop stated that he attempted to find the full articles for Dr. Gur's abstracts, but that full articles did not exist (Evidentiary hearing transcript p. 538).

26. The State also called Dr. Gamache. Dr. Gamache was admitted as a neuropsychologist (Evidentiary hearing transcript p. 581). Dr. Gamache testified that Dr. Bordini's opinions that some abnormalities were signs of defects is wrong (Evidentiary hearing transcript pp. 583-584). He believed that Dr. Bordini's opinion that respiratory distress at birth caused damage was not supported by the data, since it is relatively common in infants, and the probability of brain damage from this is "next to zero" (Evidentiary hearing transcript pp. 584-587). Further, Dr. Gamache testified there was no evidence for brain damage in Defendant's case, and he was discharged within days (Evidentiary hearing transcript p. 587). He criticized Dr. Bordini's test results, stating that it was "making a huge leap to extrapolate brain damage" from Defendant's score on individual tests, and that Dr. Bordini's "premise that frontal lobe damage" was indicated from the abbreviated card sort test was not supported by the data, and did not correlate to the full version of the test (Evidentiary hearing transcript pp. 592-593). Dr. Gamache testified that a large difference between a person's verbal and nonverbal IQ scores did not equate to any defect (Evidentiary hearing transcript pp. 598-599). Dr. Gamache analogized Defendant's verbal IQ score to an exceptionally fast 100 meter sprint, and his nonverbal IQ score to a bench press that was just above average, wherein "the fact that he is exceptionally fast does not mean that his bench press strength is impaired; in fact, it's above average. It's not indicative of impairment" Evidentiary hearing transcript p 638). He stated that Defendant "is smarter than

the average person by a significant amount" (Evidentiary hearing transcript pp. 598-599). While Dr. Gamache stated that the trail making test has been shown to be specifically sensitive to frontal lobe defects, he criticized Dr. Bordini's belief that Defendant's results in this test showed such damage, since Defendant's scores were either above average or average, and not indicative of any brain damage (Evidentiary hearing transcript pp. 599-601). Dr. Gamache believed that the tests used by Dr. Bordini were older tests, and there are newer tests that focus on frontal lobe abilities that were not administered to Defendant (Evidentiary hearing transcript pp. 601-602). He testified that while the tests used by Dr. Bordini can be useful in making inferences about behavior, there was no evidence in the records that Defendant had any impairment in goals, planning, or switching goals (Evidentiary hearing transcript pp. 604-605). As an example, Dr. Gamache pointed out that Defendant adjusted his goal of vandalizing the gym into a goal of eliminating the victim as a witness to the vandalism, as part of his overall goal of criminal behavior and anarchy, which shows Defendant had no deficits in executive function (Evidentiary hearing transcript pp. 605-606).

27. Dr. Gamach also criticized Dr. Sultan's conclusion that Defendant had bipolar disorder as being only her subjective assessment (Evidentiary hearing transcript pp. 606-608). He pointed out that her assessment appears inaccurate, especially since she thought Defendant's IQ was only average (Evidentiary hearing transcript pp. 606-608). Dr. Gamache testified that he did not find support for bipolar disorder in Defendant's behavioral history, but he did find that Defendant met the criteria for narcissistic disorder (Evidentiary hearing transcript p. 610). Dr. Gamache stated he was familiar with brain map images in quantitative EEG and limited application in those areas, but that the brain map images used by Dr. Gur were not used

frequently by neuropsychologists (Evidentiary hearing transcript pp. 616-617). On cross-examination, Dr. Gamache indicated that he testified in one third of cases as a court appointed expert, in one third for the defense, and in one third for the State (Evidentiary hearing transcript p. 619). He testified that he was familiar with the brain image algorithm, but did not know of anyone other than Dr. Gur using it, and it was his opinion that the method was not generally accepted by the scientific community (Evidentiary hearing transcript pp. 629-630).

28. He testified that he was familiar with brain maturation, and that it did not manifest in subtle signs (Evidentiary hearing transcript pp. 696-697). He cited a recent study done at Emory University, which found that, contrary to common belief in the field, juveniles who engaged in the riskiest behavior had more mature brains then juveniles who did not engage in any risky behavior (Evidentiary hearing transcript pp. 697-698). Dr. Gamache questioned the diagnoses of bipolar disorder, since those diagnoses were based only on Defendant's self reporting (Evidentiary hearing transcript pp. 699-700). He also testified that he had reviewed the jail records, and there is no evidence of a depressive episode, just behavior typical of someone who was in custody for a serious charge (Evidentiary hearing transcript pp. 702-703). When questioned by postconviction counsel on cross-examination regarding Defendant's alleged refusal to shower or change his bed linen every time these activities were offered, Dr. Gamache testified that the jail records showed this remained Defendant's pattern for the two years he was incarcerated at the jail, and was not evidence that Defendant was crashing from a manic episode, contrary to Dr. Sultan's testimony (Evidentiary hearing transcript p. 704). He pointed out that that a jail record indicating "no" recreation did not mean Defendant refused recreation, but that possibly none was offered, since other jail records clearly state "refused" when Defendant

refused an activity (Evidentiary hearing transcript p. 705). Regarding the gunshot wound to Defendant's abdomen prior to the murder, Dr. Gamache testified that if the emergency room staff had suspected Defendant was suicidal, they would have made a referral (Evidentiary hearing transcript p. 715). The emergency room report, relevant portions of which are attached, indicates that Defendant and his mother both stated that the discharge of the gun was accidental, and denied any depression or suicidal tendencies. Defendant's statements at the time are more credible than Defendant's assertions of depression now, when he has a motive to show some sort of deficiency.

29. The State also called Dr. Wald, who, along with neurologist Dr. Masterson, was appointed to evaluate Defendant prior to trial. Dr. Wald testified that, although he did not recall evaluating Defendant, in evaluating any individual, he would conduct the evaluations in the same basic manner each time (Evidentiary hearing transcript pp. 556; 561). His records indicated that he had twice evaluated Defendant, had reviewed records, and had interviewed Mrs. Foster (Evidentiary hearing transcript pp. 557-558). In his evaluation, he would have observed Defendant's demeanor, emotions, and body language, would have obtained Defendant's social history and background, looked for delusions or paranoia, and inquired after Defendant's state of mind at the time of the offense (Evidentiary hearing transcript pp. 561-565). Dr. Wald testified that his evaluation would have detected bipolar disorder, and that the evaluation should have picked up frontal lobe damage in most cases (Evidentiary hearing transcript pp. 565-568). If he had thought there was a need for neurological testing of Defendant based on his evaluation, he would have referred Defendant to Dr. Masterson (Evidentiary hearing transcript p. 569). The record did not reflect that he submitted a written report, and Dr. Wald stated that he would never

prepare a report if he was asked not to do so (Evidentiary hearing transcript pp. 569-570). As stated previously, Mr. Wootton testified that Mr. Jacobs decided not to hire further experts, since the evaluations of Defendant indicated no mental health issues and no mental health mitigation. See Mr. Wootton's testimony, *infra*. To the extent that Mr. Wootton was tasked with inputting all documents and information relating to the case into the new computer program, the Court finds his testimony to be credible that, had any potential mitigating mental health information been received, trial counsel would have followed up on it. Co-counsel, Mr. Rinard, testified that the defense went with what they had, regarding their mitigation strategy of humanizing the Defendant. See Mr. Rinard's testimony, *infra*. Considering this testimony with Dr. Wald's testimony that his evaluation would have found bipolar disorder or frontal lobe damage, had Defendant possessed such defects, and considering the previous testimony by Mr. Wootton and Mr. Rinard, the Court finds that Defendant has failed to demonstrate that the pretrial evaluations of Defendant uncovered any mental defects or organic brain damage, or any significant mental health mitigation, which trial counsel failed to present.

30. That Defendant has now offered expert opinions different from those of the experts appointed before trial does not mean relief is warranted. Cherry v. State, 781 So.2d 1040 (Fla. 2000). Trial counsel made a reasonable tactical decision not to pursue further mental health investigation after receiving an initial diagnosis that there was no mental health mitigation, and that initial diagnosis is not rendered incompetent merely because defendant has now secured the testimony of an expert who gives a more favorable diagnosis. Asay v. State, 769 So.2d 974 (Fla. 2000). Defense counsel is entitled to rely on the evaluations conducted by qualified mental health experts, even if, in retrospect, those evaluations may not have been as complete as others

may desire. Stewart v. State, 37 So.3d 243, 251-252 (Fla. 2010), *citing* State v. Sireci, 502 So.2d 1221, 1223 (Fla.1987). "[T]rial counsel's reliance on his retained experts is not proven unreasonable simply because another expert . . . questions the thoroughness of the prior evaluations." Stewart, 37 So.3d at 253-254. Counsel cannot be deemed ineffective simply because he relied on what may have been less than complete pretrial psychiatric evaluations. State v. Sireci, 502 So.2d 1221, 1223 (Fla. 1987). In addition, the denials of any mental health issues by Defendant and his family collaborated those evaluations, and counsel is not ineffective for relying on the utter lack of any negative mitigating evidence and not investigating deeper. Further, a subsequent finding of a mental deficiency does not necessarily warrant a new sentencing hearing, unless the psychiatric examinations were so grossly insufficient that they ignored clear indications of either mental retardation or organic brain damage. Id. at 1224. Defendant presented no evidence that Dr. Wald's evaluations were grossly insufficient, nor that he ignored clear indications Defendant suffered from mental retardation or organic brain damage. The Defendant's postconviction experts' "soft" and "subtle" findings do not cause the Court to find that any clear indications existed that Defendant suffered from organic brain damage. Defendant has failed to meet his burden as to either prong of Strickland. Therefore, **Ground III(a) is DENIED.**

31. **As to Claim III(b)**, Defendant argues counsel was ineffective during the penalty phase for failure to adequately challenge the aggravating circumstances such that no adversarial testing could occur. Mr. Rinard testified that the defense knew negative information was going to be presented during the guilt phase, but was not sure that most of that information had anything to do with the aggravating circumstances, except perhaps the nature of the murder, which would

go toward the cold calculated and premeditated aggravating factor (Evidentiary hearing transcript p. 186). He had no recollection of arguing against some of the aggravating factors during the penalty phase, although the transcript and his notes in the case file indicated he did (Evidentiary hearing transcript p. 186). Postconviction counsel did not inquire further on this issue. Defendant presented no evidence that, or in what way, the arguments made at trial against the aggravating factors were inadequate. Defendant has thus failed to meet his burden of proof to establish either prong of Strickland. Therefore, **Claim III(b) is DENIED.**

32. For the reasons stated in the previous order directing an evidentiary hearing, Claims I(a) I(b), I(c), II, III(c), IV, V, VI, VII, VIII, IX, X, and XI are hereby denied.

33. The following are attached hereto: (1) relevant portions of the trial transcript; (2) relevant portions of the penalty phase transcript; (3) relevant portions of the record; and (4) relevant portions of the transcript of the evidentiary hearing.

Accordingly, it is

ORDERED AND ADJUDGED that that Defendant's "Amended Motion To Vacate Judgment Of Conviction And Sentence With Special Request For Leave To Amend," is DENIED. Defendant may file a notice of appeal within thirty (30) days of the date this order is rendered.

DONE AND ORDERED in Chambers at Fort Myers, Lee County, Florida, this 5 day of July, 2011.

Edward J. Volz, Jr.
Circuit Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above Order has been furnished to **Stephen D. Ake**, Assistant Attorney General, Office of the Attorney General, 3507 East Frontage Road, Suite 200, Tampa, FL 33607-7013; **Terri L. Backhus**, Special Assistant, Capital Collateral Regional Counsel, Southern Region, 101 N.E. 3rd Avenue, Suite 400, Fort Lauderdale, FL 33301; **Scott Gavin**, Capital Collateral Regional Counsel, Southern Region, 101 N.E. 3rd Avenue, Suite 400, Fort Lauderdale, FL 33301; **Jennifer Gutmore**, Assistant State Attorney, P.O. Box 399, Fort Myers, FL 33902-0399; **David Maijala**, Assistant State Attorney, P.O. Box 399, Fort Myers, FL 33902-0399; and **Administrative Office of the Courts (XIV)**, 1700 Monroe Street, Fort Myers, FL 33901; this 7 day of July, 2011.

CHARLIE GREEN
Clerk of Court

By: Tompkins
Deputy Clerk

***** CAPITAL CASE *****

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

KEVIN DON FOSTER,

Petitioner,

v.

SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

APPENDIX I

Kevin Don Foster v. State of Florida, 778 So. 2d 906 (Fla. 2000),
Florida Supreme Court Opinion Affirming Conviction and Sentence on Direct Appeal

778 So.2d 906
Supreme Court of Florida.

Kevin Don FOSTER, Appellant,
v.
STATE of Florida, Appellee.

No. SC93372

Sept. 7, 2000.

Rehearing Denied Jan. 22, 2001.

Synopsis

Gang leader was convicted in the Circuit Court, Lee County, Isaac Anderson, J., of first-degree murder and was sentenced to death. Leader appealed. The Supreme Court held that: (1) pretrial publicity did not entitle leader to change of venue; (2) victim's statement to gang members that he would report them to police for theft and vandalism was not hearsay; (3) his statement to friend about intent to report the members was inadmissible hearsay; (4) gang member's statement that victim "had to die" was admissible hearsay under co-conspirator exception; (5) prosecution witness' taped statement to police was not hearsay on redirect examination; (6) statement by defendant's mother allegedly attempting to persuade mother of co-conspirator to assist in making up an alibi was inadmissible hearsay; (7) information charging other crimes by the leader was inadmissible; (8) trial court could reject the age as a mitigating circumstance; and (9) the death sentence for a cold, calculated, and premeditated murder (CCP) to avoid arrest was proportional.

Affirmed.

Wells, C.J., concurred in the result and filed statement.

Attorneys and Law Firms

***909** James Marion Moorman, Public Defender, and Robert F. Moeller, Assistant Public Defender, Tenth Judicial Circuit, Bartow, Florida, for Appellant.

Robert A. Butterworth, Attorney General, and Robert J. Landry, Assistant Attorney General, Tampa, Florida, for Appellee.

Opinion

PER CURIAM.

We have on appeal the judgment and sentence of the trial court imposing the death penalty upon Kevin Don Foster. We have jurisdiction. Art. V, § 3(b)(1), Fla. Const. As explained below, we affirm Foster's conviction and sentence of death.

TRIAL

The evidence presented at trial established that in early April of 1996, a few teenagers organized a group called the "Lords of Chaos." The original membership of the group was made up of Foster, Peter Magnotti and Christopher Black, the latter two of whom were attending Riverdale High School ("Riverdale") at the time. Foster, the leader of the Lords of Chaos, was not a student. The group eventually grew to later include, among other Riverdale students, Derek Shields, Christopher Burnett, Thomas Torrone, Bradley Young and Russell Ballard as additional members. Each member of the Lords of Chaos had a secret code name. Foster's code name was "God." The avowed purpose of the group was to create disorder in the Fort Myers community through a host of criminal acts.

***910** On April 30, 1996, consistent with its purpose, the group decided to vandalize Riverdale and set its auditorium on fire. Foster, Black, and Torrone entered Riverdale and stole some staplers, canned goods, and a fire extinguisher to enable them to break the auditorium windows. Leading the group, Foster carried a gasoline can to start the fire in the auditorium while the other group members, Shields, Young, Burnett, Magnotti, and Ballard, kept watch outside.

The execution of the vandalism was interrupted at around 9:30 p m., when, to the teenagers' surprise, Riverdale's band teacher, Mark Schwebes, drove up to the auditorium on his way from a school function nearby. Upon seeing the teacher, Foster ran, but Black and Torrone were confronted by Schwebes who seized the stolen items from them. Schwebes told them that he would contact Riverdale's campus police the next day and report the incident. Schwebes then left to have dinner with a friend, David Adkins. [1]

When Black and Torrone rejoined the others, Black declared that Schwebes "has got to die," to which Foster replied that it could be done and that if Black could not do it, he would

do it himself. Foster was apparently concerned that the arrest of Black and Torrone would lead to the exposure of the group and their criminal activities.

Subsequently, Black suggested that they follow Schwebes and make the killing look like a robbery. However, upon further discussion, the group decided to go to Schwebes' home and kill him there instead. Foster then told the group that he would go home and get his gun. They obtained Schwebes' address and telephone number through a telephone information assistance operator, and confirmed this information by calling and identifying Schwebes' voice on his answering machine. They then went to Foster's home where they obtained a map to confirm the exact location of Schwebes' address, and procured gloves and ski masks in preparation for the killing. Foster decided to use his shotgun in the killing, and replaced the standard birdshot with # 1 buckshot, a more deadly ammunition. The group also retrieved a license tag they had stolen earlier to use during the crime.

Black, Shields, Magnotti, and Foster agreed to participate in the murder, and at 11:30 p m., drove to Schwebes' home. Shields agreed to knock at the door and for Black to drive. When the group finally arrived there, Foster and Shields walked up to Schwebes' door, and as Shields knocked, Foster hid with the shotgun. As soon as Schwebes opened the door, Shields got out of the way, Foster stepped in front of Schwebes and shot him in the face. As Schwebes' body was convulsing on the ground, Foster shot him once more.

Although there were no other eyewitnesses, two of Schwebes' neighbors heard the shots and a car as it left the scene.[2] Paramedics arrived at the scene almost immediately and declared Schwebes dead. The medical examiner confirmed that Schwebes died of shotgun wounds to his head and pelvis, and that Schwebes would have died immediately from the shot to the face.

On the way to Foster's home after the killing, the group stopped to remove the stolen tag, and Foster wiped off the tag to remove any fingerprints before discarding it. Once home, the four of them got into a “group hug” as Foster congratulated them for successfully sticking to the plan. Foster then called Burnett and Torrone and boasted about how he blew off part of Schwebes' face and to watch for it in the ***911** news. The next day, on May 1, 1996, while at Young's apartment, the six o'clock news reported the murder, and Foster continuously laughed, hollered, and bragged about it. Young testified that Foster said that he looked Schwebes right in the eyes before shooting him in the face and then watched as this “red cloud” flowed out of his face.

The police found Foster's shotgun, a ski mask, gloves, and a newspaper clipping of the murder in the trunk of Magnotti's car. According to Burnett, he was directed by Foster to put those items in Magnotti's trunk. Foster's fingerprint was found on the shotgun, the latex gloves, and the newspaper. Burnett and Magnotti's prints were also found on the newspaper.

Foster's mother, Ruby Foster (“Ms.Foster”), testified on direct examination that Foster called her from home at around 4:30 p.m. on the day of the murder. When she got home that night, at 9 p.m., Foster was there. She later left the house at about 9:45 p m., but found Foster home when she returned a little past 11 p.m. She made another trip to the Circle K store and returned at about 11:20 p.m. once again to find Foster where she left him. On cross-examination, however, Ms. Foster admitted that she merely assumed that Foster was at home when he called her. Additionally, all the participants in the conspiracy and the murder testified that when they met at Foster's home on the night of the murder, no one was in the home and Foster had to disable the alarm apparatus upon entering.

All the members of the Lords of Chaos who participated in the murder and the conspiracy cooperated with the State through various plea agreements[3] and testified to the above facts at trial against Foster with regard to the make-up of the group, Foster's leadership role in the group, criminal acts committed by the group prior to the murder, and his leadership and mastermind role in the conspiracy and the ensuing murder. Foster was convicted for the murder of Schwebes.

PENALTY PHASE

During the penalty phase, the State presented one witness. The State's witness, Robert Duram, was the director of student assignment for Lee County and former principal of Riverdale. Duram testified to his knowledge and hiring of Schwebes as band director. He also testified that Schwebes' death was devastating not only to the school, but also to the rest of the student body, whose participation in extra-curricular activities dropped significantly as a result of the tragedy. The school had to bring in numerous counselors to help the students cope with the effects of Schwebes' death.

The defense presented numerous witnesses who presented a picture of Foster as a kind and caring person. May Ann Robinson, Foster's neighbor, testified that he once helped her start her car and offered to let her borrow a lawn mower. Robert Moore, another neighbor, testified that Foster was well-mannered and a hard worker. Shirley Boyette found Foster to be very caring, intelligent, and well-mannered. Robert Fike, Foster's supervisor at a carpentry shop, and James Voorhees, his co-worker, found him to be a reliable worker. Voorhees also testified that Foster was very supportive to Voorhees' son who suffered from and eventually died of leukemia. Similarly, Raymond and Patricia Williams testified that Foster was very nice to their son who suffered from spina bifida. Peter Albert, who is confined to a ***912** wheelchair, related how Foster had helped Albert's mother care for him after his wife died. Foster also helped Albert in numerous other ways, including preparing his meals, fixing things around the house, and helping Albert in and out of his swimming pool.

There was additional testimony that described Foster's involvement with foreign exchange students. Foster was also known to have given positive advice to young children. Foster's sister, Kelly Foster, testified to how he obtained his GED after dropping out of high school and that he obtained a certificate for the completion of an "auto cad" program at a vocational-technical school. Finally, Foster's mother testified that he was born prematurely and suffered from allergies, and that Foster's father abandoned him a month after birth. On cross-examination, many of the witnesses who testified to Foster's kindness admitted that they had not been in contact with him for a number of years.

SENTENCE

The jury recommended that Foster be sentenced to death by a nine-to-three vote. Following a *Spencer* hearing, [4] the trial court found two aggravating factors: (1) the capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody; [5] and (2) the capital felony was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification. [6] Further, the court rejected the statutory mitigator of age-Foster was eighteen at the time of the crime-and attached very little to no weight to some twenty-three nonstatutory mitigators offered by Foster. [7] The trial court followed the jury's recommendation and imposed the death penalty. Foster now appeals and raises seven issues for review. [8]

Change of Venue

Initially, Foster asserts that, in light of extensive local pretrial publicity, the trial court erred in denying his several motions for change of venue. A criminal defendant is guaranteed a right to a fair trial by an impartial jury by both our state and federal constitutions. *See* *Singer v. State,* 109 So.2d 7, 15 (Fla.1959). We have accordingly provided the following test to determine when a change of venue is necessary to protect a defendant's right:

> 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 on the evidence presented in the courtroom.

Rolling v. State, 695 So.2d 278, 284 (Fla.1997) (quoting *McCaskill v. State,* 344 So.2d 1276, 1278 (Fla.1977)). Once a defendant raises the partiality of the venire, the trial court must make the following two-pronged analysis: "(1) the extent and nature of any pretrial publicity; and (2) the difficulty encountered in actually selecting a jury." *Rolling,* 695 So.2d at 285. ***913** The burden of showing bias and prejudice is upon the defendant. *See* *Murphy v. Florida,* 421 U.S. 794, 799, 95 S.Ct. 2031, 44 L.Ed.2d 589 (1975).

Of course, the mere existence of some pretrial publicity does not necessarily lead to an inference of partiality. *See* *Farina v. State,* 679 So.2d 1151, 1154 (Fla.1996) (citing *Bundy v. State,* 471 So.2d 9, 19 (Fla.1985)). Rather, the pretrial publicity must be examined in the context of

numerous circumstances, including: (1) when it occurred in relation to the time of the crime and the trial; (2) whether the publicity was made up of factual or inflammatory stories; (3) whether the publicity favored the prosecution's side of the story; (4) the size of the community; and (5) whether the defendant exhausted all of his peremptory challenges. *See* *Rolling,* 695 So.2d at 285.

Trial courts are also encouraged to attempt to impanel a jury before ruling on a change of venue. *See* *Henyard v. State,* 689 So.2d 239, 245 (Fla.1996); *Davis v. State,* 461 So.2d 67, 69 n. 1 (Fla.1984); *Manning v. State,* 378 So.2d 274, 276 (Fla.1979). This provides trial courts an opportunity to determine through voir dire whether it is actually possible to find individuals who have not been seriously infected by the publicity. *See* *Rolling,* 695 So.2d at 285. If the trial court finds such individuals, a jury is selected. Where the voir dire fails to produce these individuals, the trial court must grant the motion for change of venue. *See id.*

While there was indeed a great deal of publicity about the case in the local community, applying the principles of law discussed above, we conclude the trial court properly denied Foster's motions for change of venue. We first focus on the nature and impact of the cited articles, and whether the articles were objective and factual in nature or whether they were inflammatory. *See* *Rolling,* 695 So.2d at 285 (citing *Provenzano v. State,* 497 So.2d 1177, 1182 (Fla.1986)).

Foster provided voluminous records of various newspaper articles and television news accounts of pretrial publicity. These included: (1) news stories immediately after Foster's arrest of how Foster and the Lords of Chaos had planned to go to Disney World and kill as many black tourists as possible; (2) an article on May 9, 1996, titled "Kevin Foster Head of Pack" with various references to Foster as a "psychopath," "Opie with a gun," and a "Jekyll–and–Hyde character;" (3) a column published on March 1, 1998, just two days before trial, titled, "Old Sparky's hot jolt may await Foster" with references to Foster as a "redneck, racist, gun-crazed punk." Another news article reported that a candidate for sheriff had made similar remarks about Foster.

In contrast to the above-cited articles, most of the articles relied upon were not inflammatory. Instead, they reported on the stages and activities of the prosecution and on plea agreements entered into by the other members of the Lords of Chaos. In fact, in one of the articles, Foster's defense counsel was quoted as saying that he had expected the plea agreements and had been preparing for them all along. Some articles focused on Schwebes' life and his contribution to the community. Still, others focused on students' reaction to and coping with the incident and on the state of various programs dealing with teenagers. Many others simply commented on and updated the proceedings in the case. We conclude that the media coverage as a whole did not reach such an inflammatory level to have irreversibly infected the community so as to preclude an attempt to secure an impartial jury.

In *United States v. Lehder–Rivas,* 955 F.2d 1510, 1524 (11th Cir.1992), for instance, the media referred to the defendant as a "drug kingpin, narcoterrorist" who was fascinated with the Third Reich. There, the court found that "such publicity, while unfavorable, did not reach the extreme levels required to trigger a finding of presumed prejudice." *Id.* Yet, the ***914** media references in *Lehder–Rivas* cannot be said to have been less inflammatory than the ones in the instant case. Moreover, of the jurors eventually empaneled in this case, no one indicated any exposure to the more egregious references cited by Foster.

We must also consider the actual timing of the articles. Most were published some two years before the trial actually took place. In *Rolling,* as pointed out by Foster, we concluded that three and a half years was a significant time in which the tremendous publicity brought out initially by the case may have dissipated in its effect. *See* *Rolling,* 695 So.2d at 287. Similarly, whether the publicity in this case still affected the community after a two-year lapse between the time of the brunt of the media frenzy and the time of trial requires that we examine the voir dire, as provided for by the second prong of *Rolling.*

During voir dire, most of the veniremen stated that they had heard something about this case through the media. As in *Rolling,* however, the court eliminated all those who stated that their fixed opinion would prevent them from reviewing the evidence in a fair manner. Moreover, as in *Rolling,* the trial court carefully permitted individual voir dire in two phases, first about pretrial publicity, and second about the venire's positions on the death penalty. The jurors who were finally selected all stated without equivocation that they could be fair and set aside what they had heard. *See* *Rolling,* 695 So.2d at 287; *Henyard,* 689 So.2d at 246 ("While the jurors had

all read or heard something about the case, each stated that he or she had not formed an opinion and would consider only the evidence presented during trial in making a decision."). Most importantly, however, not only did Foster not challenge for cause any of the jurors actually seated, he was also allotted additional peremptory challenges by the trial court in order to ensure that no biased jurors were selected.

Of course, trial courts should approach this issue conservatively and err on the side of excluding a potentially biased juror. In addition, there are instances in which a trial court must grant a change of venue motion despite assurances of impartiality from the jurors. Certain communities may be so small and the residents so close and personally connected to each other that a particular defendant could not get a fair trial in that community in a highly publicized case. However, Lee County, from which Foster's jury was selected, does not appear to be such a place. With a population of 405,637, Lee is the eleventh largest of the sixty-seven counties in this state. *See Florida Statistical Abstract* 10 (33d ed.1999). It should be noted that Rolling's sentencing proceedings, which involved the highly publicized murder of five University of Florida students, took place in the university town of Gainesville itself, in Alachua County. Alachua is about half the size of Lee, with a high concentration of students and residents in Gainesville itself. Nevertheless, the trial court successfully selected a jury there. At the end, a jury was also selected in just three days here, as opposed to the three weeks it took in *Rolling.*

We therefore conclude that, as in *Rolling,* the trial court did not abuse its discretion in denying the change of venue motions since the circumstances from the record do not indicate that the community was so infected by the media coverage of this case that an impartial jury could not be impaneled, and an impartial jury appears to have been actually seated.

Hearsay

In issue two, Foster contends that the trial court erred in admitting hearsay testimony of several witnesses.

As defined in section 90.801(1)(c), Florida Statutes (1997), " '[h]earsay' is a statement, other than the one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." A statement may, however, be offered to prove a ***915** variety of things besides its truth. *See Williams v. State,* 338 So.2d 251 (Fla. 3d DCA 1976) ("Merely because a statement would not be admissible for one purpose (i.e., its truth or falsity) does not mean it is not admissible for another (e.g., to show the declarant's state of mind."). A statement may be offered, for instance, to show motive, *see Escobar v. State,* 699 So.2d 988, 997 (Fla.1997); *Chatman v. State,* 687 So.2d 860, 862 (Fla. 1st DCA 1997); knowledge, *see Colina v. State,* 570 So.2d 929, 932 (Fla.1990); *Duncan v. State,* 616 So.2d 140, 141 (Fla. 1st DCA 1993); or identity, *see State v. Freber,* 366 So.2d 426, 427 (Fla.1978). Of course, the alternative purpose for which the statement is offered must relate to a material issue in the case and its probative value must not be substantially outweighed by its prejudicial effect. *See State v. Baird,* 572 So.2d 904, 907 (Fla.1990).

Foster argues that the statements of Magnotti, Young, and Shields, which repeated what Black had told them regarding Schwebes' statement to Black and Torrone about reporting them to campus authorities, constituted hearsay within hearsay and, therefore, were not admissible. We conclude that the trial court properly admitted these statements to establish both knowledge and motive, rather than to establish the factual truth of the contents of the statements. Specifically, these statements were introduced to show, first, that Foster and the rest of the group members present had knowledge of the statement made by Schwebes. As provided for in *Colina,* that is a perfectly permissible purpose for which an otherwise hearsay statement may be admitted. *See Colina,* 570 So.2d at 932 ("[D]efense counsel was merely trying to show that Castro had made various statements about the Diazes from which the jury could infer that Castro knew the Diazes.").

The statements were also admitted to establish that Foster had a motive for killing Schwebes as soon as he found out about Schwebes' promise to tell the authorities the next morning. As in *Escobar,* where a defendant's hearsay statement that "he would kill a police officer before he would go back to jail" was admitted to show motive, the statements here established a motive to kill Schwebes and prevent him from reporting the group to the authorities. *Escobar,* 699 So.2d at 997. For both of these purposes, knowledge and motive, the truth of the matter asserted is not an issue. Additionally, knowledge and motive were both material for the prosecution to demonstrate why Schwebes was killed. *See Koon v. State,* 513 So.2d 1253, 1255 (Fla.1987) (admitting statement to show that, having heard it, the defendant could have formed the motive

to kill a witness, rather than admitting it for the truth of the matter asserted). We conclude the statements were properly admitted.

Foster's next hearsay challenge relates to the testimonies of Young, Magnotti, and Shields that Black said that Schwebes "had to die." The State argues the statements were properly admitted as those of coconspirators. That is, the State asserts, a statement of a coconspirator of the party made during the course and in furtherance of the conspiracy may be admitted since it is not being offered for its truth but rather to establish the conspiracy and the defendant's participation in it. *See* § 90.803(18)(e), Fla. Stat. (1997).

To qualify under this exception, the existence of the conspiracy must be proven by a preponderance of the evidence and independent of the hearsay statements. *See Romani v. State,* 542 So.2d 984, 986–87 (Fla.1989). Here, there was independent evidence establishing the conspiracy. For instance, Black himself admitted to participating in the conspiracy and saying that Schwebes had to die. There was also testimony from members of the group regarding the planning and the carrying out of the killing (i.e., finding out Schwebes' place of residence and replacing the birdshot with the more lethal ammunition) and ***916** testimony from Young about Foster's admission to, and description of, carrying out the killing the following day. We agree these statements were properly admitted.

Next, Foster challenges the testimony of David Adkins, whom Schwebes had dinner with immediately after the confrontation with the members of the Lords of Chaos and disclosed his intent to report the group. Unlike the testimonies of the group members, Adkins' testimony was hearsay and we can find no exception allowing its introduction. Adkins' testimony was also clearly cumulative considering that Black and Torrone had already testified to what Schwebes said to them; and Magnotti, Shields, and Young had also testified as to what Black and Torrone told them after their confrontation with Schwebes. However, we find any error in the admission of Adkins' testimony to be harmless in light of the substantial unrebutted direct evidence establishing Foster's knowledge and motive concerning Schwebes' statements. *See Moore v. State,* 701 So.2d 545, 550 (Fla.1997) ("Because there was direct evidence from other witnesses that Moore possessed a gun on the actual day of the murder and direct evidence that Moore shot the victim, there is no reasonable possibility that the error contributed to the conviction here.").

Next, Foster argues that the testimony of Shields and the introduction of his taped statement on redirect constituted hearsay. On direct examination, Shields testified to his involvement in the conspiracy and the murder of Schwebes. Specifically, he testified as to the plan to vandalize the school, the confrontation with Schwebes as he saw it from where he stood that night, Black's account of the confrontation with Schwebes, Black's suggestion that Schwebes had to die and Foster's immediate agreement and subsequent planning of the murder, and the actual description and execution of the murder. On cross-examination, defense counsel asked numerous questions implying that Shields' testimony was motivated by the deal he made with the State. On redirect and over defense counsel's objection, the trial court allowed Shields to testify about his taped statement to law enforcement officers immediately after his arrest, and before any plea negotiations were discussed. The State was also allowed to introduce and play the taped statement to buttress Shields' direct testimony as a prior consistent statement. Foster argues the trial court erred in admitting this testimony.

A prior consistent statement of a witness who testifies at trial and is subject to cross-examination concerning that statement is excluded from the definition of hearsay when the statement is offered to "rebut an express or implied charge ... of improper influence, motive, or recent fabrication." § 90.801(2)(b), Fla. Stat. (1997); *see also Chandler v. State,* 702 So.2d 186, 198 (Fla.1997); *Rodriguez v. State,* 609 So.2d 493, 499 (Fla.1992).

In *Rodriguez,* following defense counsel's references to plea agreements entered into by two prosecution witnesses, the court allowed statements the witnesses made prior to the plea agreement to rebut the inference of improper motive to fabricate. *See Rodriguez,* 609 So.2d at 499. Arguably, defense counsel's line of questioning here was an attempt to show bias or recent fabrication on the part of Shields. In fact, the questioning was very similar to that in *Rodriguez* in that it questioned Shields' motive for testifying against Foster. Hence, the testimony and the introduction of the tape on redirect were proper to show that Shields' testimony at trial was consistent with his statement to law enforcement officers prior to the plea agreement. We also conclude that any error in allowing the testimony and the tape of Shields on redirect would have been harmless in light of the overwhelming evidence against Foster. *See Moore,* 701 So.2d at 549.

***917** The last hearsay-based claim of Foster deals with a portion of Ms. Magnotti's testimony. At trial, she was allowed to testify about a telephone conversation in which Ms. Foster allegedly attempted to persuade her to assist Ms. Foster in making up an alibi for Foster. Specifically, Ms. Magnotti testified that Ms. Foster wanted her to corroborate that Magnotti and her son spent the evening at Foster's home on the night of the murder. Foster argues that the testimony was hearsay and should not have been admitted. The State counters that Ms. Magnotti's testimony was offered to prove "the *falsity* of the matter asserted, i.e., that Magnotti did not spend the night at Foster's house, and thus it was not hearsay." (Emphasis supplied.) It should be noted that Ms. Foster never testified that Magnotti spent the night at the Fosters; in fact, she specifically denied so during cross-examination. Also, Magnotti himself testified as to the time he left Foster's house. Therefore, there was no "falsity" to be proven by the prosecution and we agree Ms. Magnotti's testimony should not have been allowed. Although the trial court erred in admitting this statement, we conclude that the error was harmless in light of the remaining evidence presented against Foster. *See* *Moore,* 701 So.2d at 549.

Judge's Comments

In issue three, Foster asserts that comments made by the trial judge during the guilt phase demonstrate that the judge had prejudged the case and did not preside over the trial with an open mind. One of the comments referred to by Foster came up as follows:

> [Trial judge]: Well, okay, back to the case that you cite. You say that—I know the theory in which it comes in, but when did it come in in that case, or in the particular?
>
> [State]: From the reading of the case, I don't know at what point in time it came in. This is Chandler, this is Cardali.
>
> [Trial judge]: Okay. You have any other argument?
>
> [Defense counsel]: Judge, we're objecting to this strongly. I think it's highly improper. If you allowed this tape where someone gives a statement for the State and after cross-examination play a statement, they could do that on every witness.
>
> [Trial judge]: Okay.
>
> [Defense counsel]: You don't seem concerned, but I think it's highly improper.
>
> [Trial judge]: Tell it to the supreme court. You'll get an opportunity, I believe.
>
> [Defense counsel]: I certainly hope the Court's not prejudging our case.
>
> [Trial judge]: Not for me to make that decision, it's for them. Guilt or innocence.
>
> [Defense counsel]: It may not be going to the supreme court, Judge.
>
> [Trial judge]: Whatever.

This claim is clearly procedurally barred because Foster failed to make contemporaneous objections at trial to the trial judge's comments or seek his disqualification. *See* *J.B. v. State,* 705 So.2d 1376, 1378 (Fla.1998) (holding that except where a fundamental error exists, to raise an error on appeal, a contemporaneous objection is required at the trial level when the alleged error occurred).

Nevertheless, having reviewed all the comments cited by Foster, we conclude that neither the cited comments nor the record as a whole show any bias on the part of the trial court. We note, however, that judges should avoid making such comments. As stated in *Peek v. State,* 488 So.2d 52 (Fla.1986), judges must make sure that their conduct and comments do not lead to even the appearance of bias. That standard of conduct is required not merely for the sake of professionalism, but more importantly to maintain a high level of confidence in our criminal justice system from all parties.

***918** *Avoid Arrest Aggravator*

As to the penalty phase, Foster asserts in issue four that the trial court erred both in finding and submitting to the jury the avoid arrest aggravator. Section 921.141(5)(e), Florida Statutes (1997), provides the following aggravator: "The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody." In *Consalvo v. State,* 697 So.2d 805 (Fla.1996), we recently stated the application of this aggravator as follows:

> Typically, this aggravator is applied to the murder of law enforcement personnel. However, the above provision has been applied to the murder of a witness to a crime as well. In this instance, "the mere fact of a death is not enough to invoke this factor.... Proof of the requisite intent to avoid arrest and detection must be very strong in these cases." In other words, the evidence must prove that the sole or dominant motive for the killing was to eliminate a witness. Mere speculation on the part of the state that witness elimination was the dominant motive behind a murder cannot support the avoid arrest aggravator. Likewise, the mere fact that the victim knew and could identify defendant, without more, is insufficient to prove this aggravator.
>
> Additionally, a motive to eliminate a potential witness to an antecedent crime can provide the basis for this aggravating circumstance. And, it is not necessary that an arrest be imminent at the time of the murder. Finally, the avoid arrest aggravator can be supported by circumstantial evidence through inference from the facts shown.

Id. at 819 (citations omitted). We conclude that the State presented sufficient evidence that Foster and his friends committed the killing for the purpose of avoiding arrest for their prior crimes. As argued by the State, the members of the group directly testified that once Schwebes told Black and Torrone he would report them to campus police the next morning, the group decided that Schwebes had to die that night. In *Fotopoulos v. State,* 608 So.2d 784 (Fla.1992), upon which the trial court relied, the dominant reason why the victim was killed was because of his knowledge of the defendant's alleged involvement in counterfeiting activities. We found that sufficient to support this aggravator. *See id.* at 792. Here, Schwebes was aware of the act of vandalism committed that night at Riverdale. With regard to Foster's argument that Schwebes may not have actually seen him that night as he ran from the auditorium, the State established that Foster was concerned that he would ultimately be implicated should either Black or Torrone get arrested. We therefore conclude that the trial court properly submitted and relied upon this aggravator in the sentencing phase.

Submission of Charging Information at Spencer Hearing

In issue five, Foster argues that the trial court erred in admitting the charging information at the *Spencer* sentencing hearing. Specifically, as additional support for the avoid arrest aggravator, the State, over Foster's objection, introduced into evidence an information in a separate case charging Foster with twenty-seven counts. These twenty-seven counts included the various crimes allegedly committed by Foster and the Lords of Chaos during the time preceding the murder.

We agree that an indictment or information for a crime other than the one being prosecuted should not be admitted as evidence of aggravation. *See Dougan v. State,* 470 So.2d 697, 701 (Fla.1985) ("An indictment or information is not evidence against an accused, but, rather, is nothing more or less than the vehicle by which the State charges that a crime has been committed."). Further, the consideration of a defendant's prior record is limited to convictions and the convictions are themselves limited to "another capital felony or ... felony involving the use or threat of violence ***919** to the person." *Perry v. State,* 395 So.2d 170, 174–75 (Fla.1980) (quoting section 921.141(5)(b), Florida Statutes, and citing *Provence v. State,* 337 So.2d 783 (Fla.1976)).

We conclude the trial court should not have admitted the charging information at the *Spencer* hearing. As stated in *Dougan* and *Perry,* the charging information reflected nothing more than mere charges, not evidence, against Foster. The State's argument that Foster later pled to most of the charges is unsatisfactory since the plea agreements were subsequent to both the guilt and penalty proceedings. Subsequent to the *Spencer* hearing, had Foster pled to all of the charges, the charging information would have still been improperly admitted. The fact that he only pled to some of the charges, however, only highlights the impropriety of having admitted the charging information to begin with.

Although we find that the admission of the charging information was improper, we note that this case is substantially distinguishable from the above cases. In *Dougan* and *Perry,* the information or indictment was actually presented to the juries *before* they rendered their advisory sentences. In the instant case, however, the State introduced the information at the *Spencer* hearing, *after* the jury had made the sentence recommendation. In addition, while a detailed list of criminal charges may not have been in evidence, there was evidence that the Lords of Chaos had committed numerous criminal acts and that criminal activity was its purpose. Because the information was not admitted to the jury and because there was evidence of other

crimes already in the record we find any error harmless. *See* *Mendoza v. State,* 700 So.2d 670, 678 (Fla.1997) ("[E]rroneously admitted evidence concerning a defendant's character in a penalty phase is subject to a harmless error review."). Importantly, we also find no indication that the trial court relied on the information in sentencing Foster.

Foster also points out that the trial court, in the sentencing order, incorrectly stated that the Lords of Chaos were engaged in criminal activities for two months before the murder even though the group had actually been in existence for less than a month. The length of time that the group was in existence was not a material issue in any part of the case and was not heavily relied upon, if at all, by the trial judge in determining the sentence. Therefore, we conclude such error was harmless. *See* *Consalvo,* 697 So.2d at 818 (Fla.1996) (error complained of was harmless where it did not contribute to the sentence of death).

Mitigating Circumstances

In issue six, Foster asserts that the sentencing order does not support the death sentence in light of the trial court's failure to consider the mitigating evidence and because of the inadequacy of its findings. Particularly, the trial court failed to provide the grounds for rejecting Foster's age, eighteen at the time of the murder, as a mitigator.

The determination of mitigating circumstances and the weight assigned to each one is within the discretion of the sentencing court. *See* *Campbell v. State,* 571 So.2d 415, 420 (Fla.1990). In *Campbell,* we provided the following in emphasizing the duty of the sentencing court in evaluating the mitigating circumstances offered by the defendant:

> When addressing mitigating circumstances, the sentencing court must expressly evaluate in its written order each mitigating circumstance proposed by the defendant to determine whether it is supported by the evidence and whether, in the case of nonstatutory factors, it is truly of a mitigating nature.... The court next must weigh the aggravating circumstances against the mitigating and, in order to facilitate appellate review, must expressly consider ***920** in its written order each established mitigating circumstance.

Id. at 419–20 (citations and footnotes omitted). Recently, however, in *Trease v. State,* 768 So.2d 1050, 1055 (Fla.2000), the Court partly receded from *Campbell* and held that though a court must weigh all the mitigating circumstances, such court may assign "little or no" weight to such factors as warranted by the relevant circumstances.

The sentencing judge in his written order substantially followed the dictates of *Campbell.* The court provided a written evaluation of both sets of aggravating and mitigating circumstances. As to the mitigating circumstances, the court addressed, as proffered, Foster's age and a list of proposed mitigating circumstances. Thus, the instant case is far different from others where we have found that the sentencing judge simply failed to provide an adequate written account of the evaluation of mitigating circumstances. *See, e.g.,* *Jackson v. State,* 704 So.2d 500, 506 (Fla.1997) (finding inadequate a sentencing order which concluded without any explanation that the testimony offered in support of mitigation was not credible); *Ferrell v. State,* 653 So.2d 367, 371 (Fla.1995) (finding sentencing order inadequate where it was made up solely of conclusory statements).

While the court did not evaluate in detail each of the asserted twenty-three nonstatutory mitigating circumstances in the exact order submitted by Foster, the court provided sufficient written grounds for its evaluation and its sentence. *See* *Armstrong v. State,* 642 So.2d 730, 739 (Fla.1994). Here, the sentencing court addressed the proffered mitigating circumstances but did not go into the ones deemed redundant. For example, Foster submitted numerous mitigating circumstances relating to his good personality and character traits. The court, however, addressed the defendant's character traits at once in a three-paragraph subset of its analysis of the mitigating circumstances. Hence, we find the asserted error to be harmless in that the court did in fact address the mitigating circumstances and provided sufficient written support. *See* *Thomas v. State,* 693 So.2d 951, 953 (Fla.1997).

Finally, with regard to mitigation, Foster claims error in the trial court's rejection of Foster's age at the time of the killing as a mitigator. Section 921.141(6)(g), Florida Statutes (1996), expressly includes the age of the defendant at the time of the crime as a mitigating circumstance. We have recognized, however, that there is no bright-line rule for applying this provision. *See* *Campbell v. State,* 679 So.2d 720, 726 (1996). The appropriate application of this mitigator goes well beyond the mere consideration of the defendant's chronological age. *See id.* Rather, it entails an analysis of factors which, when placed against the chronological age of the defendant, might reveal a much more immature individual than the age might have initially indicated. Although trial courts are given wide discretion in ultimately determining the existence of this mitigator, they nonetheless must carefully assess all the factors which may impact upon this mitigator.

Relying on *Mahn v. State,* 714 So.2d 391 (Fla.1998), Foster argues that the trial court improperly rejected his age at the time of the killing as a mitigator. Consistent with the principle enunciated in *Campbell,* 679 So.2d at 726, in *Mahn* we held that for a defendant's age to be given any significant weight, "it must be linked with some other characteristic of the defendant or the crime such as immaturity." *Mahn,* 714 So.2d at 400 (quoting *Echols v. State,* 484 So.2d 568, 575 (Fla.1985)). We then found that the sentencing court failed to consider Mahn's "unrefuted long-term substance abuse, chronic mental and emotional instability, and extreme passivity in the face of unremitting physical and mental abuse" as a link between his youthful age and immaturity. *Id.*

***921** As pointed out by the State, however, the facts in *Mahn* are vastly distinguishable from the present case. The record simply does not contain any evidence remotely similar to the substantial emotional and mental problems in *Mahn.* As the sentencing court pointed out, Foster had completed his GED requirement, taken college and vocational-technical courses, and was the leader of the young men of the Lords of Chaos. Foster produced no evidence of any emotional or mental irregularities, chronic or otherwise, despite the availability of two mental experts. In fact, the evidence established that Foster was of above-average intelligence. We therefore conclude that the court properly evaluated Foster's age as a mitigator.

Proportionality

In this last issue, Foster asserts that the death sentence is not proportional in this case. Due to the uniqueness and the finality of death, we address the propriety of all death sentences in a proportionality review. *See* *Porter v. State,* 564 So.2d 1060, 1064 (Fla.1990). To ensure uniformity in the imposition of the death sentence, we review and consider all the circumstances in a case relative to other capital cases. *See* *Terry v. State,* 668 So.2d 954, 965 (Fla.1996); *Tillman v. State,* 591 So.2d 167, 169 (Fla.1991) ("[P]roportionality review is a unique and highly serious function of this Court, the purpose of which is to foster uniformity in death-penalty law.").

Here, the trial court found two serious aggravators (avoid arrest and CCP), no statutory mitigators and some nonstatutory mitigators. The trial court accorded great weight to both aggravators and assigned very little weight to the mitigators proposed by Foster. As discussed above, the avoid arrest aggravator was proven beyond a reasonable doubt.

Although Foster does not challenge the CCP finding, a brief analysis of the aggravator is appropriate. In essence this aggravator applies to an execution-style killing that has been calmly and coldly planned in advance. As an example, we have found CCP where a defendant "told others in prison that when he got out he was going to kill the victim; told [someone] that he was going to escape, get his shotgun, kill the first person he saw, steal the person's vehicle, and leave the area; concealed himself in the victim's barn and waited for him; and then kidnapped and murdered the victim and stole his truck." *Monlyn v. State,* 705 So.2d 1, 6 (Fla.1997). Accordingly, to establish CCP:

> [T]he jury must first determine 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.

Woods v. State, 733 So.2d 980, 991 (Fla.1999) (quoting *Gordon v. State,* 704 So.2d 107, 114 (Fla.1997)). To avoid any confusion with the premeditation element required to prove first-degree murder, the trial court is required to instruct and emphasize to the jury that CCP involves a much higher degree of premeditation.

This case appears to present a classic case of a cold and ruthless execution-style killing by a group of young men who knew exactly what they were doing. The sentencing order and the record reveal that Foster and the group carefully planned the killing of Schwebes. To begin, Foster and the group discussed several alternatives before ultimately choosing Foster's plan. Foster got his shotgun and replaced the birdshot it carried with the more lethal # 1 buckshot to ensure Schwebes' death. Foster and the group then obtained gloves and ski masks to hide their identities. Each member of the group had a specific assignment as directed by Foster. Finally, Foster looked ***922** Schwebes right in the eye before shooting him in the face and the buttock. These facts strongly support the finding of CCP, as found by this Court in somewhat similar circumstances. *See* *Bell v. State,* 699 So.2d 674, 677 (Fla.1997).

Recently, we affirmed the imposition of a death sentence upon an eighteen-year old where the trial court found three aggravators (HAC, CCP, and commission during a robbery), one statutory mitigator (age of eighteen), and a number of nonstatutory mitigators. *See* *Nelson v. State,* 748 So.2d 237 (Fla.1999). Similarly, we conclude the death penalty is not disproportionate here in light of the presence of two strong aggravators and the absence of statutory and nonstatutory mitigators. *See, e.g.,* *Davis v. State,* 703 So.2d 1055, 1061–62 (Fla.1997) ("Where there are one or more valid aggravating factors that support a death sentence and no mitigating circumstances to weigh against the aggravating factors, death is presumed to be the appropriate penalty.") (quoting *Blanco v. State,* 452 So.2d 520, 526 (Fla.1984)); *Sliney v. State,* 699 So.2d 662, 672 (Fla.1997) (finding the death penalty proportional with the existence of two aggravators (commission during a robbery and avoid arrest), two statutory mitigators (age and lack of criminal history), and a number of nonstatutory mitigators); *Hayes v. State,* 581 So.2d 121, 126–27 (Fla.1991) (upholding the death penalty where there were two aggravators (CCP and commission during a robbery), one statutory mitigator (age), and other nonstatutory mitigators).

Foster also points out that he was the only one sentenced to death out of the four participants in the crime, further arguing the disproportionality of his sentence.[9] While a death sentence is not disproportionate per se because a codefendant receives a lesser punishment for the same crime, especially when he is less culpable, *see Hannon v. State,* 638 So.2d 39 (Fla.1994), we agree the sentence of an accomplice may indeed affect the imposition of a death sentence upon a defendant. *See Gafford v. State,* 387 So.2d 333, 337 (Fla.1980); *Salvatore v. State,* 366 So.2d 745, 751 (Fla.1978). However, we have found with some limited exceptions that the defendant who actually plans and kills the victim is usually the most culpable, and his death sentence will not be considered disproportionate in comparison to his codefendants' lesser sentences. *See Sliney,* 699 So.2d at 672 (death sentence not disproportionate because defendant was more culpable than codefendant); *Cook v. State,* 581 So.2d 141, 143 (Fla.1991) (defendant's death sentence was not disproportionate to sentences of his accomplices, whose level of participation in murder was clearly less than defendant's, and where it was defendant, not his accomplices, who killed victims). Here, the record reveals that Foster was the dominant person in the crime, he planned the killing, assigned the various tasks to the participants, procured ***923** the shotgun and the ammunition, and actually shot and killed Schwebes. Under these circumstances we conclude the death penalty is not disproportionate.

Accordingly, for the reasons stated in this opinion, we affirm Foster's conviction and sentence.[10]

It is so ordered.

SHAW, HARDING, ANSTEAD, PARIENTE, LEWIS and QUINCE, JJ., concur.

WELLS, C.J., concurs with an opinion.

WELLS, C.J., concurring.
I concur in affirming the conviction. I do *not* concur in that portion of the opinion concerning the judge's comments.

I concur in result only as to the sentence.

All Citations

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Footnotes

1 Adkins testified that he saw Schwebes' vehicle parked at the spot where Black and Torrone were caught by Schwebes at about 9:30 p.m. He also saw someone running from the general location of Schwebes' vehicle.

2 The two witnesses testified to hearing a car with a loud muffler leaving immediately after the two shots. Shields' car had a bad muffler. One testified to seeing a car driving away.

3 Pursuant to plea agreements with the State which required truthful testimony against Foster, the group members were sentenced as follows: Black and Shields were sentenced to life without the possibility of parole; Magnotti was sentenced to thirty-two years' imprisonment; Burnett was sentenced to two years in county jail for non-homicidal offenses; Torrone was sentenced to one year in county jail, ten years probation, one hundred hours of community service and restitution. As to the other members, the record does not indicate whether there was any plea agreement or any jail or prison sentences.

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

5 *See* § 921.141(5)(e), Fla. Stat. (1997).

6 *See* § 921.141(5)(i), Fla. Stat. (1997).

7 Even though Foster referred to the 23 mitigators as nonstatutory, the trial court treated them as statutory pursuant to section 921.141(6)(h), Florida Statutes (1997).

8 The seven issues are: (1) his numerous pretrial change of venue motions were improperly denied; (2) the court erred in permitting the State to elicit hearsay testimony of several witnesses; (3) comments of the trial court during the guilt phase demonstrate that the court had prejudged the case; (4) the avoid arrest aggravator should not have been submitted to the jury in the penalty phase; (5) the trial court erred in admitting the charging information at the *Spencer* hearing; (6) the trial court failed to properly consider the mitigating circumstances and its findings are unclear; and (7) the sentence was disproportionate in comparison to other cases.

9 We note that Immediately before jury selection, Foster turned down a plea offer of life without parole on the murder count:

> [State]: Yesterday afternoon I did contact Mr. Jacobs at the public defender's office and we did extend an offer in this case of life imprisonment ... That offer I guess up until this time is still open. However, it's my understanding that he would be rejecting that.
>
> [Defense counsel]: I spoke to my client last night upon receipt of the offer at the jail. I told him I wanted to [sic] him to sleep on it. I talked to him this morning, and it's my understanding that he is turning down the offer; is that correct, Kevin?

[Foster]: Yes, sir.

[Defense counsel]: Do you understand that if you accepted the State's offer the case will be over today and you will receive a sentence of life without parole; you understand that?

[Foster]: Yes.

[Defense counsel]: The State would be willing to waive the death penalty at this point in time.

[Foster]: I understand that.

[Defense counsel]: And knowing all those facts, is it your decision to turn down the State's offer?

[Foster]: Yes, it is.

[State]: At this point the offer will be withdrawn.

10 Though Foster did not raise a sufficiency of the evidence claim, after reviewing all the evidence in the record, we also find that there is sufficient evidence to support his conviction for first-degree murder.