DOCKET NO. 11A556

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2011

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LANCELOT URILEY ARMSTRONG,

*Petitioner*

v.

STATE OF FLORIDA,

*Respondent.*

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On Petition For A Writ Of Certiorari To
The Florida Supreme Court

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# PETITION FOR A WRIT OF CERTIORARI

## CAPITAL CASE

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CAPITAL CASE

## QUESTION PRESENTED

Whether the Florida Supreme Court's proportionality review of Mr. Armstrong's death sentence violated the Eighth and Fourteenth Amendments to the United States Constitution.

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## PETITION FOR A WRIT OF CERTIORARI

Petitioner Lancelot Uriley Armstrong prays that a Writ of Certiorari issue to review the opinion of the Florida Supreme Court.

## CITATIONS TO OPINION BELOW

The 2011 opinion of the Florida Supreme Court affirming Mr. Armstrong's death sentence following his previously ordered penalty phase is reported as *Armstrong v. State*, 73 So. 2d 155 (Fla. 2011) and is attached as Appendix A. The 2003 Florida Supreme Court opinion remanding the case back to the trial court for a new penalty phase is reported as *Armstrong v. State*, 862 So. 2d 705 (Fla. 2003) and is attached as Appendix B. The Florida Supreme Court direct appeal opinion is reported as *Armstrong v. State*, 642 So. 2d 730 (Fla. 1994) and is attached as Appendix C.

## JURISDICTION

Petitioner invokes this Court's jurisdiction to grant the Petition for a Writ of Certiorari to the Florida Supreme Court on the basis of 28 U.S.C. § 1257(a). The Florida Supreme Court issued its decision on September 22, 2011. An application to extend the time in which to file the present petition was filed on December 7, 2011. On December 12, 2011, that application was granted and the time for filing the present petition was extended to February 19, 2012. This petition is timely filed.

## CONSTITUTIONAL PROVISIONS INVOLVED

The Eighth Amendment to the United States Constitution provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

The Fourteenth Amendment to the United States Constitution provides:

> No State shall make or enforce any law which shall abridge the privileges or immunities of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

## STATEMENT OF THE CASE

On March 7, 1990, Lancelot Uriley Armstrong was indicted for the first degree murder of Deputy Sheriff John Greeney, the attempted murder of Deputy Sheriff Robert Salustio, and armed robbery. The jury returned a guilty verdict and recommended the death penalty by a vote of nine to three. On direct appeal, the Florida Supreme Court affirmed Mr. Armstrong's convictions and death sentence. *Armstrong v. State*, 642 So. 2d 730 (Fla. 1994). Mr. Armstrong's co-defendant, Wayne Coleman, was tried separately and found guilty, but the jury recommended a life sentence, and he was sentenced to life in prison. On direct appeal, the Florida Supreme Court conducted a proportionality review of Mr. Armstrong's death sentence and found that the sentence was not disproportionate.

Mr. Armstrong then filed a motion for post conviction relief pursuant to Fla. R. Crim. P. 3.851. Following an evidentiary hearing[1] on Mr. Armstrong's claim of

[1] At the evidentiary hearing, Mr. Armstrong presented the testimony of numerous lay witnesses, together with Dr. Thomas Hyde, a behavioral neurologist, Dr. Terry Goldberg, a neuropsychologist, Dr. Richard Dudley, a psychiatrist, Dr. Antoinette Appel, a psychologist, and Dr. Laurie Gunst, a

ineffective assistance of counsel at his penalty phase and a claim pursuant to *Johnson v. Mississippi*, 486 U.S. 578 (1988), the motion was denied. On appeal to the Florida Supreme Court, Mr. Armstrong's claims relating to his guilt phase were denied. However, the Court granted a new penalty phase predicated on Mr. Armstrong's claim pursuant to *Johnson v. Mississippi*, because a prior violent felony conviction from Massachusetts, which had been used as an aggravating circumstance in his capital case, was vacated. *Armstrong v. State*, 862 So. 2d 705, 717-18 (Fla. 2003).

Mr. Armstrong's new penalty phase took place in April 2007. At the penalty phase, resentencing counsel presented the testimony of Dr. Rupert Rhond, a developmental economist, internist Dr. Michael Morrison, and Mr. Armstrong himself. At the close of the defense witnesses' testimony, the court held the following colloquy:

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|---|---|
| The Court: | Mr. Armstrong, you have no additional mitigation to present, is that correct? |
| The Defendant: | Excuse me one moment. |
| The Court: | Yes sir. Talk to your counsel please. |
| Mr. Rowe: | Give us two minutes. |
| The Court: | Yes sir. |
| The Defendant: | Not at this moment. |
| The Court: | Mr. Armstrong, this is the moment. There are no additional moments. Your attorney has rested the defense at this point. If there is additional mitigation that you want to present, now is the time to present it. |
| The Defendant: | I don't have anything further, your Honor. |

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Caribbean historian, in support of the extensive mitigation evidence that would have been available to present to the jury had trial counsel only conducted a constitutionally adequate investigation.

(R. 1374).

The Court made only the following further inquiry regarding the potential mental health mitigation:

> The Court: Additionally, you raised a 3.850 which was a three day evidentiary hearing raised before Judge Cohn, if I'm not mistaken, which raised mental health regarding a brain injury and post traumatic stress disorder. Do you understand that?
>
> The Defendant: Yes.

The State subsequently read out the names on the defense's preliminary witness list,[2] and the court inquired as to whether Mr. Armstrong knew what they were going to say. Mr. Armstrong merely responded "yes." (R. 1389.) The court then found that Mr. Armstrong had made a knowing, intelligent and voluntary waiver of further mitigation.

Following closing arguments, the jury recommended a death sentence by a verdict of nine to three. A *Spencer*[3] hearing was conducted on September 7, 2007. At that hearing, the defense presented the testimony of two lay witnesses who had befriended Mr. Armstrong since his original conviction, Mr. Armstrong's mother, and Mr. Armstrong himself (R- Supp. 1-47). At the *Spencer* hearing, Mr. Armstrong complained that he did not, in fact, have the opportunity to present mitigation that he wished to present. The trial court imposed a sentence of death, and Mr.

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[2] The preliminary witness list did not include the majority of the expert and lay witnesses who had testified at the Rule 3.850 evidentiary hearing.

Armstrong appealed to the Florida Supreme Court.

Mr. Armstrong raised four issues on this direct appeal. The State raised the issue of proportionality. The Florida Supreme Court's analysis of the proportionality issue was as follows:

> In determining whether death is a proportionate punishment, this Court is required to compare the totality of circumstances of Armstrong's case to the circumstances of similar cases in which the Court has affirmed sentences of death. This Court conducts a two-prong inquiry comparing the instant case to other cases to "determine whether the crime falls within the category of both (1) the most aggravated, and (2) the least mitigated of murders." "This entails a qualitative review by this court of the underlying basis for each aggravator and mitigator rather than a quantitative analysis."
>
> In the instant case, the jury recommended death by a vote of nine to three. The trial court found three aggravators: (1) prior violent felony based on two underlying felonies; (2) the murder was committed during a robbery; and (3) the victim in this capital case was a law enforcement officer engaged in the performance of his duties. Each aggravating factor was afforded great weight. The trial court found one statutory mitigator: (1) the existence of any other factors in the defendant background that would mitigate against the imposition of the death penalty. Finally the trial court found the existence of one nonstatutory mitigator: (1) Armstrong had problems growing up because he was biracial (little weight). After weighing the aggravation and mitigation, the trial court stated that "the aggravating circumstances in this case far outweigh the mitigating circumstances. The aggravating circumstances in this case are overwhelming." Then, the trial court sentenced Armstrong to death.
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> We have previously affirmed the death penalty in a single aggravator case where the single aggravator was a prior

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

> violent felony. We have repeatedly explained that that the prior violent felony aggravator is one of the "most weighty" in Florida's sentencing scheme. Given the presence of this aggravator, which is based on the contemporaneous attempted murder of Sallustio and on an armed robbery that Armstrong committed 13 days prior to the murder of Greeney, and the scant mitigation present in this case, it appears that Armstrong's death sentence remains proportionate. Moreover, we have upheld the imposition of the death penalty as proportionate where there was similar aggravation and more mitigation. Accordingly, we conclude that when compared with other capital cases, the death sentence in Armstrong's case is proportionate.

*Armstrong*, 73 So. 2d at 175 (citations omitted).

In light of the circumstances surrounding Mr. Armstrong's purported waiver of mitigation, this analysis violates the Eighth and Fourteenth Amendments to the United States Constitution.

## REASONS FOR GRANTING THE PETITION

### I. MR. ARMSTRONG WAS AFFORDED AN INADEQUATE PROPORTIONALITY REVIEW BY THE FLORIDA SUPREME COURT IN VIOLATION OF *FURMAN V. GEORGIA* AND ITS PROGENY.

#### A. INTRODUCTION

Over thirty years ago, this Court announced that under the Eighth Amendment, the death penalty must be imposed fairly, and with reasonable consistency, or not at all. *Furman v. Georgia*, 408 U.S. 238, 310 (1972) (per curiam).[4] At issue in *Furman* were three death sentences: two from Georgia and

[4]The previous year, this Court in *McGautha v. California*, 402 U.S. 183 (1971), had considered whether:

one from Texas. The Petitioners, relying upon statistical analysis of the number of death sentences being imposed and upon whom they were imposed, argued that the death penalty was cruel and unusual within the meaning of the Eighth Amendment. Five Justices agreed, and each wrote a separate opinion setting forth his reasoning. Each found the manner in which the death schemes were then operating to be arbitrary and capricious. *Furman*, 408 U.S. at 253 (Douglas, J., concurring) ("We cannot say from facts disclosed in these records that these defendants were sentenced to death because they were black. Yet our task is not restricted to an effort to divine what motives impelled these death penalties. Rather, we deal with a system of law and of justice that leaves to the uncontrolled discretion of judges or juries the determination whether defendants committing

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> the absence of standards to guide the jury's discretion on the punishment issue is constitutionally intolerable. To fit their arguments within a constitutional frame of reference petitioners contend that to leave the jury completely at large to impose or withhold the death penalty as it sees fit is fundamentally lawless and therefore violates the basic command of the Fourteenth Amendment that no State shall deprive a person of his life without due process of law.

*McGautha*, 402 U.S. at 196. In the majority opinion written by Justice Harlan, the Court found no due process violation. In reaching this conclusion, the majority noted the impossibility of cataloging the appropriate factors to be considered:

> Those who have come to grips with the hard task of actually attempting to draft means of channeling capital sentencing discretion have confirmed the lesson taught by the history recounted above. To identify before the fact those characteristics of criminal homicides and their perpetrators which call for the death penalty, and to express these characteristics in language which can be fairly understood and applied by the sentencing authority, appear to be tasks which are beyond present human ability . . . . For a court to attempt to catalog the appropriate factors in this elusive area could inhibit rather than expand the scope of consideration, for no list of circumstances would ever be really complete.

*Id.* at 204, 208. When *Furman* reached the Court the next year and the Petitioners presented an argument that the statutory schemes for imposing a sentence of death violated the Eighth Amendment, Justice Stewart and Justice White joined the dissenters from *McGautha* and found that the death penalty statutes were indeed unconstitutional.

these crimes should die or be imprisoned. Under these laws no standards govern the selection of the penalty. People live or die, dependent on the whim of one man or of 12."); *id.* at 293 (Brennan, J., concurring) ("it smacks of little more than a lottery system"); *id.* at 309 (Stewart, J., concurring) ("[t]hese death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual"); *id.* at 313 (White, J., concurring) ("there is no meaningful basis for distinguishing the few cases in which it is imposed from the many cases in which it is not"); *id.* at 365-66 (Marshall, J., concurring) ("It also is evident that the burden of capital punishment falls upon the poor, the ignorant, and the underprivileged members of society. It is the poor, and the members of minority groups who are least able to voice their complaints against capital punishment. Their impotence leaves them victims of a sanction that the wealthier, better-represented, just-as-guilty person can escape. So long as the capital sanction is used only against the forlorn, easily forgotten members of society, legislators are content to maintain the status quo, because change would draw attention to the problem and concern might develop.") (footnote omitted). As a result, *Furman* stands for the proposition most succinctly explained by Justice Stewart in his concurring opinion: "The Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be . . . wantonly and . . . freakishly imposed" on a "capriciously selected random handful" of individuals. *Id.* at 310.[5]

[5] It is important to recognize that the decision in *Furman* did not turn upon proof of arbitrariness as to one individual claimant. Instead, the Court looked at the systemic arbitrariness. *Furman*

In the wake of *Furman*, all death sentences were vacated. Proof of individual harm or the lack of such proof was irrelevant. Thereafter, the State of Florida (and other states) sought to adopt a death penalty scheme that would pass scrutiny under *Furman*. Florida's newly adopted scheme was reviewed by this Court in *Proffitt v. Florida*, 428 U.S. 242 (1976). In *Gregg v. Georgia*, 428 U.S. 153 (1976), a companion case to *Proffitt*, this Court explained: "the concerns expressed in *Furman* that the penalty of death not be imposed in an arbitrary or capricious manner can be met by a carefully drafted statute that ensures that the sentencing authority is given adequate information and guidance." *Gregg v. Georgia*, 428 U.S. at 195 (plurality opinion).[6] Applying this principle to Florida's newly-adopted capital sentencing scheme, this Court concluded:

> Florida, like Georgia, has responded to *Furman* by enacting legislation that passes constitutional muster. That legislation provides that after a person is convicted of first-degree murder, there shall be an informed, focused, guided, and objective inquiry into the question whether he should be sentenced to death. If a death

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involved a macro analysis of a death penalty scheme and a determination as to whether the scheme permitted the death penalty to be imposed in an arbitrary and/or capricious manner.

[6]The plurality in *Gregg* noted:

> In view of *Furman, McGautha* can be viewed rationally as a precedent only for the proposition that standardless jury sentencing procedures were not employed in the cases there before the Court so as to violate the Due Process Clause. We note that *McGautha*'s assumption that it is not possible to devise standards to guide and regularize jury sentencing in capital cases has been undermined by subsequent experience. In view of that experience and the considerations set forth in the text, we adhere to *Furman*'s determination that where the ultimate punishment of death is at issue a system of standardless jury discretion violates the Eighth and Fourteenth Amendments.

*Gregg v. Georgia*, 428 U.S. at 195, n. 47.

> sentence is imposed, the sentencing authority articulates in writing the statutory reasons that led to its decision. Those reasons, and the evidence supporting them, are conscientiously reviewed by a court which, because of its statewide jurisdiction, can assure consistency, fairness, and rationality in the evenhanded operation of the state law. As in Georgia, this system serves to assure that sentences of death will not be "wantonly" or "freakishly" imposed.

*Proffitt*, 428 U.S. at 259-60. Subsequent decisions have explained that *Furman* required that a capital sentencing scheme produce constitutional reliability and "a reasoned moral response to the defendant's background, character, and crime." *Penry v. Lynaugh*, 492 U.S. 302, 319 (1989) (quoting *California v. Brown*, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring) (emphasis deleted). *See Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) (plurality opinion); *Jurek v. Texas*, 428 U.S. 262, 276 (1976) (plurality opinion). As a result, a capital sentencing scheme must: (1) "narrow" the capital sentencer's discretion; *see Godfrey v. Georgia*, 446 U.S. 420 (1980); *Maynard v. Cartwright*, 486 U.S. 356 (1988); and (2) permit the sentencer to consider "*as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." *Lockett v. Ohio*, 438 U.S. 586, 604 (1978). *See also Penry v. Lynaugh*, 492 U.S. 302, 324.

However, over time, various Justices of this Court have expressed concern whether the capital sentencing schemes approved in *Gregg* and *Proffitt* actually delivered the promised and requisite reliability. Justice Scalia observed an

inherent inconsistency between the narrowing requirement and the broad discretion to consider mitigation requirement:

> My initial and my fundamental problem, as I have described it in detail above, is not that *Woodson* and *Lockett* are wrong, but that *Woodson* and *Lockett* are rationally irreconcilable with *Furman*. It is that which led me into the inquiry whether either they or *Furman* was wrong. I would not know how to apply them—or, more precisely, how to apply both them and *Furman*—if I wanted to. I cannot continue to say, in case after case, what degree of "narrowing" is sufficient to achieve the constitutional objective enunciated in *Furman* when I know that that objective is in any case impossible of achievement because of *Woodson-Lockett*. And I cannot continue to say, in case after case, what sort of restraints upon sentencer discretion are unconstitutional under *Woodson-Lockett* when I know that the Constitution positively *favors* constraints under *Furman*. *Stare decisis* cannot command the impossible. Since I cannot possibly be guided by what seem to me incompatible principles, I must reject the one that is plainly in error.

*Walton v. Arizona*, 497 U.S. 639, 672-73 (1990).

Thereafter, Justice Blackmun soon concluded that the *Furman* promise could not be delivered, and accordingly the death penalty should be declared unconstitutional:

> Twenty years have passed since this Court declared that the death penalty must be imposed fairly, and with reasonable consistency, or not at all and, despite the effort of the States and courts to devise legal formulas and procedural rules to meet this daunting challenge, the death penalty remains fraught with arbitrariness, discrimination, caprice, and mistake. This is not to say that the problems with the death penalty today are identical to those that were present 20 years ago. Rather, the problems that were pursued down one hole with procedural rules and verbal formulas have come to the

> surface somewhere else, just as virulent and pernicious as they were in their original form. Experience has taught us that the constitutional goal of eliminating arbitrariness and discrimination from the administration of death can never be achieved without compromising an equally essential component of fundamental fairness—individualized sentencing.

*Callins v. Collins*, 510 U.S. 1141, 1143-44 (1994) (Blackmun, J., dissenting from the denial of certiorari) (citations omitted).

Most recently, Justice Souter wrote in an opinion joined by Justices Stevens, Ginsburg, and Breyer:

> Decades of back-and-forth between legislative experiment and judicial review have made it plain that the constitutional demand for rationality goes beyond the minimal requirement to replace unbounded discretion with a sentencing structure; a State has much leeway in devising such a structure and in selecting the terms for measuring relative culpability, but a system must meet an ultimate test of constitutional reliability in producing "'a reasoned moral response to the defendant's background, character, and crime.'" The Eighth Amendment, that is, demands both form and substance, both a system for decision and one geared to produce morally justifiable results.
>
> * * *
>
> That precedent, demanding reasoned moral judgment, developed in response to facts that could not be ignored, the kaleidoscope of life and death verdicts that made no sense in fact or morality in the random sentencing before Furman was decided in 1972. Today, a new body of fact must be accounted for in deciding what, in practical terms, the Eighth Amendment guarantees should tolerate, for the period starting in 1989 has seen repeated exonerations of convicts under death sentences, in numbers never imagined before the development of DNA tests. We cannot face up to these facts and still hold that the guarantee of morally justifiable sentencing is hollow

> enough to allow maximizing death sentences, by requiring them when juries fail to find the worst degree of culpability: when, by a State's own standards and a State's own characterization, the case for death is "doubtful."
>
> * * *
>
> We are thus in a period of new empirical argument about how "death is different": not only would these false verdicts defy correction after the fatal moment, the Illinois experience shows them to be remarkable in number, and they are probably disproportionately high in capital cases. While it is far too soon for any generalization about the soundness of capital sentencing across the country, the cautionary lesson of recent experience addresses the tie-breaking potential of the Kansas statute: the same risks of falsity that infect proof of guilt raise questions about sentences, when the circumstances of the crime are aggravating factors and bear on predictions of future dangerousness.

*Kansas v. Marsh*, 548 U.S. 163, 204-05, 207-08, 210-11 (2006) (Souter, J., dissenting) (citations omitted).

B. THE ABA REPORT

On September 17, 2006, the American Bar Association's Death Penalty Moratorium Implementation Project and the Florida Death Penalty Assessment Team published its comprehensive report of Florida's death penalty system. American Bar Association, Evaluating Fairness and Accuracy in the State Death Penalty Systems: The Florida Death Penalty Assessment Report, September 17, 2006 (hereinafter ABA Report). The information, analysis and ultimate conclusions contained in the ABA Report make clear that Florida's death penalty system is so seriously flawed and broken that it does not meet the constitutional requisite of

being fair, reliable or accurate. ABA Report at iii ("The team has concluded, however, that the State of Florida fails to comply or is only in partial compliance with many of these recommendations and that many of these shortcomings are substantial."). The flaws and defects identified by the ABA Report demonstrate that Florida's capital sentencing scheme does not deliver on the *Furman* promise. The identified flaws and defects inject arbitrariness into the capital sentencing process. Who in fact gets executed in Florida does not depend upon the facts of the crime or the character of the defendant, but upon the flaws and defects of the capital sentencing process.[7] Thus, the imposition and carrying out of the death penalty in Mr. Armstrong's case constitutes cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments. *See Furman*, 408 U.S. at 239-40.

The ABA has always believed that "[f]airness and accuracy together form the foundation of the American Criminal Justice system" and that "these goals are particularly important in cases in which the death penalty is sought." ABA Report at 1. In 1997, the ABA responded to the growing concern that the capital jurisdictions did not provide fairness and accuracy in the administration of justice and called for a moratorium on executions until the states had an opportunity to

[7] Who gets executed in Florida turns upon such factors as who represented the condemned; what objections he did or did not make; what investigation he did or did not undertake; whether counsel was diligent in finding evidence demonstrating that the condemned was innocence; at what point in time did the Florida Supreme Court review the case; did the condemned get the benefit of new law identifying constitutional or statutory error in his case; did the State preserve the physical evidence containing DNA material that would prove innocence; what procedural bars were applied by the courts to preclude consideration of meritorious claims; etc.

study and implement changes to their systems. ABA Report at 1. Florida did not heed the ABA's advice and no moratorium was imposed, nor any comprehensive study conducted. Instead, Florida continued to impose the death penalty and carry out executions.

In 2001, the ABA created the Death Penalty Moratorium Implementation Project to, among other things, collect and monitor data on death penalty developments, as well as analyzing responses from government and courts to death penalty issues. ABA Report at 1. And, "[t]o assist the majority of capital jurisdictions that have not yet conducted comprehensive examinations of their death penalty systems, the Project decided in February 2003 to examine several U.S. jurisdictions' death penalty systems and preliminarily determine the extent to which they achieve fairness and provide due process." ABA Report at 1. Florida was one such jurisdiction. Along with individuals from the ABA, a state assessment team was assembled. ABA Report at 2. Those comprising Florida's assessment team were: the Chair, Professor Christopher Slobogin, Judge O. H. Eaton, Jr., Dr. Mark R. Fondacaro, Michael J. Minerva, Mark Schlackman, Justice Leander J. Shaw, Harry L. Shorstein, Sylvia Walbolt and students who assisted with research from the University of Florida College of Law. ABA Report at 3-6.[8]

[8] Most of the assessment team members are easily recognizable as individuals with a vast experience in Florida's death penalty system. *See* ABA Report on Florida at 3-6. However, it is equally clear that many of the members are in favor of the death penalty. Specifically, State Attorney of the Fourth Judicial Circuit, Harry Shorstein, made clear in a comment that he is "a proponent of the Death Penalty." ABA Report at 5.

The state assessment team in Florida was charged with "collecting and analyzing various laws, rules, procedures, standards and guidelines relating to the administration of the death penalty." ABA Report at 2. As set forth in the report's table of contents, the team concentrated on thirteen distinct areas: 1) death row demographics, 2) DNA testing and testing and preservation of biological evidence; 3) law enforcement tools and techniques; 4) crime laboratories and medical examiners; 5) prosecutorial professionalism; 6) defense services; 7) direct appeal process; 8) state postconviction proceedings; 9) clemency; 10) jury instructions; 11) judicial independence, 12) racial and ethnic minorities; and 13) mental retardation and mental illness.

The team identified a number of the areas discussed in the report "in which Florida's death penalty system falls short in the effort to afford every capital defendant fair and accurate procedures." ABA Report at iii. In the report, recommendations were made to assist Florida in fixing a broken system. But, the team cautioned that the apparent harms in the system "are cumulative" and must be considered in such a way; "problems in one area can undermine sound procedures in others." ABA Report at iii-iv. A review of the areas identified in the report as falling short makes apparent that Florida's death penalty scheme is deficient for the many of the same reasons the schemes at issue in *Furman* were found to be unconstitutional.[9] Death sentences like Mr. Armstrong's are a product

[9] For example, the various opinions written in *Furman* noted the same evidence of arbitrary factors unrelated to the crime or the defendant's character that were at work in the sentencing process that is set forth in the ABA Report on Florida. *Furman*, 408 U.S. at 256 n. 21 (whether counsel timely

of an arbitrary and capricious system. Those death sentences that are actually carried out have another layer of arbitrariness, the postconviction process. Who is executed in Florida is determined by a myriad of factors unrelated to the facts of the crime or the character of the defendant.

### C. THE FLORIDA SUPREME COURT'S PROPORTIONALITY REVIEW

The Florida Supreme Court reviews all of the cases where the death sentence is imposed and has the obligation to determine whether death is a proportionate penalty. "Because of the role that meaningful comparative proportionality review can play in eliminating arbitrary and excessive death sentences, states that do not engage in the review, or that do so only superficially, substantially increase the risk that their capital punishment system will function in an arbitrary and discriminatory manner." ABA Report at xxii, 208. Thus, while the Florida Supreme Court may have considered on direct appeal the fact that Mr. Armstrong's co-defendant Wayne Coleman did not receive the death penalty, it did not compare the proportionality of his death sentence with any other similarly situated individuals who received life sentences. Furthermore, there is no evidence that the Florida Supreme Court even considered the proportionality of Mr. Armstrong's death sentence against Mr. Coleman's life sentence after the 2007 penalty phase. The

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objected to error was on occasion a decisive, albeit arbitrary factor in whether a death sentence was imposed); *id.* at 290 (the manner in which retroactivity rules operate injected arbitrariness); *id.* at 293, 309-10, 313 (the number of executions in comparison to the number of murders suggested a lottery); *id.* at 364-66 (evidence that racial prejudices and/or classism and/or sexism infected sentencing decisions); *id.* at 366-67 (likelihood that an innocent may be executed suggested arbitrariness); *id.* at 368 n. 158 (the failure to apply scientific developments in criminal cases fast enough to enhance reliability of outcome of process created arbitrary results).

limited scope of the proportionality review, only looking at other cases in which death has been imposed, skews the review in favor of death and undercuts its "meaningfulness".[10] But in addition to this, the ABA assessment team noted a disturbing trend in the Florida Supreme Court's proportionality review: "Specifically, the study found that the Florida Supreme Court's average rate of vacating death sentences significantly decreased from 20 percent for the 1989-1999 time period to 4 percent for the 2000-2003 time period." ABA Report at 212. The ABA Report noted "that this drop-off resulted from the Florida Supreme Court's failure to undertake comparative proportionality review in the 'meaningful and vigorous manner' it did between 1989 and 1999." ABA Report at 213. The ABA Report also noted "that, since 1999, the Florida Supreme Court is no longer holding true to its own rule that proportionality review should be a 'qualitative review . . . of the underlying basis for each aggravator and mitigator' and not simply a comparison between the number of aggravating and mitigating circumstances." ABA Report at 213.[11]

The shift in the affirmance rate and in the manner in which the proportionality review was conducted is an arbitrary factor. Whether a death sentence was or is affirmed on appeal depends upon what year the appellate review

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[10] The state assessment team recommended that the Court review cases where the death penalty was not sought and was not imposed in order to conduct a meaningful proportionality review. ABA Report at xxiii.

[11] The state assessment team noted that its study "attributed this drop-off in vacations of death sentences on proportionality grounds to the political pressure from the executive and legislative branches regarding the disposition of death penalty appeals and the changing composition of the Court." ABA Report at xxii, n. 53.

was or is conducted. This variable has nothing to do with the facts of the crime or the character of the defendant. Accordingly, it could only be described as arbitrary. It is not a "meaningful basis for distinguishing the few cases in which it is imposed from the many cases in which it is not" *Furman*, 408 U.S. at 313 (White, J., concurring).

As noted previously, the shift in the Florida Supreme Court's proportionality review commencing since the year 2000, reflects a reoccurring pattern in the appellate process. The Florida Supreme Court's review of judicial overrides of life recommendations has shifted repeatedly. Even though the majority of the court frequently cites *Tedder v. State*, 322 So. 2d 908 (Fla. 1975) as establishing the standard, dissenting justices who were previously in the majority in other cases repeatedly assert that the manner in which the *Tedder* standard is applied has shifted. *See Combs v. State*, 525 So. 2d 853 (Fla. 1988); *Cochran v. State*, 547 So. 2d 928 (Fla. 1989); *Zakrzewski v. State*, 717 So. 2d 488 (Fla. 1998). Moreover, the affirmance rate of judicial overrides also waxes and wanes in a fashion supporting the dissenting justices' claim that the manner in which the standard was applied has changed.

Furthermore, in this case no proper analysis was done of the available mitigation at the second penalty phase due to Mr. Armstrong's purported waiver of mental health and other mitigation. This Court has also noted deficiencies in the Florida Supreme Court's appellate review. *See Parker v. Dugger*, 498 U.S. 308, 320 (1991) ("What the Florida Supreme Court could not do, but what it did, was to

State did, that Mr. Armstrong knew what the mitigating circumstances were because he sat through both the evidentiary hearing in 2001, and the original trial years before, stretches credulity.

In *Muhammad v. State*, 782 So. 2d 343 (Fla. 2001), the Florida Supreme Court set forth the procedures that should be followed in cases where a defendant in a capital case elects not to present mitigation and wishes to have the death penalty imposed. The court emphasized that:

> [W]e expect and encourage trial courts to consider mitigating evidence even when the defendant refuses to present mitigating evidence. We have repeatedly emphasized the duty of the trial court to consider *all* mitigating evidence "contained anywhere in the record to the extent it is believable and uncontroverted." This requirement "applies with no less force when a defendant argues in favor of the death penalty and even if the defendant asks the court not to consider mitigating evidence."
>
> In the past, we have encouraged trial courts to order the preparation of a PSI to determine the existence of mitigating circumstances "in at least those cases in which the defendant is essentially not challenging the imposition of the death penalty." Having continued to struggle with how to ensure reliability, fairness and uniformity in the imposition of the death penalty in those cases where the defendant waives mitigation, we have now decided that the better policy will be to require the preparation of a PSI in every case where the defendant is not challenging the imposition of the death penalty and refuses to present mitigation evidence.
>
> To be meaningful, the PSI should be comprehensive and should include information such as previous mental health problems (including hospitalizations), school records, and relevant family background. In addition, the trial court could require the Stat to place in the record all

> evidence in its possession such as school records, military records, and medical records. Further, if the PSI and the accompanying records alert the trial court to the probability of significant mitigation, the trial court has the discretion to call persons with mitigating evidence as its own witnesses.

*Muhammad*, 782 So. 2d at 363-64 (citations omitted). Thus, the Florida Supreme Court made clear that this procedure was important in order for a proper proportionality review to be conducted. The Court further explained:

> In all capital cases, this Court is constitutionally required "to engage in thoughtful, deliberate proportionality review, to consider the totality of circumstances in a case and to compare it with other capital cases." This case provides a perfect example of why the defendant's failure to present mitigating evidence makes it difficult, if not impossible, for this Court to adequately compare the aggravating and mitigating circumstances present in this case to those present in other death penalty cases.

*Id.* at 365.

The Florida Supreme Court is thus aware of the need for a record on appeal to reflect the full quotient of available mitigation in order to conduct a meaningful proportionality review in waiver cases. Paradoxically, however, the court does not require that the procedures set forth in *Muhammad* be used by the trial court in cases such as Mr. Armstrong's in which some mitigation was presented but where other significant mitigation was not. This is despite the fact that the rationale of *Muhammad*—to ensure a complete consideration of mitigation in performing a constitutionality adequate proportionality review—applies with equal logic to cases such as Mr. Armstrong's, in which some meager mitigation was presented, but a

great deal more significant mental health and social history mitigation was available but not presented.

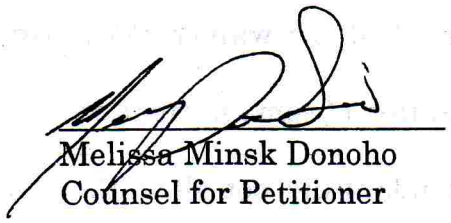
In *Boyd v. State*, 910 So. 2d 167 (Fla. 2005), the Florida Supreme Court distinguished the waiver of the **right** to present mitigation from the waiver of the **presentation** of some mitigation. In *Boyd*, the defendant and his pastor testified but the defendant did not allow the testimony of certain other family members, despite counsel having such witnesses available. *Id.* at 188. The extensive procedures set forth in *Muhammad* were therefore not followed in *Boyd*, notwithstanding the impossibility of conducting an adequate proportionality review without full access to all available mitigation evidence.

Whether or not Mr. Armstrong executed a knowing, intelligent, and voluntary waiver of the presentation of significant mental health and other mitigation, the record in this case does not reflect the totality of the available mitigation. The Florida Supreme Court did not consider the mitigation that was presented at both the trial and the postconviction evidentiary hearing. Thus, the Florida Supreme Court did not conduct a constitutionally adequate weighing of mitigation in Mr. Armstrong's 2007 penalty phase.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully Submitted,



Melissa Minsk Donoho
Counsel for Petitioner

February 17, 2012

# APPENDIX A

73 So.3d 155
Supreme Court of Florida.

Lancelot Uriley ARMSTRONG, Appellant,
v.
STATE of Florida, Appellee.

No. SC09–1659. | Sept. 22, 2011.

**Synopsis**

**Background:** Defendant filed a motion for postconviction relief after his convictions for first-degree murder, attempted murder, and armed robbery and his sentence of death were affirmed, 642 So.2d 730. The motion was denied. On appeal, the Supreme Court, 862 So.2d 705, affirmed in part, reversed in part, vacated the death sentence, and remanded for resentencing. On remand in the Circuit Court, Broward County, Michael L. Gates, J., defendant was again sentenced to death. Appeal followed.

**Holdings:** The Supreme Court held that:
1 photograph of victim's body at the crime scene was admissible;
2 photograph of the side of victim's face, a graze wound, and soot in victim's left ear at the crime scene was admissible;
3 autopsy photograph of victim's face, neck, and upper torso with stippling on the neck and left shoulder and a bullet hole in the neck and left shoulder was admissible;
4 vial of blood taken from victim's heart during the autopsy was admissible;
5 any error in trial court's admission of the three photographs and the vial of blood was harmless;
6 trial court could find that the state met its burden of establishing a proper chain of custody of a bullet fragment;
7 trial court was not required give a jury instruction, in response to a jury question during deliberations, that defendant was not guaranteed parole at or after 25 years; and
8 sentence of death was a proportionate punishment.

Ordered accordingly.

Canady, C.J., concurred in result.

Pariente, J., concurred in part and dissented in part and filed opinion in which Labarga, J., concurred.

West Headnotes (33)

1 **Criminal Law**
Documentary evidence

A trial court's ruling on the admission of photographic evidence will not be disturbed absent a clear showing of abuse of discretion.

2 **Criminal Law**
Photographs arousing passion or prejudice; gruesomeness

Photographs, like all other evidence, are subject to the balancing test in the rule providing that relevant evidence is inadmissible if its probative value is substantially outweighed by the danger of unfair prejudice or other considerations. West's F.S.A. § 90.403.

3 **Sentencing and Punishment**
Documentary evidence

Photograph of victim's body at the crime scene was relevant and had a probative value that was not substantially outweighed by the danger of unfair prejudice at a new penalty phase in a prosecution for capital murder, even though defendant asserted that the photograph was particularly gruesome; photograph was relevant to show the position of victim's body at the crime scene, the location of the crime, victim's manner of death, and his identity as a law enforcement officer in support of an aggravating sentencing factor, and the photograph was probative because it tended to prove that defendant shot victim and to rebut defendant's theory of the case. West's F.S.A. § 90.403.

4 **Sentencing and Punishment**
Documentary evidence

Photograph of the side of victim's face, a graze wound, and soot in victim's left ear at the crime scene was relevant and had a probative value that was not substantially outweighed by the danger of unfair prejudice at a new penalty phase in a prosecution for capital murder, even though the defense stipulated to the fact that soot was in victim's ear; presence of soot corroborated a doctor's testimony that victim was shot from within 12 to 36 inches and tended to prove that

victim was shot from approximately 18 inches away, photograph displayed scrapes on victim's face that demonstrated his manner of death, and the graze wound demonstrated the location of one of victim's wounds. West's F.S.A. § 90.403.

5 **Criminal Law**
Photographs arousing passion or prejudice; gruesomeness

Trial courts have broad discretion in admitting photographic evidence, and the test for the admission of such evidence is not whether the evidence is necessary; rather, the evidence is subject to the balancing test of whether the evidence is relevant and, if so, whether the probative value outweighs the danger of prejudice. West's F.S.A. § 90.403.

6 **Sentencing and Punishment**
Documentary evidence

Autopsy photograph of victim's face, neck, and upper torso with stippling on the neck and left shoulder and a bullet hole in the neck and left shoulder was relevant and had a probative value that was not substantially outweighed by the danger of unfair prejudice at a new penalty phase in a prosecution for capital murder; photograph was relevant to victim's manner of death and was probative of who killed victim, who was a law enforcement officer, and shot another officer, which was a fact in dispute as a result of defendant's claim that he did not shoot the officers and that his involvement was minor or a result of duress. West's F.S.A. § 90.403.

7 **Criminal Law**
Purpose of admission

Autopsy photographs that are relevant to show the manner of death, location of wounds, and the identity of the victim or to assist the medical examiner in explaining the victim's injuries are generally admissible evidence in a murder prosecution.

8 **Criminal Law**
Photographs arousing passion or prejudice; gruesomeness

Mere fact that photographs may be gruesome does not mean they are inadmissible.

9 **Criminal Law**
Depiction of Injuries or Dead Bodies

To be relevant, a photo of a deceased victim must be probative of an issue that is in dispute.

10 **Sentencing and Punishment**
Documentary evidence

Although a photograph may be relevant to prove the death-penalty aggravator that the murder was heinous, atrocious, or cruel (HAC), HAC is not a prerequisite for the admissibility of a photograph.

11 **Sentencing and Punishment**
Demonstrative evidence

Vial of blood taken from victim's heart during an autopsy was relevant and had a probative value that was not substantially outweighed by the danger of unfair prejudice at a new penalty phase in a prosecution for capital murder; vial was relevant because it was used for DNA testing and to show that victim's blood was found inside defendant's vehicle, and the victim's blood in defendant's vehicle, combined with other evidence, negated defendant's claim that he did not shoot victim. West's F.S.A. § 90.403.

12 **Sentencing and Punishment**
Demonstrative evidence

**Sentencing and Punishment**
Reception of evidence

Admission of three photographs of victim's body and a vial of blood taken from victim's heart during an autopsy did not amount to a needless presentation of cumulative evidence at a new penalty phase in a prosecution for capital murder, even though the relevance and probative value of

the three photographs overlapped to some extent; one photograph was the only one that showed victim's body as it was at the crime scene and showed victim in his law enforcement uniform, another photograph was the only one that clearly showed stippling and bullet wounds in victim's neck and shoulder area, the third photograph was the only one that showed soot in victim's ear, and the vial of blood was used to match victim's blood to blood inside defendant's vehicle. West's F.S.A. § 90.403.

13 **Sentencing and Punishment**

Harmless and reversible error

Any error in trial court's admission of three photographs of victim and a vial of blood taken from victim's heart during an autopsy was harmless at a new penalty phase in a prosecution for capital murder; the jury would have reached the same result, i.e., a recommendation of a death sentence, had the photographs and vial of blood not been admitted, in that other evidence supported the three death-penalty aggravators that were imposed, specifically that victim was a law enforcement officer engaged in the performance of his duties, that defendant had prior convictions for violent felonies, and that the murder was committed during a robbery or flight from a robbery.

14 **Criminal Law**

Documentary and demonstrative evidence

Where a trial court has abused its discretion in admitting photographs, an appellate court uses a harmless-error analysis.

15 **Criminal Law**

Documentary and demonstrative evidence

If there is a reasonable probability that an error in admitting photographs affected a verdict, then such error is harmful.

16 **Criminal Law**

Prejudice to rights of party as ground of review

Harmless-error test is not a sufficiency of the evidence, a correct result, a not clearly wrong, a substantial evidence, a more probable than not, a clear and convincing, or even an overwhelming evidence test; the focus is on the effect of the error on the trier of fact.

17 **Criminal Law**

Matters or Evidence Considered

A harmless-error analysis requires an examination of the entire record.

18 **Criminal Law**

Necessity and scope of proof

**Criminal Law**

Reception and Admissibility of Evidence

Admissibility of evidence is within the sound discretion of the trial court, and the trial court's ruling will not be reversed unless there has been a clear abuse of that discretion.

19 **Sentencing and Punishment**

Reception of evidence

It is within the sound discretion of the trial court during resentencing proceedings in a capital case to allow the jury to hear probative evidence that will aid it in understanding the facts of the case so that it may render an appropriate advisory sentence.

20 **Criminal Law**

Condition; change; tampering

**Criminal Law**

Chain of custody

Relevant physical evidence is admissible unless there is an indication of probable tampering; this is a test for determining whether the chain of custody is established.

21 **Criminal Law**

Condition; change; tampering

To demonstrate probable tampering with physical evidence, the party attempting to bar the evidence must show that there was a probability that the evidence was tampered with; the mere possibility is insufficient.

22 **Criminal Law**

Condition; change; tampering

**Criminal Law**

Chain of custody

Once a party seeking to bar physical evidence due to tampering meets its burden of showing that there was a probability that the evidence was tampered with, the burden shifts to the nonmoving party to establish a proper chain of custody or submit other evidence that tampering did not occur.

23 **Sentencing and Punishment**

Demonstrative evidence

Defendant who sought to bar the admission of a bullet fragment due to tampering met his burden of showing that probable tampering occurred, for the purpose of determining whether the fragment was admissible at a new penalty phase in a prosecution for capital murder; a doctor and a detective testified that there were two or three projectile fragments initially, one or two of the fragments were missing, and neither the doctor nor the detective was able to provide an explanation for their disappearance.

24 **Sentencing and Punishment**

Demonstrative evidence

Trial court could find that the state met its burden of establishing a proper chain of custody of a bullet fragment and provided a reasonable explanation to rebut defendant's claim that there was a probability of evidence tampering, as required for the fragment to be admissible at a new penalty phase in a prosecution for capital murder, even though one or two of the initial two or three fragments were missing; custodial supervisor testified to custody procedures and that, other than one occasion, an envelope with projectile fragments remained stored in a warehouse since defendant's trial started 17 years earlier, and, inter alia, the state argued that the fragments were each the size of a dot and that it was likely that the missing fragment simply fell out of the envelope at some point.

25 **Sentencing and Punishment**

Other discovery and disclosure

Bad faith did not exist in the state's failure to preserve a bullet fragment, so as to allow the admission of a remaining, larger fragment at a new penalty phase in a prosecution for capital murder; record did not indicate that the prosecutors or the police believed that the fragments were exculpatory or had any tendency to exonerate defendant, and the record also did not reveal that the fragments were destroyed, in that it did not logically follow that anyone who sought to destroy the evidence would remove one tiny fragment but leave the larger fragment intact.

26 **Sentencing and Punishment**

Demonstrative evidence

Trial court could admit a bullet fragment at a new penalty phase in a prosecution for capital murder; it was necessary for the state to show the circumstances surrounding the crime and facts that established defendant's guilt to prove aggravation, the state was permitted to rebut defendant's offered mitigation, and the fragment supported defendant's guilt and his volitional and intimate involvement in a robbery, a shooting of a law enforcement officer, and the first-degree murder of another officer.

27 **Sentencing and Punishment**

Deliberations

Trial court was not required give a jury instruction, after the jury at a new penalty phase in a prosecution for capital murder submitted a question during deliberations about whether defendant's 17 years in prison would be included in his sentence of life imprisonment without the

possibility of parole for 25 years, that defendant was not guaranteed parole at or after 25 years; the jury was repeatedly informed that parole was only a possibility, the jury was aware that defendant was serving other sentences in addition to the life sentence, and trial court answered the jury's specific question of whether defendant would be entitled to time served. West's F.S.A. § 775.082(1); West's F.S.A. RCrP Rule 3.410.

28 **Criminal Law**
Issues related to jury trial

Instructions given by a trial court during jury deliberations are subject to the abuse-of-discretion standard of review. West's F.S.A. RCrP Rule 3.410.

29 **Criminal Law**
Discretion of Lower Court

Discretion is abused only when the judicial action is arbitrary, fanciful, or unreasonable, which is another way of saying that discretion is abused only where no reasonable person would take the view adopted by the trial court.

30 **Criminal Law**
Confused or misleading instructions

A trial court should not give jury instructions that are confusing, contradictory, or misleading.

31 **Sentencing and Punishment**
Harmless and reversible error

Any error in trial court's failure to give a jury instruction, after the jury at a new penalty phase in a prosecution for capital murder submitted a question during deliberations about whether defendant's 17 years in prison would be included in his sentence of life imprisonment without the possibility of parole for 25 years, that defendant was not guaranteed parole at or after 25 years was harmless; such an instruction would not have caused the jury to arrive at a conclusion that it would not have otherwise reached because there was substantial aggravation that provided independent support for the jury's recommendation of a death sentence.

32 **Sentencing and Punishment**
Killing while committing other offense or in course of criminal conduct

**Sentencing and Punishment**
Nature, degree, or seriousness of other offense

**Sentencing and Punishment**
Childhood or familial background

**Sentencing and Punishment**
Law enforcement officer

Sentence of death for first-degree murder was a proportionate punishment, even though trial court found a statutory mitigator and a nonstatutory mitigator based on defendant's background, where trial court found three aggravators, specifically that defendant had prior convictions for violent felonies, that the murder was committed during a robbery, and that victim was a law enforcement officer engaged in the performance of his duties.

33 **Sentencing and Punishment**
Proportionality

In determining whether death is a proportionate punishment, the Supreme Court conducts a two-pronged inquiry, comparing the case before it to other cases to determine whether the crime falls within the category of both (1) the most aggravated and (2) the least mitigated of murders; this entails a qualitative review of the underlying basis for each aggravator and mitigator rather than a quantitative analysis.

**Attorneys and Law Firms**

*160 John Cotrone, Fort Lauderdale, FL, for Appellant.
Pamela Jo Bondi, Attorney General, Tallahassee, FL, and Leslie T. Campbell, Assistant Attorney General, West Palm Beach, FL, for Appellee.

**Opinion**

PER CURIAM.

This case is before the Court on appeal from a sentence of death. We have jurisdiction. *See* art. V, § 3(b)(1), Fla. Const.

## I. OVERVIEW

On March 7, 1990, Lancelot Uriley Armstrong was indicted for the February 17, 1990, first-degree shooting murder of Deputy Sheriff John Greeney, attempted murder of Deputy Sheriff Robert Sallustio, and armed robbery. The jury returned a guilty verdict and recommended a sentence of death by a vote of nine to three. On direct appeal, we affirmed Armstrong's convictions and sentence of death. *Armstrong v. State (Armstrong I)*, 642 So.2d 730 (Fla.1994).

Armstrong filed a motion for postconviction relief under Florida Rule of Criminal Procedure 3.850, which was denied. On appeal, this Court affirmed the denial of collateral relief on the guilt phase issues, but vacated Armstrong's death sentence and remanded for a new penalty phase after concluding that one of Armstrong's prior violent felony aggravators had since been invalidated. *Armstrong v. State (Armstrong II)*, 862 So.2d 705, 715 (Fla.2003).

On April 16, 2007, Armstrong's new penalty phase commenced. On April 25, 2007, the jury again recommended death by a vote of nine to three. Following a *Spencer*[1] hearing, the trial court found the existence of three aggravators, one statutory mitigator, and four nonstatutory mitigators ***161** and imposed a sentence of death. This appeal followed.

Armstrong raises four issues below. The State raises a fifth issue: proportionality. For the reasons expressed below, Armstrong is not entitled to relief.

## II. FACTS AND PROCEDURAL HISTORY

The facts of Armstrong's crimes are laid out in this Court's opinion on Armstrong's first direct appeal:

> In the early morning hours of February 17, 1990, Armstrong called a friend and asked him to go with him to rob Church's Fried Chicken restaurant. The friend refused. According to several employees of Church's, around two o'clock that same morning, Armstrong and Michael Coleman came to the restaurant asking to see Kay Allen, who was the assistant manager of the restaurant and Armstrong's former girlfriend. The restaurant employees testified that Allen did not want to see Armstrong and asked him to leave. Armstrong and Coleman, however, remained at the restaurant and eventually Allen accompanied Armstrong to the vehicle he was driving while Coleman remained inside the restaurant. The employees additionally testified that Allen and Armstrong appeared to be arguing while they were sitting in the vehicle.
>
> Allen testified that, while she was in the car with Armstrong, he told her he was going to rob the restaurant, showed her a gun under the seat of the car, and told her he might have to kill her if she didn't cooperate. Coleman then came out to the car, and Armstrong, Coleman, and Allen went back into the restaurant. Allen was responsible for closing the restaurant, and by this time, the other employees had left. Coleman and Armstrong ordered Allen to get the money from the safe. Before doing so, she managed to push the silent alarm. Shortly thereafter, Armstrong returned to the car. Coleman remained in the restaurant with Allen to collect the money from the safe.
>
> Other testimony reflected the following facts. When the alarm signal was received by the alarm company, the police were notified and Deputy Sheriffs Robert Sallustio and John Greeney went to the restaurant where they found Armstrong sitting in a blue Toyota. Greeney ordered Armstrong out of the car and told him to put his hands on the car. After Greeney ordered Armstrong to put his hands on the car, Greeney holstered his gun to "pat down" Armstrong. Sallustio then noticed movement within the restaurant, heard shots being fired from the restaurant and from the direction of the car, and felt a shot to his chest. Apparently, when the movement and shots from the restaurant distracted the officers, Armstrong managed to get his gun and began firing at the officers.
>
> According to Allen, when Coleman noticed that police officers were outside the building, he started firing at the officers. Allen took cover inside the restaurant, from where she heard Coleman firing more shots and heard a machine gun being fired outside the restaurant. Sallustio was shot three times, but still managed to run from Armstrong and radio for assistance. When other officers arrived, they found Greeney dead at the scene. Greeney had died instantly. Allen was found inside the restaurant; Coleman and Armstrong had fled.

That same day, Armstrong told one friend that he got shot and that he returned a shot; he told his girlfriend that a police officer had asked him to step out of his car and that, when he did so, ***162** the officer pulled a gun on him and tried to shoot him; and he told another friend that someone shot him while trying to rob him. Thereafter, Armstrong and Coleman fled the state but were apprehended the next day in Maryland. Before being apprehended, Armstrong had two bullets removed from his arm by a Maryland doctor.

A number of shell casings were recovered from the scene. All of the bullets removed from Sallustio and Greeney were fired from a nine-millimeter, semi-automatic weapon; Greeney had been shot from close range. Evidence reflected that Armstrong had purchased a nine-millimeter, semi-automatic weapon the month before the crime. Armstrong's prints were found in the blue Toyota as well as on firearm forms found in the car. Additional ballistics evidence reflected that the shots fired from the restaurant did not come from a nine-millimeter, semi-automatic weapon. This indicated that only someone near the car could have fired the shots that wounded Sallustio and killed Greeney. Additionally, testimony was introduced to show that Armstrong was seen with a nine-millimeter, semi-automatic gun right after the incident. Armstrong was convicted as charged. [n.1]

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At the penalty phase, the State presented evidence showing Armstrong's prior conviction of indecent assault and battery on a fourteen-year-old child. Armstrong presented evidence from a number of witnesses in support of the following nonstatutory mitigating circumstances: (1) he had significant physical problems during childhood (he was dyslexic but a good student and had a brain hemorrhage when he was a baby); (2) helped others and had a positive impact on others (routinely assisted his grandmother, brothers and sisters, both financially and emotionally; was a good father and provider to his son; trained others to do carpentry work and was a positive influence on those he assisted); (3) was present as a child when his mother was abused and would come to her aid; (4) could be productive in prison (was an excellent carpenter and plumber); (5) is a good prospect for rehabilitation; (6) codefendant received a life sentence; (7) the alternative sentence is life imprisonment without the possibility of parole; (8) Armstrong is religious (attends church); and (9) Armstrong failed to receive adequate medical care and treatment as a child (had a brain hemorrhage when he was a baby but, due to finances, did not receive the medical attention he needed).

The jury recommended death by a nine-to-three vote. The trial judge found no statutory mitigating circumstances and four aggravating circumstances: (1) prior conviction of a violent felony; (2) committed while engaged in the commission of a robbery or flight therefrom; (3) committed for the purpose of avoiding arrest or effecting an escape from custody; and (4) murder of a law enforcement officer engaged in the performance of official duties. The trial judge sentenced Armstrong to death for the murder of Officer Greeney, to life imprisonment for the attempted murder of Officer Sallustio, and to life imprisonment for the armed robbery.

*Armstrong I*, 642 So.2d at 733–34. On direct appeal, Armstrong raised twenty-four issues, nine of which pertained to the guilt phase and fifteen of which pertained to the penalty phase. *Id.* at 734. This Court affirmed Armstrong's convictions and sentences. *Id.* at 739.

***163 Armstrong's Rule 3.850 Proceedings and Appeal**

On April 20, 2000, Armstrong filed an amended rule 3.850 motion for postconviction relief. Armstrong raised thirty-four issues. After a *Huff*[2] hearing, the postconviction court summarily denied thirty-two of the claims and granted an evidentiary hearing on the following two claims: (1) that Armstrong's death sentence was predicated on a since-vacated prior violent felony conviction, and (2) ineffective assistance of counsel regarding the investigation and presentation of mitigating evidence during the penalty phase trial. After the evidentiary hearing, the trial court entered a final order denying relief on all claims. Armstrong appealed the postconviction court's denial of his rule 3.850 motion and petitioned this Court for a writ of habeas corpus.

On appeal, Armstrong raised sixteen claims alleging that he was entitled to postconviction relief for various issues relating to both the guilt and penalty phase trial below. In his first penalty phase claim, Armstrong alleged that he was entitled to relief because his sentence of death was based on a prior violent felony conviction that was subsequently invalidated. Pursuant to *Johnson v. Mississippi*, 486 U.S. 578, 108 S.Ct. 1981, 100 L.Ed.2d 575 (1988), this Court agreed. Therefore, this Court affirmed all issues relating solely to the guilt phase

trial, but vacated the death sentence and remanded the case for a new penalty phase and resentencing. *Armstrong II*, 862 So.2d at 721.

### Armstrong's New Penalty Phase

Prior to the new penalty phase, the State filed a motion in limine seeking to preclude Armstrong from presenting testimony, evidence, or any arguments concerning Armstrong's innocence pursuant to *Preston v. State*, 607 So.2d 404, 411 (Fla.1992) (explaining that such arguments would be considered improper). The trial court granted the motion, but permitted Armstrong to challenge the extent of his involvement in the robbery and homicide based on the mitigating circumstances he raised. Armstrong claimed the mitigation revealed that Coleman was the shooter and that Armstrong's involvement in the crime was minor and a result of his acting under duress.

Pursuant to this Court's mandate, jury selection for the capital resentencing hearing began on April 10, 2007. On April 11, 2007, the jury panel was accepted. During jury selection, the State and defense resolved a defensive challenge for cause by agreement to excuse the challenged juror.

On April 16, 2007, the panel was sworn in and the evidentiary portion of the penalty phase proceeded. At the conclusion of the new penalty phase trial, the trial court instructed the jury that its recommendation should either be for: (1) death, or (2) life imprisonment without the possibility of parole for 25 years. Specifically, the trial court instructed: "If you find the aggravating circumstances do not justify the death penalty, your advisory sentence should be one of life imprisonment without possibility of parole for twenty-five (25) years." The trial court further instructed the jury, "If a majority of the jury determine that Lancelot Armstrong should be sentenced to death, your advisory sentence will be a majority of the jury by a vote of blank to blank, advised, recommend to the Court that it impose the death penalty upon Lancelot Armstrong." Additionally, the trial court instructed:

> On the other hand, if by six or more votes the jury determines that Lancelot Armstrong should not be sentenced to ***164** death, your advisory sentence would be, the jury advises and recommends to the Court by a vote of blank to blank that it impose a sentence of life imprisonment to Lancelot Armstrong without the possibility of parole for 25 years.

The written instruction was consistent with the verbal instruction.

The trial evidence revealed that Armstrong was originally incarcerated in 1990 and sentenced in 1991. After jury deliberations began, the jury submitted a question, asking, "Will the 17 yrs he served be included in his 25 yrs sentence?" The trial court relayed the jury question to counsel, stating, "Will the 17 years he served be included in his sentence?"

After considering the arguments presented, the trial court stated:

> THE COURT: I'm troubled by the language in the *Downs* [*v. State*, 572 So.2d 895 (Fla.1990),] case because in the *Downs* case says under the facts presented we find that the trial court did not use the discretion.
>
> State argued that the *Downs* case created issue decision because he said, quote stands 25 more years. We haven't heard that here. They have narrowly by this case permitted the response.

Ultimately, the jury was instructed as follows: "The defendant will receive credit for the time served on this charge."

On April 25, 2007, the jury again recommended a sentence of death by a vote of nine to three.

### *Nelson*[3] Hearing

On May 31, 2007, Armstrong filed a "motion to discharge counsel of record and appoint counsel outside of Public Defender's office." On June 14, 2007, based on the contents of that motion, the trial court held a "modified" *Nelson* hearing. There, Armstrong announced the names of the witnesses he alleged to have asked counsel to contact, and complained that counsel had not provided him with a copy of the postconviction evidentiary hearing transcript. The matter was taken under advisement. On July 2, 2007, the trial court denied the motion to discharge counsel.

### *Spencer* Hearing

On September 7, 2007, the trial court conducted a *Spencer* hearing. During the *Spencer* hearing, Armstrong presented testimony from (1) David Massar, a crime filmmaker who came to know Armstrong through a prison pen pal program; (2) Avia Joy McKenzie, a woman who befriended Armstrong after he was incarcerated and testified that Armstrong was there for her when her daughter died in 1996; and (3) Armstrong. However, at that time, Armstrong made several

comments that were clearly an attempt to relitigate the 1991 guilt phase, the new penalty phase proceedings, the presentation of mitigation, and the motion to discharge counsel. The trial court categorized Armstrong's comments as a hybrid *Muhammad,* [4] *Boyd,* [5] and *Grim* [6] claim. As a result, the trial court recessed. On October 7, 2007, the trial court entered an order resetting the *Spencer* hearing.

On November 15, 2007, and November 30, 2007, the trial court continued the *Spencer* hearing. Although the *Spencer* hearing concluded in November 2007, the trial court was unable to enter its sentencing order until 2009. The delay appears to ***165** be the result of extensive transcription problems.

### The August 7, 2009, Sentencing Order

On August 7, 2009, the trial court entered it order sentencing Armstrong to death. In its extensive sentencing order, the trial court found and afforded "great weight" to each of the following three aggravating circumstances: (1) the Defendant was convicted of another capital felony or of a felony involving the use or threat of violence to the person (prior violent felony); (2) the capital felony was committed while the Defendant was engaged or was an accomplice in the commission of or an attempt to commit the crime of robbery (robbery); and (3) the victim in this capital felony case was a law enforcement officer engaged in the performance of his duties. [7]

The trial court considered and rejected four statutory mitigators: (1) the Defendant has no significant history of prior criminal activity, (2) the age of the Defendant (Armstrong was 28 years old) at the time of the crime, (3) the Defendant was an accomplice in the capital felony committed by another person and his participation was relatively minor, and (4) the Defendant acted under extreme duress or under the substantial domination of another person.

However, the trial court did find one statutory mitigator: (1) the existence of any other factors in the defendant's background that would mitigate against the imposition of the death penalty. The trial court considered the following background mitigation under this statutory mitigator: (a) Armstrong was born and raised in an impoverished country (Jamaica) where living conditions were deplorable and there was a constant threat of erupting and escalating violence (little weight); (b) had a problematic health history as a child and suffered from dyslexia (little weight); (c) was a good prisoner and regularly attended religious ceremonies while incarcerated (little weight); (d) suffered abuse at the hands of his stepfather and his brother cut off a portion of his finger when he was working in the cane fields (some weight); and (e) assisted in raising his siblings in Jamaica (some weight).

Finally, the trial court found that four of the nonstatutory mitigating circumstances were applicable after considering whether Armstrong (1) had problems growing up because he was biracial (little weight); (2) was a member of the police in Jamaica who assisted during times of rioting and political unrest (not applicable); (3) assisted and trained others for jobs and counseled young adults while in Boston and Florida (not applicable); (4) taught himself how to read and write while imprisoned (not applicable); (5) was suffering from a benign internal tumor, at the time of sentencing, the size of a golf ball which could turn into cancer in the future (not mitigating); (6) having been incarcerated for 18 years at that point, was deprived of seeing his children grow as a result of his incarceration (not mitigating); (7) was a kind, gentle man (not mitigating); (8) assisted the police in preventing the sale of drugs while in Massachusetts (nonexistent); (9) was a good businessman (rejected); (10) expressed sorrow for the death of Greeney and the shooting of Sallustio and for their families, but maintained that he did not ***166** commit the crimes (no remorse); and (11) properly raised a residual or lingering doubt (not appropriate).

The trial court weighed the aggravating factors and the mitigating factors and found that "the aggravating circumstances in this case far outweigh the mitigating circumstances. The aggravating circumstances in this case are overwhelming." Armstrong was again sentenced to death for his conviction of first-degree murder. He was also sentence to two consecutive life sentences for the attempted first-degree murder and armed robbery convictions.

### This Appeal

In his second direct appeal following the completion of his new penalty phase and resentencing, Armstrong raises four issues: (1) whether the trial court abused its discretion in admitting into evidence a vial of blood or photographs of the victim that were taken at the scene of the crime and the medical examiner's office, (2) whether the trial court abused its discretion in admitting into evidence the remaining bullet fragment of the three original bullet fragments, (3) whether the trial court abused its discretion when it instructed the jury on the terms of a life sentence or when it answered the jury's question regarding credit for time served, and (4) cumulative

error. The State raises proportionality as the fifth issue. Each of these issues is discussed below.

## III. ANALYSIS

### A. Vial of Blood and Photographs

1 First, Armstrong contends that the trial court abused its discretion in admitting a vial of blood and several photographs during his new penalty phase. "A trial court's ruling on the admission of photographic evidence will not be disturbed absent a clear showing of abuse of discretion." *Davis v. State,* 859 So.2d 465, 477 (Fla.2003) (citing *Mansfield v. State,* 758 So.2d 636, 648 (Fla.2000)). Below, we discuss the trial court's admission of each of these items into evidence and conclude that the trial court did not abuse its discretion.

2 Photographs, like all other evidence, are subject to the section 90.403, Florida Statutes (1989), balancing test. Pursuant to section 90.403, "Relevant evidence is inadmissible if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of issues, misleading the jury, or needless presentation of cumulative evidence." § 90.403, Fla. Stat.

In *Czubak v. State,* 570 So.2d 925 (Fla.1990), this Court discussed the admissibility of gruesome photographs:

> This Court has long followed the rule that photographs are admissible if they are relevant and not so shocking in nature as to defeat the value of their relevance. Where photographs are relevant, "then the trial judge in the first [instance] and this Court on appeal must determine whether the gruesomeness of the portrayal is so inflammatory as to create an undue prejudice in the minds of the jury and [distract] them from a fair and unimpassioned consideration of the evidence." We have consistently upheld the admission of allegedly gruesome photographs where they were independently relevant or corroborative of other evidence.

*Id.* at 928 (citations omitted).

*Hertz v. State,* 803 So.2d 629, 641 (Fla.2001). Further, this Court has consistently held that the initial test for determining the admissibility of photographic evidence is relevance, not necessity. *See Mansfield,* 758 So.2d at 648.

#### *167 *Photograph Taken at the Scene of the Crime (State's Exhibit 24)*

3 Armstrong argues that the trial court erred by admitting into evidence a particularly gruesome photograph that was taken of Greeney at the scene of the crime because it was prejudicial beyond any value as relevant evidence.

This Court has explained that the trial court does not abuse its discretion in admitting allegedly inflammatory photographs of the victim taken at the scene of the crime when the photographs are relevant to assist the crime scene technician in explaining the condition of the crime scene when police arrived, to show the position and location of the body when it was found, or to show the manner in which the victim was killed. *Id.* at 641–42.

In the instant case, State's Exhibit 24 is a photograph that was taken of Greeney's body at the scene of the crime. In response to defense counsel's objection, the State alleged that the "photograph was introduced at trial and shows the way that Deputy Greeney was. When he was found on his back and gun in his holster." The State presented the testimony of Detective Charles F. Edel who testified that the picture accurately portrayed Greeney's body at the scene of the crime and that Greeney's holster was unsnapped but the gun was not removed from the holster. Further, Detective Edel testified that the Greeney's gun had not been fired and was fully loaded. This photograph was relevant to show the position of Greeney's body at the scene of the crime, the location of the crime, Greeney's manner of death, and his identity as a police officer in support of the third aggravating factor that the victim in this capital felony case was a law enforcement officer engaged in the performance of his duties. The photograph was probative because it tended to prove that Armstrong shot Greeney and to rebut Armstrong's theory of the case. Therefore, we conclude that the trial court did not abuse its discretion in admitting State's Exhibit 24.

#### *Enlarged Photograph Taken at the Scene (State's Exhibit 92)*

4 Armstrong contends that the trial court abused its discretion in admitting State's Exhibit 92, an enlarged photograph taken at the scene of the crime that depicted the side of Greeney's face and showed a graze wound and soot in Greeney's left ear. Through Dr. Raul Villa's testimony, the State introduced State's Exhibit 92. Defense counsel

objected to the introduction of the photograph and informed the trial court that the defense stipulated to the fact that soot was in Greeney's ear. However, the trial court admitted the photograph.

Armstrong cites to *Dyken v. State,* 89 So.2d 866, 867 (Fla.1956), to support his argument that photographic evidence cannot be admitted if defense counsel stipulates to the content of the picture. This argument is misguided. There, this Court did not hold that photographic evidence is never admissible if some of the photographic content is stipulated to. Rather, because the only basis for its relevance had already been stipulated to, this Court concluded that it was not independently relevant. *Id.* at 866.

5 In the instant case, the photograph displayed not only the presence of soot, which corroborated Dr. Villa's testimony that Greeney was shot from within 12 to 36 inches and tended to prove that Greeney was shot from approximately 18 inches away, but also displayed scrapes on Greeney's face that demonstrated his manner of death, and the graze wound to Greeney's ear, demonstrating the location of one of his wounds. Thus, the instant case is distinguishable from *Dyken* because the ***168** photograph in the instant case is independently relevant. Moreover, although defense counsel stipulated to the presence of soot, trial courts have broad discretion in admitting photographic evidence and the test for the admission of such evidence is not whether the evidence is necessary. Rather, the evidence is subject to the balancing test: whether the evidence is relevant and, if so, whether the probative value outweighs the danger of prejudice. Thus, the trial court did not abuse its discretion in admitting State's Exhibit 92.

***Autopsy Photograph (State's Exhibit 23)***

6 7 8 9 Next Armstrong alleges that the trial court abused its discretion in admitting State's Exhibit 23, an autopsy photograph. Autopsy photographs that are relevant to show the manner of death, location of wounds, and the identity of the victim or to assist the medical examiner in explaining the victim's injuries are generally admissible evidence. *See Ault v. State,* 53 So.3d 175 (Fla.2010) (concluding that the trial court did not abuse its discretion in admitting four relevant autopsy photographs that were not unduly prejudicial during Ault's new penalty phase trial on resentencing) *petition for cert. filed,* No. 10–11173 (U.S. June 20, 2011). This Court has explained:

> Photographs are admissible if "they assist the medical examiner in explaining to the jury the nature and manner in which the wounds were inflicted." *Bush v. State,* 461 So.2d 936, 939 (Fla.1985). Moreover, photographs are admissible "to show the manner of death, location of wounds, and the identity of the victim." *Larkins v. State,* 655 So.2d 95, 98 (Fla.1995). On the other hand, trial courts must be cautious in not permitting unduly prejudicial or particularly inflammatory photographs before the jury. However, a trial court's decision to admit photographic evidence will not be disturbed absent an abuse of discretion. *See Mansfield,* 758 So.2d at 648.

*Ault,* 53 So.3d at 198–99 (quoting *Brooks v. State,* 787 So.2d 765, 781 (Fla.2001)). "[T]he mere fact that photographs may be gruesome does not mean they are inadmissible." *Ault,* 53 So.3d at 199 (quoting *Harris v. State,* 843 So.2d 856, 864 (Fla.2003)). To be relevant, however, "a photo of a deceased victim must be probative of an issue *that is in dispute.*" *Almeida v. State,* 748 So.2d 922, 929 (Fla.1999).

In this case, the autopsy photograph was first offered into evidence during Detective Edel's testimony. This photograph was labeled State's Exhibit 23. This photograph depicts Greeney's face, neck, and the top of his torso. There are small dots, known as stippling, covering Greeney's neck and left shoulder and there is a bullet hole in his neck as well as in his left shoulder. Detective Edel testified that he is trained to recognize stippling and has seen evidence of stippling some 200 to 300 times. Detective Edel testified that the stippling around Greeney's neck caused by burning gunpowder coming into contact with Greeney's skin. The State then questioned Detective Edel about a photograph of the victim taken at the autopsy, asking, "Does this truly reflect Deputy Greeney at the autopsy?"

Later on, Dr. Villa testified that Greeney sustained one gunshot wound to his anterior neck and one underneath his left shoulder. His testimony revealed that the wound to Greeney's neck was fatal and Greeney would not have lived for more than a few minutes after receiving the wound because it hit the carotid artery and spinal cord. The State introduced the autopsy photograph because it was relevant to Greeney's manner of death and Armstrong's involvement in Greeney's death. The autopsy photograph was probative of ***169** Armstrong's involvement in Greeney's murder. According to Dr. Villa, Greeney suffered a grazing gunshot wound to his ear and two penetrating gunshot wounds shot from close range. Based on the stippling around his wounds and the searing or burning that his shirt sustained, the State

was able to establish that Greeney was shot from close range. Dr. Villa estimated the shots were fired from 18 inches away from Greeney who could have survived only a few minutes after being hit.

The ballistics from the scene revealed that bullets fired from inside the restaurant were from a revolver. Ballistics also revealed that Greeney did not fire his weapon and Sallustio fired 19 shots. The remaining rounds were from a .9 millimeter weapon similar to the one Armstrong possessed. All of the projectiles recovered from Greeney and Sallustio were fired from a .9 millimeter Intertech, Tech-nine firearm. These projectiles were consistent with the firearm that Armstrong purchased in January 1990. This evidence established that Armstrong was the one who shot Greeney and Sallustio and rebutted Armstrong's claim that he did not shoot the officers and that his participation was minor or a result of duress.

Armstrong's reliance on *Reddish v. State,* 167 So.2d 858 (Fla.1964), is misplaced because, in *Reddish,* the photographic evidence was found to be irrelevant. *Id.* at 863. In contrast, the autopsy photograph that was introduced during Armstrong's new penalty phase trial, which was conducted in front of new jurors who did not sit for the guilt phase trial, was relevant to Greeney's manner of death and was probative of who killed Greeney and shot Sallustio—a fact in dispute as a result of Armstrong's claim that he did not shoot the officers and that his involvement was minor or a result of duress. Thus, the trial court did not abuse its discretion in admitting the autopsy photograph of Greeney.

**10** Furthermore, Armstrong's contention that the photographs were admissible the photographs were not admissible because the State did not seek the HAC aggravator is misguided. While a photograph may be relevant to prove HAC, *see Mansfield,* 758 So.2d at 648 (concluding that the admission of photographs of the victim's mutilated genitalia to support HAC and a sexual battery aggravator was not an abuse of discretion), HAC is not a prerequisite for the admissibility of a photograph. "This Court has upheld the admission of photographs when they are offered to explain a medical examiner's testimony, the manner of death, the location of the wounds, or to demonstrate the heinous, atrocious, or cruel (HAC) factor." *McWatters v. State,* 36 So.3d 613, 637 (Fla.), *cert. denied,* —— U.S. ——, 131 S.Ct. 510, 178 L.Ed.2d 378 (2010). Here, each photograph was admissible despite the absence of the HAC aggravator. Thus, this argument is without merit.

***Vial of Blood (State's Exhibit 22)***

**11** Finally, Armstrong contends that the trial court erred in admitting a vial of Deputy Greeney's blood into evidence during the second penalty phase trial. During the 1991 guilt phase trial, a vial of Greeney's blood was proffered through Dr. Villa's testimony, who removed the blood from Greeney's heart during the autopsy, and offered and received without defense objection through Detective Edel's testimony. Dr. Villa testified that the blood was used for toxicology testing and also given to the crime scene laboratory for analysis.

During Armstrong's second penalty phase trial, the State introduced the same vial. Armstrong claims the vial of blood ***170** had no evidentiary value and was had no purpose or effect other than to inflame the minds of the jurors. However, the vial of blood was relevant because it was used for DNA testing and to show that Greeney's blood was found inside of Armstrong's vehicle. Moreover, the State contends that the vial of blood was probative because it demonstrated that some of the blood found inside of Armstrong's vehicle matched, and was in fact, Greeney's blood. When coupled with the testimony that Armstrong was outside and Coleman was inside of the Church's Chicken, and the presence of Armstrong's blood spatter in the car as well, this negated Armstrong's claim that he did not shoot Greeney. We therefore conclude that the trial court did not abuse its discretion in admitting the vial of Greeney's blood.

***Presentation of Cumulative Evidence***

**12** Defense counsel objected to the admission of State's Exhibit 92 as cumulative. As the State noted, State's Exhibit 92 was the only photograph depicting soot in Greeney's ear. Once defense counsel objected, the State offered, "If Mr. Rowe has another picture indicating the soot on his left ear, I will be happy to use that, but this is the only picture we have." While the State introduced 130 photographs, only three were of Greeney's dead body. The relevance and probative value of the three photographs do overlap to some extent. However, State's Exhibit 23 was the only photograph that showed Greeney's body as it was at the scene and also showed Greeney in his police uniform. State's Exhibit 24 was the only photograph that clearly showed the stippling and the bullet wounds to Greeney's neck and shoulder area. Meanwhile, State's Exhibit 92 was the only photograph that depicted the soot in his ear. Further, the vial of blood was taken from Greeney's heart and used to match his blood to the

blood inside Armstrong's vehicle. Thus, the admission of the photographs and vial of blood did not amount to a needless presentation of cumulative evidence.

Moreover, to the extent Armstrong alleges that State's Exhibit 92 was cumulative because defense counsel stipulated to the presence of soot in Greeney's ear, this claim is without merit. *See Zamora v. State,* 361 So.2d 776, 783 (Fla. 3d DCA 1978) (concluding that, notwithstanding defendant's offer to stipulate to murder, position of body, etc., photographs of victim were relevant in that they corroborated testimony of certain witnesses, as to the cause of death, location and characteristics of wound, and position of body in reference to physical makeup of room; furthermore, photographs were not inflammatory to point of prejudicing minds of jury and, thus, were properly admitted).

***Harmless Error***

**13 14 15 16 17** Even if the trial court abused its discretion in admitting any of the aforementioned evidence, the error is harmless. "Where the trial court has abused its discretion in admitting photographs, this Court uses a harmless error analysis." *Philmore v. State,* 820 So.2d 919, 931 (Fla.2002) (citing *Almeida,* 748 So.2d at 930). If there is a reasonable probability that the error affected the verdict, then such error is harmful. *McDuffie v. State,* 970 So.2d 312, 328 (Fla.2007) (citing *State v. DiGuilio,* 491 So.2d 1129, 1138 (Fla.1986)). "It is well-established that the harmless error test 'is not a sufficiency-of-the-evidence, a correct result, a not clearly wrong, a substantial evidence, a more probable than not, a clear and convincing, or even an overwhelming evidence test' but the 'focus is on the effect of the error on the trier-of-fact.' " *McDuffie,* 970 So.2d at 328 (quoting *DiGuilio,* 491 So.2d at 1139). A harmless error analysis "requires ***171** an examination of the entire record." *DiGuilio,* 491 So.2d at 1135.

Here, even if the allegedly improper evidence had not been admitted, the jury would have reached the same result. Armstrong had already been convicted of the crime and the evidence during his second penalty phase trial supported the three aggravating factors that were imposed. The photographs and vial of blood supported the aggravating factor that the victim in this capital case was a law enforcement officer engaged in the performance of his duties. However, Sallustio's testimony also supported that aggravator. Additionally, without this evidence, there was still evidence to independently support both of the underlying felonies that were used in support of the prior violent felony aggravator and there was independent evidence to support the robbery aggravator. Thus, the error complained of did not contribute to the verdict. Accordingly, we conclude that the trial court did not abuse its discretion in admitting the photographic evidence and the vial of blood.

**B. Bullet Fragment**

**18 19** Second, Armstrong contends that the trial court abused its discretion in admitting a bullet fragment into evidence during his new penalty phase. The admissibility of evidence is within the sound discretion of the trial court, and the trial court's ruling will not be reversed unless there has been a clear abuse of that discretion. *Ray v. State,* 755 So.2d 604, 610 (Fla.2000); *Zack v. State,* 753 So.2d 9, 25 (Fla.2000). "It is within the sound discretion of the trial court during resentencing proceedings to allow the jury to hear probative evidence that will aid it in understanding the facts of the case so that it may render an appropriate advisory sentence." *Bonifay v. State,* 680 So.2d 413, 419 (Fla.1996) (citing *Teffeteller v. State,* 495 So.2d 744 (Fla.1986)).

***Probable Tampering***

**20 21 22** Armstrong argues that he met his burden of demonstrating that there was probable tampering, and thus, the trial court should have excluded the remaining bullet fragment. "Relevant physical evidence is admissible unless there is an indication of probable tampering." *Peek v. State,* 395 So.2d 492, 495 (Fla.1980). This is a test for determining whether the chain of custody is established. In order to demonstrate probable tampering, the party attempting to bar the evidence must show that there was a probability that the evidence was tampered with—the mere possibility is insufficient. *Murray v. State (Murray I),* 838 So.2d 1073, 1082–83 (Fla.2002). Once the party moving to bar the evidence has met its burden, the burden shifts to the nonmoving party to establish a proper chain of custody or submit other evidence that tampering did not occur. *Id.*

In the instant case, Armstrong cites to *Murray I,* 838 So.2d at 1082–83 (concluding that the trial court abused its discretion in admitting the evidence because Murray met his burden of demonstrating probable evidence tampering and the State failed to meet its burden of proving that such tampering did not occur) and *Dodd v. State,* 537 So.2d 626, 627 (Fla. 3d DCA 1988) (concluding that the State failed to establish a sufficient chain of custody to meet its burden of proving that tampering did not occur). Nevertheless, a sufficient showing

of the chain of custody is made where the object has been kept in proper custody since the time it was under possession and control until the time it is produced at trial. *See Murray v. State (Murray II )*, 3 So.3d 1108 (Fla.2009) (concluding that there was no break in the chain of custody where lotion was missing from an evidence bag, but was later found to have been intentionally removed from ***172** the bag by a print expert so it would not contaminate other evidence).

**23** **24** Based on *Murray I* and *Dodd,* Armstrong correctly asserts that he met his burden of demonstrating that probable tampering occurred. Dr. Vincent Karag and Detective John Auer testified that there were two or three projectile fragments initially. When asked about the missing fragment or fragments, neither Dr. Karag nor Detective Auer was able to provide an explanation for their disappearance. The absence of the projectile fragments is certainly suspect and indicative of tampering. However, this claim is without merit because, unlike in *Murray I* and *Dodd,* the State met its burden of establishing a proper chain of custody or submitting other evidence that tampering did not occur.

During Armstrong's new penalty phase, the State introduced the testimony of Dave Tomkins, the Custodial Supervisor for the Broward County Clerk of Courts since 1998. Tomkins testified that procedurally, evidence is marked, tagged, given a storage location and then either stored in his office or in a warehouse. Tomkins testified that if someone wants to view evidence, he or she must make an appointment and sign a review form. Tomkins himself oversees this process and is in the room when the evidence is reviewed. Tomkins testified that he sent the envelope of projectile fragments up for review on or about January 25, 2007. Outside of that instance, the envelope remained stored in the warehouse since the commencement of Armstrong's trial 17 years ago. Additionally, the State argued that the fragments were each the size of a dot, wrapped in tissue paper, and stored in an envelope. The State contended that it was likely the missing fragment simply fell out of the envelope at some point. Moreover, the State reminded the trial court that the fragments were properly admitted during the Armstrong's guilt phase trial and that they were part of the record. The State explained that, because Armstrong had already been convicted and the fragments were inculpatory rather than exculpatory, there was no chain of custody problem or risk of prejudice in admitting the fragment. The trial court accepted the State's argument and noted, "With reference to item Z5, the Court finds that this particular piece has been in the custody of the County Clerk's Office since 1991."

Accordingly, we conclude that the trial court did not abuse its discretion in finding that the State established a chain of custody and provided a reasonable explanation to rebut Armstrong's contention that there was a probability of evidence tampering.

***Lost or Destroyed Evidence***

**25** Once the trial court found that the evidence had not been tampered with, the trial court categorized the missing fragment as lost or destroyed evidence and found that the remaining fragment was admissible under *Arizona v. Youngblood,* 488 U.S. 51, 56, 109 S.Ct. 333, 102 L.Ed.2d 281 (1988) ( "[U]nless a criminal defendant can show bad faith by the police on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law."). *Youngblood* explained that the "presence or absence of bad faith for purposes of the Due Process Clause must necessarily turn on the police's knowledge of the exculpatory value of the evidence at the time it was lost or destroyed." 488 U.S. at 56 n. *, 109 S.Ct. 333; *see also Guzman v. State,* 868 So.2d 498, 509 (Fla.2003).

In the instant case, the trial court found that the failure to preserve the missing fragment was not indicative of bad faith. This Court has previously recognized, "[B]ad faith exists only when law enforcement officers intentionally destroy evidence ***173** they believe would exonerate a defendant." *Id.* Here, Armstrong has not shown that the projectile exonerated him or that the State ever believed it might. The testimony presented below does not indicate that the prosecutors or police in this case believed the bullet fragments were exculpatory or had any tendency to exonerate Armstrong. Nor does the record reveal that the fragments were destroyed. It does not logically follow that anyone who sought to destroy the evidence would remove one tiny fragment, but leave the larger fragment intact. Therefore, any claim of bad faith destruction or loss of the evidence fails.

**26** Furthermore, as the State repeatedly explained throughout its brief, Armstrong's offered mitigation involved claims that he was not the shooter and that if Armstrong had any involvement it was minor and under duress. Given that the instant jury had not heard the original guilt phase presentation, but was there merely for resentencing, it was necessary for the State to show the circumstances surrounding the crime and facts that established Armstrong's guilt to prove aggravation. Likewise, the State was permitted to rebut the offered mitigation. The bullet fragments supported

Armstrong's guilt and his volitional and intimate involvement in the robbery, the shooting of Sallustio, and the first-degree murder of Greeney. Accordingly, we conclude that the trial court did not abuse its discretion in admitting the remaining projectile fragment during Armstrong's new penalty phase trial.

### C. Jury Question

27 Third, Armstrong contends that the trial court abused its discretion when it failed to instruct the jury that Armstrong was not guaranteed parole at or after 25 years.

28 29 30 Instructions given by a trial court during jury deliberations are subject to the abuse of discretion standard of review. *See Green v. State,* 907 So.2d 489, 498 (citing *Perriman v. State,* 731 So.2d 1243, 1246 (Fla.1999)); Fla. R.Crim. P. 3.410. "Discretion is abused only when the judicial action is arbitrary, fanciful, or unreasonable, which is another way of saying that discretion is abused only where no reasonable person would take the view adopted by the trial court." *White v. State,* 817 So.2d 799, 806 (Fla.2002). However, "the court should not give instructions which are confusing, contradictory, or misleading." *Butler v. State,* 493 So.2d 451, 452 (Fla.1986) (citing *Finch v. State,* 116 Fla. 437, 156 So. 489 (1934)).

In the present case, the trial court considered this Court's decisions in *Downs,* 572 So.2d at 900 (concluding that the trial court did not abuse its discretion in only instructing the jury that the defendant would received credit for time served); *Gore v. State,* 706 So.2d 1328, 1332–33 (Fla.1997) (concluding that the trial court did not abuse its discretion in instructing the jury that the defendant would receive credit for time served and in instructing the jury to rely on their recollection of the evidence when asked when parole would occur on the defendant's other life sentences); and *Green v. State,* 907 So.2d 489, 497 (Fla.2005) (concluding that the trial court did not abuse its discretion in instructing the jury that the defendant would be entitled to credit for time served, but that parole at or after twenty-five years was not guaranteed).

As the State correctly contends, this Court's decision in *Green* does not require that a jury be instructed on the eligibility of parole. Although the circumstances surrounding the jury question and the trial court's jury instruction in a case may give rise to an abuse of discretion, we have *174 never held that a trial court is required, or per se abuses its discretion in failing, to instruct a jury that parole is not guaranteed. Notably, the standard jury instruction does not apprise a jury of whether a defendant will be guaranteed parole.

The jury instruction below was not confusing, misleading, or contradictory. Nor was it a misstatement of the law. The record reveals that the jury was repeatedly informed that parole was only a possibility. Moreover, the jury was aware that Armstrong had been convicted of other crimes—the State presented evidence that Armstrong was convicted of the related violent felonies and an armed robbery that occurred on February 4, 1990. Thus, the jury was aware that Armstrong was serving other sentences in addition to the life sentence that serves as the basis for this issue. The trial court provided the jury with an accurate instruction when it limited the jury instruction to the specific jury question that was asked. The jury asked whether Armstrong would be entitled to credit for time served, and the trial court instructed the jury that he would be entitled to credit for time served.

As Armstrong correctly points out, the State's reliance on *Waterhouse v. State,* 596 So.2d 1008 (Fla.1992), is misplaced because there, the trial court refused to answer the jury question and instead informed the jury that it would have to depend on the evidence and the instructions. *Id.* at 1015.

Additionally, the instant case does not contain the "peculiar facts" that were present in *Hitchcock v. State,* 673 So.2d 859, 863 (Fla.1996) (concluding that the State's argument that Hitchcock would be eligible for parole after twenty-five years was misleading and prejudicial due to the close proximity of the expiration of his sentence and his resentencing).

31 Furthermore, even if the trial court abused its discretion, it would be of no consequence, because any error is harmless. Armstrong had already been convicted of the crime. It cannot be said that this instruction would have caused the jury to arrive at a conclusion they would not have otherwise reached as there is substantial aggravation in the instant case that provides independent support for the jury recommendation. Accordingly, we conclude that the trial court did not abuse its discretion below.

### D. Cumulative Error

Fourth, Armstrong contends that the cumulative effect of the alleged errors deprived him of a fundamentally fair trial and undermines confidence in the result of his capital proceedings. We have repeatedly held that where the alleged errors, when viewed individually, are "either procedurally barred or without merit, the claim of cumulative error

also necessarily fails." *Israel v. State,* 985 So.2d 510, 520 (Fla.2008) (quoting *Parker v. State,* 904 So.2d 370, 380 (Fla.2005)). Moreover, during Armstrong's second penalty phase, ample evidence in support of the aggravating factors and sentence of death was introduced independent of the allegedly erroneous evidence. Because Armstrong has failed to demonstrate that any of his claims amounted to error, we deny his claim of cumulative error.

### E. Proportionality

32 33 In determining whether death is a proportionate punishment, this Court is required to compare the totality of the circumstances of Armstrong's case to the circumstances of similar cases in which the Court has affirmed sentences of death. *See Simmons v. State,* 934 So.2d 1100, 1122 (Fla.2006) (citing *Urbin v. State,* 714 So.2d 411, 417 (Fla.1998)). This Court conducts a two-pronged inquiry, comparing ***175** the instant case to other cases to "determine [whether] the crime falls within the category of both (1) the most aggravated, and (2) the least mitigated of murders." *Almeida v. State,* 748 So.2d 922, 933 (Fla.1999). "This entails 'a qualitative review by this Court of the underlying basis for each aggravator and mitigator rather than a quantitative analysis.' " *Offord v. State,* 959 So.2d 187, 191 (Fla.2007) (quoting *Urbin,* 714 So.2d at 416).

In the instant case, the jury recommended death by a vote of nine to three. The trial court found three aggravators: (1) prior violent felony based on two underlying felonies; (2) the murder was committed during a robbery; and (3) the victim in this capital case was a law enforcement officer engaged in the performance of his duties. Each aggravating factor was accorded great weight. The trial court found one statutory mitigator: (1) the existence of any other factors in the defendant's background that would mitigate against the imposition of the death penalty. Finally, the trial court found the existence of one nonstatutory mitigator: (1) Armstrong had problems growing up because he was biracial (little weight). After weighing the aggravation and mitigation, the trial court stated "that the aggravating circumstances in this case far outweigh the mitigating circumstances. The aggravating circumstances in this case are overwhelming." Then, the trial court sentenced Armstrong to death.

We have previously affirmed the death penalty in a single-aggravator case where the single aggravator was a prior violent felony. *See Bevel v. State,* 983 So.2d 505, 524 (Fla.2008) (citing *Ferrell v. State,* 680 So.2d 390 (Fla.1996)); *see also Lindsey v. State,* 636 So.2d 1327, 1329 (Fla.1994). We have repeatedly explained that the prior violent felony conviction aggravator is one of the "most weighty" in Florida's sentencing scheme. *Sireci v. Moore,* 825 So.2d 882, 887 (Fla.2002). Given the presence of this aggravator, which is based on the contemporaneous attempted murder of Sallustio and on an armed robbery that Armstrong committed 13 days prior to the murder of Greeney, and the scant mitigation present in this case, it appears that Armstrong's death sentence remains proportionate. Moreover, we have upheld the imposition of the death penalty as proportionate where there was similar aggravation and more mitigation. *See Wheeler v. State,* 4 So.3d 599, 603 (Fla.2009) (concluding that the death sentence was proportionate where there were four aggravators, two statutory mitigators, and eleven nonstatutory mitigators). Accordingly, we conclude that when compared with other capital cases, the death sentence in Armstrong's case is proportionate.

It is so ordered.

LEWIS, QUINCE, POLSTON, and PERRY, JJ., concur.

CANADY, C.J., concurs in result.

PARIENTE, J., concurs in part and dissents in part with an opinion, in which LABARGA, J., concurs.

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

I agree with the majority's reasoning as to all issues on appeal except for the trial judge's answer to a question from the jury regarding sentencing options. I would reverse for a new penalty phase. In this case, by giving the jurors a brief answer that Armstrong would receive credit for time served, the trial court did not provide a complete and full answer to the jurors' question, but in fact reinforced the jurors' idea that Armstrong's sentence for murder would be completed within a mere eight years.

***176** The crime in this case took place in 1990, and by 2007 when Armstrong received a new penalty phase, he had already served seventeen years in prison. The trial judge initially instructed the jury that they could either recommend death or life imprisonment without the possibility of parole for twenty-five years. [8] After deliberations began, the jury asked, "Will the 17 years he served *be included in his sentence?* " The judge answered that "the defendant will receive credit for the time served."

It is apparent on the face of the jury's inquiry that the jurors had a very logical question regarding the effect of a recommendation of life and wanted to know in advance how such a recommendation would work in this case, since the defendant had already served seventeen years of any sentence to be imposed. Obviously, the implication that the defendant would be eligible for parole in eight years would work against him significantly. Moreover, the question also reflects a potential misunderstanding that the jurors believed that if they voted for life, his sentence would be limited to only twenty-five years, as opposed to a life sentence without the possibility of parole for the first twenty-five years.

I conclude that by not answering the question to explain that the twenty-five years was not the defendant's actual sentence, but rather the minimum length of a sentence of life, and that there was no guarantee of parole at or after twenty-five years, the court gave the jurors a confusing and incomplete answer, leading them to believe that he would be released in another eight years. Rather, under the circumstances of this case, where Armstrong would be merely eligible for parole in only eight years, the proper instruction would have been a variation of that given by the trial judge in *Green v. State*, 907 So.2d 489, 496 (Fla.2005):

> The defendant, if sentenced to life without possibility for parole for 25 years, would be entitled to credit for all time jail served [sic] against a life sentence. *However, there is no guarantee that the defendant would be granted parole at or after 25 years.*

(Emphasis added.)

In my view, this case is similar to *Hitchcock v. State*, 673 So.2d 859, 863 (Fla.1996), in which this Court explicitly held that it was unfairly prejudicial to permit the State to argue that a defendant was eligible for parole after serving twenty-five years in a case where the defendant had already served seventeen out of the twenty-five years at the time of resentencing. Specifically, in that case, the defendant raised two related claims on appeal: (1) he was prejudiced by the State's argument that if given a life sentence, he would be eligible for parole after serving twenty-five years; and (2) the trial court erred in instructing the jury that his time served would be credited toward his sentence. *Id.* at 863, 860 n. 1.

*177 As the Court had already determined that Hitchcock was entitled to resentencing based on an unrelated claim, the Court did not need to address either of these arguments. Regardless, the Court reviewed the claim pertaining to the State's argument in order to provide guidance during the next resentencing and explicitly directed the State to refrain from making such arguments again during the resentencing because the arguments "unfairly prejudiced" the defendant. *Id.* at 863. Although this Court did not address the claim regarding whether the trial court erred as to its instructions to the jury, the Court expressly held that the State improperly argued that Hitchcock would be eligible for parole after serving twenty-five years because "*the resentencing occurred so close to the expiration of the twenty-five-year sentence.*" *Id.* (emphasis added); *see also Gore v. State*, 706 So.2d 1328, 1333 (Fla.1997) ("In *Hitchcock*, the State argued in a resentencing proceeding that the defendant would be eligible for parole after twenty-five years if given a life sentence. We held this argument to be improper and unfairly prejudicial because the resentencing occurred so close in time to the expiration of the twenty-five-year period. In contrast, the State in the present case did not make any such argument, nor was Gore close to meeting the expiration of the twenty-five-year minimum mandatory.").

As in *Hitchcock*, here, Armstrong had served seventeen years and had only eight years remaining until he was "eligible" for parole. Moreover, both in *Hitchcock* and in this case, the jury was apprised that parole was only a possibility —not a guarantee. The majority summarily asserts that this case does not contain the "peculiar facts" that were established in *Hitchcock*, but fails to discuss what peculiar facts differentiate *Hitchcock* from the instant case. Both cases involve a defendant who was a mere eight years away from being eligible for parole, and both cases involve the jury being apprised that parole was not a guarantee. However, in the decision now pending before the Court, the majority permits the trial court to inform the jury on the very issue that this Court previously held that the State may not argue during closing. In *Hitchcock*, this Court stated that even permitting the prosecutor to make the argument would be "unfairly prejudicial."

In this case, while the court had discretion in determining whether to answer the question posed, if the court chose to answer the question, the defendant was entitled to a complete answer. The trial court's incomplete response gave the impression that the defendant would be out in society in a mere eight years. This may have ultimately played a critical role in the jury's decision not to recommend consecutive life sentences. Such an error cannot be considered harmless error beyond a reasonable doubt.

Another troubling aspect of this case is that the defendant was given *consecutive* life sentences, so in reality he could not possibly have been released from prison in any event after twenty-five years. Although in *Gore*, 706 So.2d at 1332–33, we stated that it was not error for the trial court to fail to discuss the other life sentences where there was no *mandatory minimum sentence for any of the life sentences*, it seems to me that when the date of a defendant's possible release is critical to whether a jury recommends a life sentence, the jury should have the complete facts in order to make an informed decision.

The jury in a capital penalty-phase proceeding is in a unique position that does not occur in the context of any other jury matter. The jury is a cosentencer, and its ***178** sentencing recommendation is entitled to "great weight." *See Snelgrove v. State*, 921 So.2d 560, 571 (Fla.2005) ("[I]n Florida, the judge and jury are considered cosentencers, and a recommendation of life must be accorded great weight by the sentencing judge." (citation omitted)). However, unlike the trial judge, the jury has no working knowledge of the actual length of the sentence that a defendant is facing if it recommends the option of life without the possibility of parole for 25 years. Therefore, to the extent that its vote for life or death may hinge on concerns that the defendant may be released from prison, the jury should be informed of all relevant information that bears upon the ultimate length of the prison sentence. In this context, the jury is solely dependent upon the instructions from the trial court and the answers to questions regarding the actual sentence.

For the reasons addressed above, I dissent as to the sentence and would remand for resentencing. However, I would urge the Committee on Standard Jury Instructions in Criminal Cases to propose a standard instruction to address situations where a defendant has been serving a lengthy prison sentence and the jury in resentencing has a question as to the effect of the sentence on his eligibility for parole. The answer to the question, while now guided by the abuse of discretion standard, may literally be the difference between life and death; that is, a jury may be more inclined to recommend a life sentence if it is not under the misapprehension that the defendant would be released shortly.

LABARGA, J., concurs.

Parallel Citations

36 Fla. L. Weekly S517

Footnotes

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

[N.1 Coleman was tried and convicted separately and received a sentence of life imprisonment.

2 *Huff v. State*, 622 So.2d 982, 983 (Fla.1993).

3 *Nelson v. State*, 274 So.2d 256 (Fla. 4th DCA 1973).

4 *Muhammad v. State*, 782 So.2d 343 (Fla.2001).

5 *Boyd v. State*, 910 So.2d 167 (Fla.2005).

6 *Grim v. State*, 841 So.2d 455 (Fla.2003).

7 Below, the trial court specifically instructed the jury on improper doubling. The jury was also instructed on and found the avoid arrest aggravator. In Armstrong's first direct appeal, we noted that "the only evidence supporting the 'committed to avoid arrest' aggravating circumstance was the fact that the victim was a law enforcement officer." *Id.* at 738. Accordingly, the trial court declined to merge the avoid arrest aggravator with the aggravating factor that the victim was a law enforcement officer.

8 Because the crime in this case occurred in 1990, once the jury returned a verdict of guilty, the sentencing options were death or life without the possibility of parole for twenty-five years. In 1994, the law changed to provide the jury with only two sentencing options: death or life without the possibility of parole. *See* § 775.082(1), Fla. Stat. (Supp.1994). This Court rejected the argument that the defendant should be able to agree to the harsher option, which would probably make a jury more likely to recommend a life sentence if they knew the defendant had no possibility of being released from prison. *See Bates v. State*, 750 So.2d 6, 10 (Fla.1999). I joined the dissent, which reasoned that a defendant should be able to waive his ex post facto rights since he is "the only person adversely affected by the waiver of the right." *Id.* at 21 (Anstead, J., dissenting).

# APPENDIX B

862 So.2d 705
Supreme Court of Florida.

Lancelot Uriley ARMSTRONG, Appellant,
v.
STATE of Florida, Appellee.
Lancelot Uriley Armstrong, Petitioner,
v.
James V. Crosby, Jr., etc., Respondent.

Nos. SC01-1874, SC02-1122. | Oct. 30, 2003. | Rehearing Denied Dec. 19, 2003.

Petitioner was convicted in the Circuit Court, Broward County, Thomas M. Coker, Jr., J., of first-degree murder, attempted first-degree murder, and robbery and was sentenced to death. Petitioner appealed. The Supreme Court, 642 So.2d 730, affirmed. Petitioner sought post-conviction relief. The Circuit Court, Broward County, James I. Cohn, J., denied relief. Petitioner appealed and sought writ of habeas corpus. The Supreme Court held that: (1) invalidation of a prior felony conviction that was introduced at penalty phase necessitated resentencing before a new jury; (2) trial and appellate counsel did not render ineffective assistance; (3) police officer's undisclosed statements as part of an internal affairs investigation were not material exculpatory evidence; and (4) firearms operations expert was sufficiently qualified to testify about searing on victim's clothing.

Affirmed in part, reversed in part, and remanded for resentencing; habeas petition denied.

Wells, J., concurred and filed opinion in which Cantero and Bell, JJ., concurred.

Anstead, C.J., specially concurred and filed opinion in which Pariente, J., concurred.

West Headnotes (30)

1 **Criminal Law**
Deficient representation and prejudice in general

To prevail on a claim of ineffective assistance, a defendant must demonstrate specific acts or omissions of counsel that are so serious that counsel was not functioning as the counsel guaranteed the defendant by the Sixth Amendment; second, the defendant must demonstrate prejudice by showing that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. U.S.C.A. Const.Amend. 6.

4 Cases that cite this headnote

2 **Criminal Law**
Prejudice in general

A "reasonable probability" of a different result without attorney's deficient performance is a probability sufficient to undermine confidence in the outcome. U.S.C.A. Const.Amend. 6.

2 Cases that cite this headnote

3 **Criminal Law**
Review De Novo

**Criminal Law**
Counsel

The Supreme Court's standard of review of a ruling on an ineffective assistance claim is two-pronged: (1) appellate courts must defer to trial courts' findings on factual issues, but (2) must review de novo ultimate conclusions on the performance and prejudice prongs. U.S.C.A. Const.Amend. 6.

2 Cases that cite this headnote

4 **Criminal Law**
Identification

Attorney's allegedly ineffective assistance in failing to object to identification testimony by eyewitness did not prejudice defendant in prosecution for restaurant robbery and capital murder and attempted murder of law enforcement officers; the identification was tested on cross-examination, four other eyewitnesses placed defendant at the scene, and he conceded in closing argument that he was present. U.S.C.A. Const.Amend. 6.

5 **Criminal Law**
Right to counsel

Defendant failed in his postconviction motion to adequately allege prejudice from attorney's alleged ineffective assistance in failing to invoke the Rule of Sequestration until after some state witnesses had already testified; defendant made a mere conclusory allegation that prejudice resulted from the witnesses' opportunity to listen to each other's testimony, but failed to allege with any degree of specificity the facts testified to prior to invocation of the Rule and a difference in certain witnesses' testimonies from their prior statements or depositions after hearing other witnesses testify. U.S.C.A. Const.Amend. 6.

2 Cases that cite this headnote

6 **Criminal Law**
Introduction of and Objections to Evidence at Trial

Attorney's allegedly ineffective assistance by failing to challenge DNA evidence that blood taken from the front seat of defendant's car matched the murder victim's blood did not prejudice defendant in prosecution for restaurant robbery and capital murder and attempted murder of law enforcement officers; the only relevancy of the DNA evidence was the proximity of officer to defendant and his vehicle, but ample other evidence established that officer was standing next to defendant at time of the gunshot. U.S.C.A. Const.Amend. 6.

7 **Criminal Law**
Hearing, ruling, and objections

A *Frye* hearing is utilized in order to determine if expert scientific opinion is admissible.

8 **Criminal Law**
Necessity and sufficiency

Expert scientific opinion must be based on techniques that have been generally accepted by the relevant community and found to be reliable.

9 **Criminal Law**
Experts; opinion testimony

Trial counsel did not render ineffective assistance by not demanding the satisfaction of a more complex test on DNA and expert opinion evidence than was required by the law at the time of trial. U.S.C.A. Const.Amend. 6.

2 Cases that cite this headnote

10 **Criminal Law**
Sufficiency and Scope of Motion

Claims of ineffective assistance of counsel by failing to object to bolstering of state's witnesses and opinion testimony were unreviewable as procedurally barred by failure to present them in motion for post-conviction relief; the motion raised the issues as judicial error. U.S.C.A. Const.Amend. 6.

11 **Criminal Law**
Interlocutory, Collateral, and Supplementary Proceedings and Questions

The Supreme Court on appeal from denial of post-conviction relief will only review those claims actually presented to the trial court and, thus, will not consider the modified versions of the claims under ineffective assistance of counsel analysis. U.S.C.A. Const.Amend. 6.

2 Cases that cite this headnote

12 **Criminal Law**
Jury selection and composition

Trial counsel did not render ineffective assistance by failing to ensure the presence of a reader for dyslexic defendant during voir dire of capital murder prosecution; defendant did not explain how a reader would have aided in his ability to consult with his attorney, and he conferred with his counsel on several occasions during voir dire. U.S.C.A. Const.Amend. 6.

13 **Criminal Law**
Jury selection and composition

Defendant failed to establish that prosecutor knew juror and that trial counsel provided ineffective assistance during jury selection by

failing to adequately question or strike juror; the juror denied knowing the prosecutor, and the prosecutor presupposed her answers to certain questions by employing a questioning method designed to condition the jury to follow the requirements of the law, rather than to reveal facts of the jurors's lives. U.S.C.A. Const.Amend. 6.

14 **Constitutional Law**
Witnesses
**Criminal Law**
Other particular issues

Police officer's statements as part of an internal affairs investigation were not material exculpatory evidence, and, thus, state's failure to disclose them did not violate due process in capital murder prosecution; defendant's attorney was present at officer's deposition, the officer's statements did not materially differ from his deposition testimony, and a reasonable probability did not exist that the outcome of the proceedings would have been different had defendant been in possession of the internal affairs investigation statements. U.S.C.A. Const.Amend. 14.

15 **Criminal Law**
Post-conviction proceeding not a substitute for appeal

Dyslexic defendant's post-conviction claim that, because a reader did not assist him during voir dire, he was rendered effectively absent during a critical stage of the proceedings was procedurally barred by failure to raise it on direct appeal.

16 **Sentencing and Punishment**
Determination and disposition

The invalidation of a prior felony conviction that was introduced at penalty phase of capital murder prosecution necessitated resentencing before a new jury.

17 **Sentencing and Punishment**
Harmless and reversible error

Error as result of jury's consideration of defendant's prior felony conviction for indecent assault and battery on a fourteen-year-old child and a subsequent decision to vacate that conviction was not harmless beyond a reasonable doubt in penalty phase of capital murder prosecution; the conviction involved a sexual offense upon a child, and the victim gave detailed testimony.

1 Cases that cite this headnote

18 **Criminal Law**
Appeal

Claim of ineffective assistance by appellate counsel requires petitioner to establish, first, that appellate counsel's performance was deficient because the alleged omissions are of such magnitude as to constitute a serious error or substantial deficiency falling measurably outside the range of professionally acceptable performance, and second, that petitioner was prejudiced because appellate counsel's deficiency compromised the appellate process to such a degree as to undermine confidence in correctness of the result. U.S.C.A. Const.Amend. 6.

19 **Criminal Law**
Raising issues on appeal; briefs

If a legal issue would in all probability have been found to be without merit had counsel raised it on direct appeal, the failure of appellate counsel to raise the meritless issue will not render appellate counsel's performance ineffective. U.S.C.A. Const.Amend. 6.

20 **Criminal Law**
Time for making

Motion for change of venue was prematurely filed before an attempt to select an impartial jury.

21 **Criminal Law**
Local Prejudice

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 in order to try the case solely on the evidence presented in the courtroom.

22 **Criminal Law**
⇐ Renewal of motion

Defendant who did not renew his motion for change of venue upon the selection of the jury did not preserve the issue for appellate review.

23 **Criminal Law**
⇐ Publicity, media coverage, and occurrences extraneous to trial

**Jury**
⇐ Opinion which will yield to evidence

The mere fact that jurors were exposed to pretrial publicity is not enough to raise the presumption of unfairness; it is sufficient if the juror can lay aside his or her opinion or impression and render a verdict based on the evidence presented in court.

24 **Criminal Law**
⇐ Raising issues on appeal; briefs

Appellate counsel lacked sufficient grounds to successfully argue fundamental error regarding issue of trial court's failure to change venue based on pretrial publicity and, therefore, did not render ineffective assistance; jurors who were exposed to pretrial publicity and selected for the jury also stated that they could set aside their pretrial knowledge and feelings about the victims. U.S.C.A. Const.Amend. 6.

25 **Criminal Law**
⇐ Knowledge, Experience, and Skill

Firearms operations expert was sufficiently qualified to testify about searing on victim's clothing in guilt phase of capital murder prosecution; he testified that a flame results from the expulsion of the exploding gunpowder within the casing, that it can go up to twelve inches from a handgun, and that searing results from such flames, and although he admitted that he had not attended any school specifically regarding searing, he also testified that he did not believe there was a "searing school" or a field of searing separate from the field of firearms operation.

26 **Criminal Law**
⇐ Raising issues on appeal; briefs

Appellate counsel did not render ineffective assistance by failing to raise on direct appeal the admission of three photographs of law enforcement officer's uniform and wounds in guilt phase of capital murder prosecution; trial counsel objected only to one exhibit, and if appellate counsel had raised the issue on direct appeal, appellate counsel would have faced two very high standards of review: (1) fundamental error regarding two exhibits admitted without objection and (2) abuse of discretion regarding other exhibit. U.S.C.A. Const.Amend. 6.

1 Cases that cite this headnote

27 **Criminal Law**
⇐ Appeal

**Habeas Corpus**
⇐ Post-trial proceedings; sentencing, appeal, etc

An alleged error in the failure to ensure the recording of portions of voir dire strike conferences would be trial counsel error, rather than appellate counsel error, and would not be properly raised in habeas corpus petition claiming ineffective assistance of appellate counsel. U.S.C.A. Const.Amend. 6.

1 Cases that cite this headnote

28 **Criminal Law**
⇐ Procedure in general; timeliness

Claim that appellate counsel rendered ineffective assistance by failing to ensure that critically material depositions and proceedings were

included in the record on appeal required a showing that appellate counsel failed to include available transcripts in the appellate record and that the missing portions of the record were material to a potentially meritorious issue on direct appeal. U.S.C.A. Const.Amend. 6.

5 Cases that cite this headnote

29 **Jury**

Peremptory challenges

Prospective juror's statement during voir dire that both his brother and his good friend had been arrested by the sheriff's office and that he himself had been harassed in his neighborhood by sheriff's officers three or four times provided a race-neutral reason for striking him in prosecution for capital murder and attempted murder of deputies in the same county.

30 **Criminal Law**

Stenographers; necessity of written record

Bare allegations of unrecorded depositions and proceedings were legally insufficient to entitle defendant to relief on the theory that he was denied review of capital murder conviction based on entire record. West's F.S.A. § 921.141(4).

1 Cases that cite this headnote

**Attorneys and Law Firms**

*709 Terri L. Backhus, Assistant CCRC and Rachel L. Day, Assistant CCRC, Office of the Capital Collateral Regional Counsel, Fort Lauderdale, FL, for Appellant/Petitioner.

Charles J. Crist, Jr., Attorney General, and Celia A. Terenzio, Assistant Attorney General, West Palm Beach, FL, for Appellee/Respondent.

**Opinion**

PER CURIAM.

Lancelot Uriley Armstrong appeals an order of the circuit court denying his motion for postconviction relief under Florida Rule of Criminal Procedure 3.850. Armstrong also files a petition for a writ of habeas corpus. We have jurisdiction. *See* art. V, § 3(b)(1), (9), Fla. Const. For the reasons that follow, we affirm in part and reverse in part the circuit court's denial of postconviction relief, vacate the death sentence, and remand for resentencing before a new jury. We also deny the petition for writ of habeas corpus.

**BACKGROUND**

Armstrong was convicted of first-degree murder, attempted murder of a law enforcement officer, and armed robbery. The facts of Armstrong's crimes are more fully discussed in this Court's opinion in *Armstrong v. State*, 642 So.2d 730 (Fla.1994), *cert. denied*, 514 U.S. 1085, 115 S.Ct. 1799, 131 L.Ed.2d 726 (1995). Briefly, they are as follows. Around two o'clock in the morning of February 17, 1990, Armstrong and another man, Michael Coleman, arrived at a Church's Fried Chicken restaurant of which Armstrong's former girlfriend, Kay Allen, was the assistant manager. Coleman and Armstrong ordered Allen to get the restaurant's money from the safe. Before doing so, she managed to activate the silent alarm. Shortly thereafter, Armstrong returned to his car while Coleman remained inside with Allen to collect the money. Due to the alarm, Deputy Sheriffs Robert Sallustio and John Greeney were dispatched to the restaurant, where they found Armstrong sitting in his vehicle. While Greeney was performing a "pat down" of Armstrong, shots were fired from the restaurant. Armstrong then retrieved his gun from the vehicle and fired at the officers. Deputy Sallustio was shot three times but survived. Deputy Greeney died instantly from close-range gunshot wounds.

The jury convicted Armstrong of the first-degree murder of Deputy Greeney, attempted murder of Deputy Sallustio, and robbery. The jury also recommended death by a nine-to-three vote. The trial court found no statutory mitigating circumstances and four aggravating circumstances: (1) Armstrong had a prior conviction for a violent felony; (2) the murder was committed while Armstrong was engaged in the commission of a robbery or flight therefrom; (3) the murder was committed for the purpose of avoiding arrest or effecting an escape from custody; and (4) Armstrong murdered a law enforcement officer engaged in the performance of his official duties. The trial court sentenced Armstrong to death for the murder conviction and to life imprisonment for the attempted murder of a law enforcement officer and armed robbery convictions.

On direct appeal, Armstrong raised twenty-four issues.[1] This Court affirmed the convictions and sentences, finding error

in the improper doubling of two aggravating circumstances-committed for the purpose of avoiding arrest and murder of a law enforcement officer-but concluded that the improper doubling was harmless ***710** error beyond a reasonable doubt. *Id.* at 738-40.

On April 24, 2000, Armstrong filed an amended motion for postconviction relief, raising thirty-four claims. [2] The circuit court below (postconviction court) held a *Huff*[3] hearing, thereafter summarily denied most of Armstrong's claims, and scheduled a limited evidentiary hearing on two claims: (1) his death sentence was predicated upon a since-vacated prior felony conviction; and (2) ineffective assistance of trial counsel was rendered with regard to the investigation and presentation of mitigating evidence for the penalty phase. *See State v. Armstrong,* No. 90-5417CF10B (Fla. 17th Cir. Ct. order filed Jan. 2, 2001) (prehearing order). Following the evidentiary hearing, the postconviction court entered a final order denying all relief. *See State v. Armstrong,* No. 90-5417CF10B (Fla. 17th Cir. Ct. order filed May 25, 2001) (posthearing order). Armstrong now appeals the postconviction court's denial of his rule 3.850 motion. He also petitions this Court for a writ of habeas corpus.

## RULE 3.850 APPEAL

In this appeal, Armstrong asserts the postconviction court erred in denying postconviction relief on the basis of numerous claims. [4] We will first address those issues ***711** relating solely to the guilt phase of Armstrong's trial [5] and then turn to Armstrong's first issue, alleging entitlement to postconviction relief on the basis of the invalidation of a prior felony conviction that was introduced at his penalty-phase hearing, which we find dispositive of all remaining penalty-phase issues.

### Guilt Phase

Armstrong raises three claims relating solely to the guilt phase of his trial, the first of which involves seven subclaims.

**1** **2** **3** In his first guilt-phase claim, Armstrong asserts that the postconviction court erred in summarily denying his claims of ineffective assistance of trial counsel regarding seven aspects of his trial. Under the standard announced in *Strickland v. Washington,* 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), to prevail on a claim that counsel provided constitutionally ineffective assistance, a defendant must demonstrate specific acts or omissions of counsel that are "so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." Second, the defendant must demonstrate prejudice by "show[ing] that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694, 104 S.Ct. 2052. A reasonable probability is a probability sufficient to undermine confidence in the outcome. This Court's standard of review of a trial court's ruling on an ineffective assistance claim also is two-pronged: (1) appellate courts must defer to trial courts' findings on factual issues but (2) must review de novo ultimate conclusions on the performance and prejudice prongs. *Bruno v. State,* 807 So.2d 55, 61-62 (Fla.2001).

**4** In his first ineffective assistance subclaim, Armstrong asserts his trial counsel provided ineffective assistance by failing to object to unreliable identification testimony by witness Bobby Norton. The postconviction court summarily denied this claim on the following basis:

> The defense developed a consistent theme that witness identification may have been influenced by photographs of Defendant displayed on television and in the newspapers. This theme was also brought out on cross examination of Bobby Norton. However, this Court finds the record reflects that there is no reasonable probability that Norton's identification of the Defendant would have been suppressed had a motion been filed.
>
> Norton was one of five eyewitnesses identifying the Defendant as having been present at Church's Fried Chicken. Norton witnessed the Defendant talking ***712** with the night manager ... Kay Allen. Although Norton was initially unsure whether he could identify the Defendant, Norton was able to pick the Defendant out of a photo lineup shortly after the murder. Norton subsequently made an in-court identification of the Defendant. The jury was well aware of Norton's initial uncertainty. All relevant facts necessary to assess the credibility of Norton were presented. Using the [*Strickland* ] standard ... this Court finds that the outcome of the case would not have been different had [Armstrong's counsel] objected to the identification made of the Defendant by Norton. This claim is without merit.

Prehearing order at 4-5. We find no error in this conclusion. Given that Norton's identification was tested on cross-examination, four other eyewitnesses placed Armstrong at the scene, and Armstrong conceded in closing argument that he

was present, Armstrong failed to sufficiently allege prejudice under *Strickland.*

5 In his second subclaim, Armstrong asserts that his trial counsel provided ineffective assistance by failing to invoke the Rule of Sequestration until after some State witnesses had already testified. The postconviction court summarily denied this claim, concluding that it was legally insufficient as pled. We find no error in this conclusion, as Armstrong made the mere conclusory allegation that prejudice resulted from the witnesses' opportunity to listen to each other's testimony without any degree of specificity as to what facts were testified to prior to invocation of the rule and without any allegation that certain witnesses' testimonies differed, after hearing other witnesses testify, from their prior statements or depositions. *See Freeman v. State,* 761 So.2d 1055, 1061 (Fla.2000) ("The defendant bears the burden of establishing a prima facie case based upon a legally valid claim. Mere conclusory allegations are not sufficient to meet this burden.").

6 7 8 In his third and fourth subclaims, Armstrong asserts that his trial counsel provided ineffective assistance by failing to request a *Frye*[6] hearing regarding DNA evidence presented through the testimony of George Duncan, a DNA serologist with the Broward Sheriff's Office, and Dr. Martin Tracey, a forensic expert court-appointed to Armstrong's case, and by failing to adequately challenge those witnesses' qualifications as DNA experts. At Armstrong's trial, Duncan and Tracey's consistent findings were that blood taken from the front seat of Armstrong's car matched the murder victim's blood. In summarily denying Armstrong's claims of ineffective assistance regarding DNA testimony, the postconviction court stated:

> This claim is conclusively rebutted by the record. A forensic expert was authorized by the court. [Armstrong's counsel] asked for a proffer of the State's DNA evidence and an objection was renewed prior to Dr. Tracey's testimony. Dr. Tracey satisfied the *Frye* test. He testified that DNA testing has been accepted in the scientific community since the mid-seventies.
>
> George Duncan, the DNA serologist with the Broward Sheriff's Office, testified that he had previously testified as an expert in DNA extraction, but never in DNA profiling. Over [Armstrong's *713 counsel's] objection, the Court qualified Duncan as an expert in DNA profiling. The only blood sample of value was removed from the front seat of the Defendant's car. Duncan found that the sample matched the blood of the deceased victim, Deputy Greeney. This Court finds that the requirements of *Frye* were met. This Court further agrees with the State that "any refinements or additions to the *Frye* analysis" which have evolved since the trial, *sub judice,* cannot be applied in evaluating the effectiveness of trial counsel's performance. [Armstrong's counsel] handled those issues concerning scientific evidence with "such skill and knowledge as will render the trial a reliable adversarial testing process."

Prehearing order at 5-6 (citations omitted). Noting that the DNA evidence was offered solely to show that Greeney's blood was found in Armstrong's vehicle, the postconviction court further concluded that there was no reasonable probability that the outcome of the trial would have been different had the DNA evidence been excluded, because the DNA evidence was cumulative.

9 We agree with the postconviction court that Armstrong failed to sufficiently allege prejudice. The only relevancy of the DNA evidence was the proximity of Greeney to Armstrong and Armstrong's vehicle when Greeney was shot. The record supports the court's conclusion that, absent Duncan and Tracey's DNA testimony, ample other evidence established that Greeney was standing next to Armstrong when he was fatally shot: testimony indicated that Greeney was conducting a "pat down" on Armstrong when the first shots were fired; and ballistics evidence indicated Greeney was shot from close range. *See Armstrong,* 642 So.2d at 733. We therefore find no error in the summary denial of these claims.[7]

10 11 In his fifth and sixth subclaims, Armstrong asserts that his trial counsel provided ineffective assistance by failing to object to improper bolstering of the State witnesses' credibility and by failing to object to the opinion testimony of State witness Detective Kammerer regarding the "Coomassie blue" method of detecting latent fingerprints. The State, however, correctly notes that these issues were presented and argued in Armstrong's postconviction motion as "judicial error" rather than ineffective assistance of trial counsel. For that reason, we agree with the postconviction court that these claims were procedurally barred as they could have been raised on direct appeal as trial error. This Court will only review those claims actually presented to the court below and thus will not consider the modified versions of these claims under ineffective assistance analysis.

12 13 In his final subclaim, Armstrong asserts his trial counsel provided ineffective assistance during jury selection by failing to ensure that a reader was present to assist Armstrong, who has dyslexia, and by failing to adequately question *714 or strike juror Deborah Baker. We agree with the postconviction court that Armstrong's claim regarding a reader at voir dire was legally insufficient as pled and factually rebutted by the record. Armstrong failed to explain how a reader would have aided in his ability to consult with his attorney during voir dire. The record also indicates that Armstrong conferred with his counsel on several occasions during voir dire. We also find that Armstrong's claim regarding juror Baker is clearly refuted by the record. Armstrong alleged that the prosecutor's questioning of juror Baker indicated an apparent familiarity with her. However, the voir dire record reveals that the prosecutor did not indicate he knew juror Baker but, rather, that he presupposed what her answers to certain questions would be since he was employing a questioning method designed to condition the jury to follow the requirements of the law rather than to reveal facts of the jurors's lives. The prosecutor engaged in similar questioning of other jurors. Armstrong's contention that additional questioning of Baker "likely" would have revealed a bias is merely a conclusory allegation that is refuted by the record, which indicates Baker, together with the majority of the panel, answered "no" when asked whether anyone knew the prosecutor.

We therefore find no merit to Armstrong's first guilt-phase claims of ineffective assistance of trial counsel.

14 In his second guilt-phase claim, Armstrong asserts that the postconviction court erred in summarily denying his claim of a *Brady*[8] violation, in which he asserted that the State had or knew of material exculpatory evidence, in the form of two statements by Officer Ronnie Noriega taken as part of an internal affairs investigation, and failed to provide that evidence to Armstrong. The postconviction court held as follows with regard to this *Brady* issue:

> The alleged exculpatory evidence in this case are statements of Officer Ronnie Noriega, an alleged eyewitness to the crime. As a result of the public records productions, the Defendant received internal affairs records from the Plantation Police Department, Noriega's employer at the time of the crime in issue. These records contained statements by Noriega as to where he was at the time of the shooting at Church's Fried Chicken.
>
> The Defendant contends that Noriega's statements which were given to internal affairs are substantially different from those Noriega gave at trial. The Defendant asserts that the statements given to internal affairs support and corroborate co-defendant Coleman's alleged confession that he (Coleman) shot Deputy Greeney from the restaurant door.
>
> This Court finds that there was no *Brady* violation. The State did not withhold information regarding Noriega who was listed by the state as a witness and who was deposed by defense counsel. As with the State, the Defendant had equal access to Noreiga. Further, this Court finds that Noriega's statements given to internal affairs do not inculpate Coleman nor do the statements contradict the State's theory.
>
> Prehearing order at 7-8.

We find Armstrong's *Brady* claim conclusively refuted by the record. Armstrong asserts that he was prejudiced by the fact that he did not receive copies of Noriega's two investigation statements. Importantly, Armstrong bases his prejudice argument on the differences between Noriega's version of events, as told in his *715 investigation statements, and the State's trial theory, rather than any alleged materiality of the fact that an internal affairs investigation was conducted. However, the content of those statements does not materially differ from Noriega's deposition testimony, which was given in the presence of Armstrong's counsel. In both his investigation statements and his deposition, Noriega gave the following statement of events: he was driving near the Church's Fried Chicken restaurant when he heard shots; he then noticed two black men standing next to a car in front of Church's; he looked in another direction and then heard additional shots, which caused him to duck and put on his brakes quickly to prevent an accident; and after his car came to a stop, he again looked toward Church's and no longer saw the two men or their car but did see officers arrive on the scene and run to and then kneel at a place where he assumed a man was down. Because Armstrong's counsel was present at Noriega's deposition, Armstrong was in fact in possession of the same information he would have had if he had received the actual transcripts of Noreiga's investigation statements. Therefore, Armstrong has failed to satisfy the *Brady* test as he has not shown a reasonable probability[9] that the outcome of the proceedings would have been different had he been in possession of the internal affairs investigation statements by Noriega.

15 In his third and final guilt-phase claim, Armstrong asserts that the postconviction court erred in summarily denying his claim that because a reader did not assist him during voir dire, Armstrong was rendered effectively absent during a critical stage of the proceedings. As we have already discussed, Armstrong's claim of ineffective assistance of counsel on this point was correctly denied. However, Armstrong also asserts that fundamental error resulted. We conclude that the postconviction court correctly found this claim procedurally barred. This claim could have been raised on direct appeal.

Finding no error in the postconviction court's summary denial of Armstrong's claims relating solely to the guilt phase, we affirm the denial of his motion for postconviction relief as that denial relates to all guilt-phase issues.

**Penalty Phase**

16 Regarding the penalty phase of Armstrong's trial, we find that his first issue, alleging entitlement to postconviction relief on the basis of the invalidation of a prior felony conviction that was introduced at his penalty phase, necessitates resentencing before a new jury and thus renders moot all remaining penalty-phase issues.

At Armstrong's penalty phase, the State presented two witnesses to testify regarding Armstrong's 1985 Massachusetts conviction of indecent assault and battery on a child of the age of fourteen. A records custodian for the Massachusetts district court in which the conviction was obtained testified that the offense was a felony and provided a certified copy of the conviction and sentence. The State then called the victim of that crime, who was fourteen at the time of the crime and twenty at the time of Armstrong's trial. She testified that she met Armstrong in Massachusetts, where they both lived at the time, through a close family friend, Angela, to whom Armstrong was married. Regarding the events of the crime, she gave the following testimony:

*716 Q. What happened on January 12th, do you remember what-#85-do you remember what day of the week that was?

A. It was a Saturday.

Q. Okay. What happened? Tell us what happened.

A. Angela had asked us to come over to her house....

....

A. And we went over to her house Saturday night and I had to go to church for A.J.S., church program and Angela and Lance was to take us, but he didn't want her to go because she was sick because she was pregnant. So he said he will take me.

....

A. He said he would take me. So as we was driving to the church, he asked if I minded if he stopped somewhere so we could talk. So I told him fine. You know, I figured he'd pull off the side of the road or something. But he drove to some park. A park I have never seen before.

....

A. We went to the park. He pulled up in the parking space and we were sitting there and he was talking. I don't know what-it was so long. I don't know what we were talking about. He asked me to get over into the driver's seat. So I got over into the driver's seat and was playing with the wheel like I was driving.

Q. Had you ever driven a car before?

A. No. I was just playing around with the wheel and he just took me by my shoulder and laid me down on the seat and got on top of me and he started moving up and down on me. I was just lying there. I was telling him to stop.

....

A.... And a car came and pulled up beside us and parked like a couple of parking spaces beside us and he kept his head low and I told him to get off me. He told me not to make any noises because he didn't want them to know we were there. And they left after a couple of minutes and then he just got up off of me and reached into the glove compartment and took out some tissue and started wiping himself. I saw this white stuff all over his hand.

Q. Did you ever see anything like that, that white stuff before?

A. No.

Q. Okay.

A. And then he started, tried to lift up my dress. I said what you doing. He said I want to make sure you are okay. I just told him leave me alone and I wanted to go home.

Q. Okay.

A. And then we drove. He drove back to his apartment.

....

Q. Okay. What happened when you got back in the apartment?

A.... So I went and sat on the couch and turned on the TV and started to study my homework.

....

Q. So what happens? You're sitting in the living room. What happens?

A. Then Lance comes in and he sits on the couch across from where I was sitting and he just was asking me about what I was studying, what I was doing. And then he came over to where I was sitting on the couch and I just sat there looking at the TV and then he just grabbed me by my shoulders and pushed me down on the couch and got on top of me and I was about to scream and he told me not to scream. He said you better not scream because Angela's ***717** in the other room and you don't want to wake her up because you know she's sick. And I just stayed there not knowing what to do because I was scared because I figured she probably would be upset and if I made any noises-

Q. What were you doing while he was on top of you?

A. I was trying to push him off of me and, you know, trying to make some kind of noise but he just kept telling me stop. Don't make any noises. Don't make any noises because she would get upset. Then he just lifted up my night gown and he put his penis in my vagina.

He pushed my panties over the side and put his penis in my vagina and I wanted to-started to scream a little and he just stopped and he just laid on top of me and I was-what is he doing and he got up and went over to her room and I ran into the bathroom and locked the door and then he came knocking on the door and I wouldn't leave and then after a while when I thought he was gone, I went into her, Angela's, room and I just went to sleep on the floor.

The victim's testimony then continued regarding how she was upset by these events and eventually told her grandmother what had happened.

In closing penalty-phase arguments, the State urged the jury to find the aggravating circumstance that Armstrong had "previously been convicted of a violent felony" on the basis of Armstrong's two contemporaneous convictions of attempted murder and robbery and this prior Massachusetts conviction. The jury recommended a death sentence, and the trial court based its finding of that aggravating circumstance, in part, on the Massachusetts conviction.

After Armstrong's direct appeal to this Court, he filed a motion for new trial with the Massachusetts court regarding his 1985 conviction. In 1999, that court vacated Armstrong's conviction of indecent assault and battery on a child of the age of fourteen, finding it constitutionally invalid. Therefore, Armstrong asserted in his subsequent 3.850 motion for postconviction relief that he was entitled to a new penalty-phase proceeding. The postconviction court granted an evidentiary hearing on the issue but denied relief, concluding that error under *Johnson v. Mississippi,* 486 U.S. 578, 108 S.Ct. 1981, 100 L.Ed.2d 575 (1988), had been shown but was harmless beyond a reasonable doubt in light of an armed robbery conviction obtained against Armstrong after his penalty phase that would be admissible upon resentencing as evidence of another valid, prior violent felony conviction to be considered in lieu of the vacated conviction.

**17** In this appeal, Armstrong asserts, on the basis of *Johnson,* that the postconviction court erred in denying relief as to this issue. We agree. This Court has previously discussed the *Johnson* decision:

> In *Johnson,* the petitioner's death sentence was predicated, in part, on a previous conviction which was vacated after the trial and direct appeal. 486 U.S. at 580, 108 S.Ct. 1981. During the sentencing phase of the petitioner's trial, the previous conviction was argued to the jury and used to support Mississippi's prior violent felony aggravating factor. *Id.* at 581, 108 S.Ct. 1981. The Supreme Court reversed the death sentence, holding that the consideration of a subsequently vacated conviction to support an aggravating factor violates the Eighth Amendment. *Id.* at 590, 108 S.Ct. 1981.
>
> In reaching this conclusion, the Court reiterated its previous holding that capital sentencing decisions cannot be based ***718** on "mere 'caprice' or on 'factors that are constitutionally impermissible or totally irrelevant to the sentencing process.' " *Id.* at 585, 108 S.Ct. 1981 (quoting *Zant v. Stephens,* 462 U.S. 862, 885, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983)). The Court stated, "the error here

extended beyond the mere invalidation of an aggravating circumstance supported by evidence that was otherwise admissible. Here the jury was allowed to consider evidence that has been revealed to be materially inaccurate." *Id.* 486 U.S. at 590, 108 S.Ct. 1981.

*Rivera v. Dugger*, 629 So.2d 105, 108 (Fla.1993). In Armstrong's case, the jury considered, in support of an aggravating factor, evidence of a conviction that has since been revealed to be materially inaccurate as that conviction has been vacated. It is now clear that reliance upon that conviction to support Armstrong's sentence was erroneous under *Johnson*. Given the nature of the crime underlying the vacated conviction-a sexual offense upon a child-and the detailed testimony given by the young victim of that crime at Armstrong's penalty phase, we cannot say that the consideration of Armstrong's prior felony conviction of indecent assault and battery on a child of the age of fourteen constituted harmless error beyond a reasonable doubt.

## PETITION FOR WRIT OF HABEAS CORPUS

In his petition for a writ of habeas corpus, Armstrong raises four claims.[10] We will address in turn each issue relating solely to the guilt phase of Armstrong's trial.[11] All remaining claims are now moot as we have ordered resentencing before a new jury.

**18** **19** In his first claim, Armstrong alleges ineffective assistance of appellate counsel regarding four aspects of the guilt phase of his trial. We initially note that habeas relief on the basis of appellate counsel's ineffectiveness is limited to those situations where the petitioner establishes, first, that appellate counsel's performance was deficient because the alleged omissions are of such magnitude as to constitute a serious error or substantial deficiency falling measurably outside the range of professionally acceptable performance; and second, that the petitioner was prejudiced because appellate counsel's deficiency compromised the appellate process to such a degree as to undermine confidence in the correctness of the result. *Rutherford v. Moore*, 774 So.2d 637, 643 (Fla.2000). If a legal issue would in all probability have been found to be without merit had counsel raised it on direct appeal, the failure of appellate counsel to raise the meritless issue will not render appellate counsel's performance ineffective. *Id.*

**20** **21** **22** In his first subclaim, Armstrong asserts that his appellate counsel rendered ineffective assistance by failing to raise on direct appeal the trial court's denial of a motion for change of venue. We find no merit to this argument. First, we note that Armstrong's motion for ***719** change of venue was prematurely filed before an attempt to select an impartial jury. 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 in order to try the case solely on the evidence presented in the courtroom. *McCaskill v. State*, 344 So.2d 1276, 1278 (Fla.1977). Thus, trial courts are encouraged to attempt to impanel a jury before ruling on a motion for change of venue because this provides an opportunity to determine through voir dire whether individuals who have not been seriously infected by the publicity can be found. *See Davis v. State*, 461 So.2d 67, 69 n. 1 (Fla.1984) (stating motion for change of venue should not be ruled upon prior to jury selection because an impartial jury may be seated if court finds credible the assurances of prospective jurors that they can set aside extrinsic knowledge and decide the case on the evidence); *Manning v. State*, 378 So.2d 274, 276 (Fla.1979) (approving procedure where ruling on defendant's motion for change of venue is delayed until attempt has been made to select jury). For that same reason, a motion for change of venue should be renewed at the conclusion of jury selection or be considered waived. *See Martin v. State*, 816 So.2d 187, 188 (Fla. 5th DCA 2002) ("Jury selection issues are deemed waived after acceptance of the jury, unless the objection is renewed, or the jury is accepted subject to an earlier objection."), *review dismissed*, 835 So.2d 267 (Fla.2002). A review of the record in this case indicates Armstrong did not renew his motion for change of venue upon the selection of the jury and thus did not preserve this issue for appellate review.

**23** **24** Furthermore, the mere fact that jurors were exposed to pretrial publicity is not enough to raise the presumption of unfairness. *See Castro v. State*, 644 So.2d 987, 990 (Fla.1994). It is sufficient if the juror can lay aside his or her opinion or impression and render a verdict based on the evidence presented in court. *See id.; Bundy v. State*, 471 So.2d 9, 19 (Fla.1985). Armstrong acknowledged in his brief to this Court that those jurors who were exposed to pretrial publicity and selected for the jury also stated that they could set aside their pretrial knowledge and feelings about the victims. Therefore, we conclude that there existed insufficient grounds for appellate counsel to successfully argue fundamental error regarding this issue. In the absence of preservation or fundamental error, this issue would have been nonmeritorious on direct appeal.

25 In his second subclaim, Armstrong asserts that his appellate counsel rendered ineffective assistance by failing to raise on direct appeal the improper qualification of three State witnesses as experts. We find no merit to this claim with regard to two of those witnesses, George Duncan and Dr. Martin Tracey, for the same reasons we found no merit to Armstrong's 3.850 appeal claim that his trial counsel rendered ineffective assistance regarding these witnesses. As to the third witness, Armstrong alleges that Charles Edel was unqualified to testify about "searing" on Deputy Greeney's clothing and that appellate counsel should have appealed the trial court's denial of Armstrong's objection to the admission of his testimony. We disagree. Edel was found to be a firearms operations expert after he testified that he had fired hundreds of different styles of weapons and had been a firearms instructor for approximately eight years, which included the testing of fire weapons "for court presentation *720 to show operability." When asked about the mechanics of a "handgun flame," Edel testified that a flame results from the expulsion of the exploding gunpowder within the casing, that it can go up to twelve inches from a handgun, and that searing results from such flames. Although Edel admitted that he had not attended any school specifically regarding searing, he also testified that he did not believe there was a "searing school" or, as Armstrong's counsel had argued, a "field of searing" separate from the field of firearms operation. Given the entirety of this testimony, it appears clear that Edel was sufficiently qualified to testify in regard to the searing on Greeney's clothing, and appellate counsel was not ineffective for failing to raise this nonmeritorious claim.

26 In his third subclaim, Armstrong asserts that his appellate counsel rendered ineffective assistance by failing to raise on direct appeal the admission of three photographs of Officer Sallustio's uniform and wounds, specifically State's Exhibits T, Q, and S. However, the record reveals that, of those three exhibits, Armstrong's trial counsel objected only to Exhibit S, arguing that it was both cumulative of other photographs that would "better describe the wound" and inflammatory. We find no merit to Armstrong's claim of ineffective assistance of appellate counsel. If this issue had been raised on direct appeal, appellate counsel would have faced two very high standards of review: (1) fundamental error regarding Exhibits T and Q; and (2) abuse of discretion regarding Exhibit S. On the basis of this record, we do not conclude that Armstrong has demonstrated a reasonable probability that this issue would have been found meritorious and resulted in a reversal of his conviction.

27 28 29 In his fourth and final subclaim, Armstrong asserts that his appellate counsel rendered ineffective assistance by failing to ensure that "critically material depositions and proceedings" were included in the record on appeal. However, Armstrong only specifically cites to the absence of certain strike conferences from the record, stating that answers by some jurors to voir dire questions went unrecorded. The alleged error here is unclear. If the alleged error is the failure to ensure the recording of portions of voir dire strike conferences, then it would be trial counsel error rather than appellate counsel error and not properly raised in this petition. To the extent that Armstrong is alleging that his appellate counsel was ineffective, he would need to show not only that his appellate counsel failed to include *available* transcripts in the appellate record but also that those portions of the record that were missing were material to a potentially meritorious issue on direct appeal. Armstrong has not shown the former since he has stated that the missing portions went unrecorded, which indicates they were not available for appellate counsel to include in the appellate record. As for the latter, Armstrong alleges that the incomplete record deprived him of a potentially meritorious argument that prospective juror Coffie was struck for cause without proper justification and on the basis of race. Yet, the record indicates that there was a race-neutral reason for striking Coffie, who stated in voir dire that both his brother and his good friend had been arrested by the Broward Sheriff's Office and that he himself had been harassed in his neighborhood by Broward Sheriff's officers three or four times. The victims of Armstrong's crimes were Broward Sheriff's officers. Thus, the allegedly incomplete record did not deprive Armstrong of a potentially meritorious argument.

We therefore find no merit to Armstrong's first habeas claim of ineffective assistance of appellate counsel.

*721 30 A second habeas claim that relates solely to the guilt phase of Armstrong's trial is closely related to his last ineffective assistance of appellate counsel subclaim. Citing *Dobbs v. Zant,* 506 U.S. 357, 113 S.Ct. 835, 122 L.Ed.2d 103 (1993), Armstrong asserts that full appellate review of capital cases must be done on the basis of a complete record. As well, citing section 921.141(4), Florida Statutes (1985), Armstrong notes that Florida law requires review of capital cases by this Court "of the entire record." He therefore alleges that he was denied a proper direct appeal due to record omissions and, citing *Delap v. State,* 350 So.2d 462 (Fla.1977), claims entitlement to habeas relief. However, Armstrong does not allege that this or any other court refused,

in violation of its duty, to examine any portion of the record. And, with the exception of voir dire strike conferences, he has failed to specifically allege what "critical depositions and proceedings" were absent from the record or, in the absence of knowing specifics about unrecorded events, how he is even aware that such events went unrecorded. Bare allegations of unrecorded depositions and proceedings are legally insufficient to entitle him to relief. As for the voir dire strike conferences, Armstrong has failed to link a meritorious appellate issue to the allegedly missing record and thus cannot establish that he was prejudiced by its absence. Furthermore, while this Court did require a new trial on the basis of missing record in *Delap,* the record that was missing in *Delap* was far more significant than that allegedly missing here. *See id.* at 463 (record missing transcript of the jury charge conferences, charge to the jury in both the trial and penalty phases, voir dire of the jury, and closing arguments of counsel in both the trial and penalty phases). Therefore, *Delap* is inapplicable to the present case.

Having found no merit to Armstrong's habeas claims that relate solely to the guilt phase of his trial and having ordered resentencing on the basis of a 3.850 appeal issue, thereby rendering penalty-phase issues moot, we deny the petition for a writ of habeas corpus.

## CONCLUSION

We hold that Armstrong is entitled to postconviction relief on the basis of his first claim. Accordingly, we affirm as to all issues relating solely to the guilt phase of Armstrong's trial but vacate the death sentence and remand for resentencing before a new jury on the first-degree murder conviction.

It is so ordered.

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

WELLS, J., concurs with an opinion, in which CANTERO and BELL, JJ., concur.

ANSTEAD, C.J., concurs specially with an opinion, in which PARIENTE, J., concurs.

WELLS, J., concurring.

I concur fully with the decision in this case. I write only to point out that I believe that the use of term "error" in the admission of the prior conviction is not accurate in the sense that it connotes error by the trial judge in admitting the prior conviction and testimony in respect to it at the time that it was admitted. The trial judge did not err in that admission. I believe a more accurate analysis is that the vacation of the prior conviction has now caused us to conclude that our confidence in the death sentence in this case has been sufficiently undermined that a new penalty phase is required as a matter of law. I join this conclusion because of ***722** the extensive testimony admitted during the penalty-phase trial concerning the facts underlying the vacated prior conviction. However, I expressly state my view that not every post-trial reversal of a conviction which is part of an aggravating circumstance is prejudicial. Prejudice in this type of situation requires a case-by-case analysis, as recognized by this Court in the cases which have found the postconviction vacation of a conviction to be harmless error.

CANTERO and BELL, JJ., concur.

ANSTEAD, C.J., specially concurring.

I concur in the majority decision. However, in light of the United States Supreme Court's recent decision in *Wiggins v. Smith,* 539 U.S. 510, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003), I feel compelled to write separately to note my concerns with Armstrong's separate claim of ineffective assistance of counsel for failure to adequately investigate mitigation to be presented in the penalty phase. The U.S. Supreme Court has repeatedly reaffirmed the importance of thorough investigation by defense counsel into mitigating factors to be presented in the penalty phase of capital cases. *See, e.g., id.* at 2537; *Williams v. Taylor,* 529 U.S. 362, 394-99, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000); *Strickland v. Washington,* 466 U.S. 668, 690-91, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).[12] *Wiggins* contains a detailed explanation of how the standard established for evaluating the performance of counsel set out in the landmark decision in *Strickland* should be interpreted and applied.

In *Wiggins,* the Court stressed that defense counsel's investigations "should comprise efforts to discover *all reasonably available* mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor." *Id.* at 2537 (quoting ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 11.4.1(C), at 93 (1989) (hereinafter 1989 ABA Guidelines)). Referring to ABA Guidelines, the Court noted that among those topics that should be considered for presentation are "medical history, educational history,

employment and training history, *family and social history,* prior adult and juvenile correctional experience, and religious and cultural influences." *Id.* (citing 1989 ABA Guidelines 11.8.6, at 133). In concluding that defense counsel's investigation was unreasonably deficient, the Court relied heavily on the ABA standards for capital defense, noting that such standards had long been referred to as "guides to determining what is reasonable." *Id.* (quoting *Strickland,* 466 U.S. at 688, 104 S.Ct. 2052).

In *Wiggins,* collateral counsel's investigation discovered a wealth of mitigation that trial counsel had not presented or investigated. *Id.* at 2533. The mitigation included in Wiggins' "bleak life history" indicated that he had suffered severe physical and sexual abuse from multiple individuals growing up. *Id.* Additionally, his mother was a chronic alcoholic who frequently left him and his siblings at home alone for days, forcing them to beg for food and to eat paint chips and garbage. *Id.* Further, despite the fact that funds were available for retaining a forensic social worker in order to prepare a detailed social history, Wiggins' trial attorneys had ***723** not done so. *Id.* In collateral proceedings, Wiggins' trial counsel defended the lack of investigation or presentation of mitigating evidence, in effect arguing that these decisions were a matter of strategy and that trial counsel "decided to focus their efforts on 'retry[ing] the factual case' and disputing Wiggins' direct responsibility for the murder." *Id.* However, after reflecting on the standards that should guide counsel's actions in investigating mitigation, the Supreme Court concluded that Wiggins' defense team, who had presented none of the extensive mitigation that existed in the case during the penalty phase of the trial, had not performed the level of investigation that would allow them to make a reasonably informed decision not to present such mitigation. *Id.*

Determining that the decision not to pursue mitigation was made based on a prematurely truncated investigation, the Court stated:

> In assessing the reasonableness of an attorney's investigation, however, 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. Even assuming [Wiggins' trial counsel] limited the scope of their investigation for strategic reasons, *Strickland* does not establish that a cursory investigation automatically justifies a tactical decision with respect to sentencing strategy. Rather, a reviewing court must consider the reasonableness of the investigation said to support that strategy.

*Id.* at 2538 (citing *Strickland,* 466 U.S. at 691, 104 S.Ct. 2052). The Court rejected arguments that Wiggins' defense team made a strategic decision based on the limited investigation they had conducted not to introduce mitigation, commenting that "the 'strategic decision' the state courts and respondents all invoke to justify counsel's limited pursuit of mitigating evidence resembles more a *post-hoc* rationalization of counsel's conduct than an accurate description of their deliberations prior to sentencing." *Id.* at 2538. Ultimately, the Supreme Court determined that trial counsel's investigation into Wiggins' background did not meet the professional norms that prevailed at the time of trial, noting that "[d]espite these well-defined norms, however, counsel abandoned their investigation of petitioner's background after having acquired only rudimentary knowledge of his history from a narrow set of sources." *Id.* at 2537. Hence, Wiggins' "counsel chose to abandon their investigation at an unreasonable juncture, making a fully informed decision with respect to sentencing strategy impossible." *Id.* at 2538.

In the instant case, similar observations can be made. The 1989 ABA Guidelines that the Supreme Court concluded should have guided counsel's investigation in *Wiggins* should have provided similar guidance to Armstrong's counsel. [13] These standards underscore not only the importance of defense counsel's investigation into mitigating factors, but also the understanding that often strategy shifts between the penalty and guilt phases of a capital trial. In general, preparation for both the penalty and guilt phases is essential, and counsel should be aware that "the sentencing phase of a death penalty trial is constitutionally different from sentencing proceedings in other criminal cases." 1989 ABA Guidelines 11.8.1, at 123. [14] "If inconsistencies between the guilt/innocence and the ***724** penalty phase defenses arise, counsel should seek to minimize them by procedural or substantive tactics." 1989 ABA Guidelines 11.7.1(B), at 115. In conducting the investigation into those individuals who might present testimony at the penalty phase, counsel is required to seek out witnesses who are "familiar with aspects of the client's life history that might affect ... possible mitigating reasons for the offense(s), and/or mitigating evidence to show why the client should not be sentenced to death." *Id.* 11.4.1(D)(3)(B), at 95. [15]

In the instant case, although trial counsel, who had taken one other case to the penalty phase prior to Armstrong's trial, undoubtedly performed some investigation into Armstrong's past and presented some mitigation during the penalty phase, he conceded, and it was clear from the evidentiary hearing, that his investigation had failed to uncover substantial important mitigation regarding Armstrong's family and social history.[16] Nevertheless, trial counsel claimed and the trial court accepted that much of the negative information associated with Armstrong's formative *725 years would have conflicted with trial counsel's strategy to "humanize" Armstrong. Moreover, relying on mental health evaluations done for competency before trial, trial counsel and the court below determined that trial counsel's failure to put on any expert testimony regarding Armstrong's mental health did not amount to a deficient performance.

However, here, as in *Wiggins,* and even presuming that the pretrial evaluations revealed some mitigation evidence, it is clear that during his investigation trial counsel did not discover mitigation of the same quantity or quality of that which actually existed and was later introduced at the postconviction evidentiary hearing. Hence, it would be difficult to conclude that counsel's knowledge of the available mitigation was sufficient to make an informed strategic choice on these matters. Without having uncovered the information regarding Armstrong's troubled background, any " 'strategic choices made after less than complete investigation are reasonable' only to the extent that 'reasonable professional judgments support the limitations on investigation.' " *Wiggins,* 539 U.S. at ----, 123 S.Ct. at 2541 (quoting *Strickland,* 466 U.S. at 690-91, 104 S.Ct. 2052). In fact, any attempt to distinguish the difference between the limited mitigation presented at Armstrong's penalty phase and that presented at the evidentiary hearing is strikingly similar to the type of post-hoc rationalization that the Supreme Court rejected in *Wiggins. Id.* at 2538.

Because we are remanding on separate grounds, there is no need to reach the issue of trial counsel's investigation in this case under a *Wiggins* analysis. However, my hope is that judges and lawyers will heed the message of *Wiggins.* In order to avoid uneven dispensation of the death sentence, it is essential for counsel to fully investigate the available mitigation so that any decision on whether or not to present such information is made on a reasonable basis.

PARIENTE, J., concurs.

Parallel Citations

28 Fla. L. Weekly S801

Footnotes

1 *See Armstrong,* 642 So.2d at 734 n. 2 (listing direct appeal claims).

2 Armstrong's claims in that motion were as follows: (1) he lacked funding for effective representation; (2) he was denied access to public records; (3) there was a lack of adversarial testing due to ineffective assistance of trial counsel, withholding of exculpatory or impeachment material, newly discovered evidence, and improper trial court rulings; (4) newly discovered evidence existed; (5) his trial counsel was ineffective during voir dire; (6) he had an *Ake* claim regarding mental health; (7) there was cumulative error; (8) he had ineffective assistance of trial counsel regarding mitigation; (9) he was innocent of first-degree murder; (10) he was innocent of the death penalty; (11) he was absent from a critical stage of the trial; (12) there was improper burden-shifting in the penalty-phase jury instructions; (13) an unconstitutionally vague aggravating factor of avoiding or preventing lawful arrest was considered; (14) an inaccurate, vague, and overly broad instruction was given on the aggravating factor of murder during the commission of a felony; (15) nonstatutory aggravating factors were introduced; (16) the jury was misled regarding a sense of sentencing responsibility; (17) his rights were denied by the rule prohibiting lawyers from interviewing jurors; (18) Florida's death penalty constitutes cruel and unusual punishment; (19) Florida's capital sentencing scheme is arbitrary and capricious; (20) there was prejudicial pretrial publicity and a failure to change venue; (21) inadmissible victim impact evidence was considered; (22) the trial court refused to find or consider mitigating circumstances; (23) there were record omissions that denied him a proper direct appeal; (24) inadequate harmless error analysis was utilized on direct appeal; (25) an invalid prior conviction was used; (26) there was a lack of testing of scientific evidence under *Frye v. United States,* 293 F. 1013 (D.C.Cir.1923); (27) the jury was misled regarding the instruction that a majority vote was required to recommend life or death; (28) his sentence was predicated upon an automatic aggravating circumstance; (29) jurors were stricken on an impermissible basis; (30) there was a systematic exclusion of eligible prospective jurors by the use of peremptory challenges in violation of *Witherspoon v. Illinois,* 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968); (31) a sufficient level of intent and participation to warrant imposition of the death penalty did not exist; (32) he is incompetent to be executed; (33) the conviction and sentence were illegally imposed in violation of international law; and (34) he received inadequate notice of a crime due to charges of both premeditated and felony murder.

3 *Huff v. State,* 622 So.2d 982, 983 (Fla.1993).

4 Those claims are: (1) Armstrong's sentence was based on a since-vacated prior felony conviction; (2) trial counsel was ineffective in investigating and presenting mitigation; (3) trial counsel rendered ineffective assistance regarding (a) the failure to challenge in-court identification, (b) the failure to invoke the rule of sequestration, (c) the failure to request a *Frye* hearing, (d) the failure to adequately challenge the qualifications of State witnesses, (e) the failure to object to improper bolstering of State witnesses, (f) the failure to object to opinion testimony from unqualified witnesses, and (g) jury selection; (4) there was a lack of specific intent to kill, thus rendering the death penalty inappropriate; (5) exculpatory or impeachment material was withheld; (6) there was newly discovered evidence relevant to both guilt and penalty phases; (7) his public records requests were denied; (8) he was innocent of first-degree murder and the death penalty; (9) unconstitutional jury instructions were used in the penalty phase; (10) nonstatutory aggravating circumstances were improperly introduced; (11) he was absent from critical stages of the trial; (12) his conviction and sentence were illegally imposed in violation of international law; (13) Florida's death penalty constitutes cruel and unusual punishment; (14) his rights were denied by the rule prohibiting lawyers from interviewing jurors; (15) he is incompetent to be executed; and (16) cumulative error exists.

5 Those issues are claims (3)(a)-(g), (5), and (11).

6 *Frye v. United States*, 293 F. 1013 (D.C.Cir.1923). Under Florida law, a *Frye* hearing is utilized in order to determine if expert scientific opinion is admissible. *See Flanagan v. State*, 625 So.2d 827, 829 (Fla.1993). Such opinion must be based on techniques that have been "general[ly] accept[ed]" by the relevant community and found to be reliable. *Frye*, 293 F. at 1014.

7 We further note the error in Armstrong's assertion that his trial counsel provided ineffective assistance by failing to challenge more specific elements of DNA testing, such as autoradiograms and population substructuring, through a *Frye* hearing. This trial occurred in 1991, six years prior to this Court's clarification of the *Frye* test in *Brim v. State*, 695 So.2d 268 (Fla.1997), that each stage of the DNA process, i.e., the methodology for determining DNA profiles, as well as the statistical calculations used to report the test results, are subject to the *Frye* test. Armstrong's trial counsel cannot be found ineffective for not demanding the satisfaction of a more complex test than was required by the law at the time of trial.

8 *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963).

9 A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Strickland v. Washington*, 466 U.S. 668, 694, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

10 Armstrong alleges the following: (1) his appellate counsel provided ineffective assistance regarding (a) the failure to appeal the denial of Armstrong's motion for change of venue, (b) the failure to appeal the improper qualification of the State's witnesses as experts, (c) the failure to appeal the admission of certain photographs, (d) the failure to ensure a complete record, and (e) the failure to raise a cumulative-error argument; (2) there was an incorrect harmless error analysis on direct appeal regarding the improper doubling of aggravating circumstances in light of Armstrong's vacated prior felony conviction; (3) he was denied a proper direct appeal due to omissions in the record; and (4) Florida's death penalty scheme is unconstitutional.

11 Those issues are claims (1)(a)-(d) and (3).

12 Likewise, this Court has recognized the importance of trial counsel's investigation into mitigating factors and has not hesitated to reverse sentences where such investigations have been deemed deficient and prejudice has resulted. *See, e.g., Ragsdale v. State*, 798 So.2d 713, 720 (Fla.2001); *Rose v. State*, 675 So.2d 567, 570-74 (Fla.1996); *Stevens v. State*, 552 So.2d 1082, 1085-87 (Fla.1989).

13 The 1989 ABA Guidelines were recently superseded by a February 2003 revision. Nevertheless, the 1989 version of the guidelines provided the prevailing norms at the time of both Wiggins' and Armstrong's trial.

14 In commentary to guideline 11.8.6, the authors explained that sentencing proceedings in capital cases are a unique area of criminal practice:

> Sentencing proceedings in a capital case resemble a separate trial more than they resemble non-capital sentencing proceedings. The Constitutional due process right to present evidence, as well as the right to counsel, to confront the witnesses against the defendant, and to not be placed twice in jeopardy, adhere to capital sentencing proceedings. Experienced criminal counsel familiar with sentencing practices in non-capital cases may not recognize the different form of advocacy required at a death penalty sentencing trial. The evidence to be presented by the defense-indeed, the whole theory of proceeding-at the sentencing phase stands outside normal criminal trial practice. Attorneys skilled in narrowing the focus of trial to exclude irrelevant references to the life and character of a client may find themselves unprepared for the sentencing phase of a capital case where the life and character of the client may have to be revealed in detail. The assistance of one or more experts (e.g. social worker, psychologist, psychiatrist, investigator, etc.) may be determinative as to outcome....
>
> (Footnotes omitted.)

15 In addition to investigating potential lay witnesses, in preparing for the penalty phase counsel should consider retaining "[e]xpert witnesses to provide medical, psychological, sociological or other explanations for the offense(s) for which the client is being sentenced, to give a favorable opinion as to the client's capacity for rehabilitation, etc. and/or to rebut expert testimony presented by the prosecutor." *Id.* 11.8.3(F)(2), at 129.

16 It is not necessary to repeat all of the mitigation presented at the evidentiary hearing here, or detail how it differed in quantity or quality from that which was introduced at the penalty phase. Nevertheless, while this case might be distinguished from *Wiggins* somewhat by the fact that limited mitigation was introduced during the penalty phase, it suffices to say that the evidentiary hearing demonstrated that there was a large amount of mitigation from family members and from expert witnesses that was never uncovered or presented at the penalty phase. The evidence introduced at the evidentiary hearing included but was not limited to the following: (1) that Armstrong suffered from a seizure disorder; (2) that he suffered from extreme poverty while growing up in Jamaica; (3) that he suffered from "pica," an eating disorder frequently seen in abused or neglected children, which caused him to eat lead paint, chicken excrement, and dirt; (4) that the accidental amputation of his fingers in a sugar cane accident led to Armstrong being hospitalized for five months and afterwards he kept his hand hidden to avoid being harassed by other children; (5) that Armstrong was routinely and severely physically abused by his binge-drinking stepfather; (6) that he suffered from a learning disability and was often beaten at school for failing to understand his schoolwork; (7) that Armstrong was living in Jamaica during a time when political and social conditions were marked by extreme violence, and Armstrong experienced these conditions first hand; and (8) that Armstrong was arrested by Jamaican police and was brutally tortured before he was released.

# APPENDIX C

642 So.2d 730
Supreme Court of Florida.

Lancelot ARMSTRONG, Appellant,
v.
STATE of Florida, Appellee.

No. 78180. | Aug. 11, 1994. |
Rehearing Denied Sept. 29, 1994.

Following jury trial, defendant was convicted of robbery, attempted first-degree murder, and first-degree murder in the Circuit Court, Broward County, Thomas M. Coker, Jr., J., and defendant appealed. The Supreme Court held that: (1) prosecution witness' change in testimony did not warrant new trial; (2) defendant was not entitled to assistance of two attorneys; (3) court's preparation of sentencing order before sentencing hearing did not deny defendant opportunity to be heard; (4) trial court's reliance on duplicative aggravating sentencing factors was harmless error; and (5) death penalty could be imposed despite codefendant's sentence of life imprisonment.

Affirmed.

West Headnotes (20)

1 **Criminal Law**
Contradictory Statements by Witness

Recantation by witness called on behalf of prosecution does not necessarily entitle defendant to new trial; in determining whether new trial is warranted, trial judge is to examine all circumstances of case, including testimony of witnesses submitted on motion for new trial.

12 Cases that cite this headnote

2 **Criminal Law**
Probable Effect of New Evidence, in General

Only when it appears that witness' testimony will change to such extent as to render probable different verdict will new trial be granted on basis of witness' recantation of testimony.

14 Cases that cite this headnote

3 **Criminal Law**
Contradictory Statements by Witness

Recantation of testimony by prosecution witness did not warrant new trial in murder prosecution; witness' testimony was consistent from time of murder to conclusion of trial, testimony did not change until witness discovered that defendant was father of witness' twins, and, based on other evidence, it was not probable that different verdict would be reached if change of testimony were introduced at new trial.

17 Cases that cite this headnote

4 **Criminal Law**
Examination of Witnesses Other Than Accused

State did not improperly elicit inadmissible evidence under guise of refreshing witness' recollection; prosecutor's attempt to refresh witness' memory was proper, and witness, not prosecutor, revealed contents of prior statement.

5 **Criminal Law**
Proceedings for Disclosure

Trial court's refusal to allow in camera review of testimony provided to grand jury was not erroneous, where court allowed defendant access to some of grand jury testimony, but defendant failed to establish predicate that remaining grand jury testimony contained material evidence and failed to advise court as to possible usefulness of grand jury testimony.

6 **Witnesses**
Testimony Before Grand Jury or at Preliminary Investigation or Coroner's Inquest

Police officer shot during robbery could testify at trial as to identification of defendant as perpetrator, though officer's trial testimony varied from his grand jury testimony, where officer testified that his memory of incident improved with time; jury was aware that officer's testimony had changed, and credibility of testimony was issue for fact finder.

7 **Criminal Law**
Evidence as to Information Acted On

Robbery victim's statement that codefendant ordered victim to open store safe was "verbal act" forming basis of victim's subsequent action in opening safe and pulling alarm, thus, statement was not inadmissible hearsay in prosecution of defendant who was outside of store.

1 Cases that cite this headnote

8 **Criminal Law**
Character or Reputation of Accused

**Homicide**
Indefinite, Impersonal, and Conditional Threats

Witness' statement that defendant had once told witness that he hated police officers was admissible in prosecution for attempted murder and murder of police officers; statement was not impermissible character evidence but was relevant and properly admitted to show defendant's state of mind to prove or explain subsequent behavior.

1 Cases that cite this headnote

9 **Criminal Law**
Evidence and Witnesses

Defendant's claim on appeal that reasonable doubt instruction denied defendant due process was procedurally barred where no objection was made to instruction at trial.

3 Cases that cite this headnote

10 **Homicide**
Grade, Degree, or Classification of Offense

State could proceed on felony-murder theory at trial even though indictment gave no notice of theory.

2 Cases that cite this headnote

11 **Criminal Law**
Number of Counsel

Appointment of multiple counsel to represent indigent defendant is within discretion of trial judge and is based on determination of complexity of given case and attorney's effectiveness therein.

7 Cases that cite this headnote

12 **Criminal Law**
Number of Counsel

Defendant was not entitled to appointment of multiple counsel to represent him, in light of defendant's access to investigators to assist in defense. U.S.C.A. Const.Amend. 6.

13 **Sentencing and Punishment**
Decision, and Order or Judgment

Trial court's preparation of sentencing order before sentencing hearing in capital case did not improperly deny defendant opportunity to be heard; defendant suffered no prejudice by prehearing preparation of order, where almost all arguments and evidence presented by defendant at sentencing hearing had previously been heard by trial court or lacked merit, and defendant had opportunity to present evidence at sentencing hearing.

14 **Courts**
In General; Retroactive or Prospective Operation

Decision setting forth proper sentencing procedures in capital case, which involved change in procedure, not change in law, was to be applied prospectively only; defendants sentenced before that decision who had full and fair opportunity to present evidence at sentencing hearing could not challenge, absent showing of prejudice, sentencing order on grounds that trial judge prepared order before sentencing hearing.

6 Cases that cite this headnote

15 **Sentencing and Punishment**

Dual Use of Evidence or Aggravating Factor

Aggravating sentencing factors of "committed to avoid arrest" and "victim was a law enforcement officer" were duplicative in prosecution for murder because both factors were based on single aspect of offense.

3 Cases that cite this headnote

16 **Sentencing and Punishment**

Dual Use of Evidence or Aggravating Factor

Aggravating sentencing factors of "committed while engaged in the commission of a robbery or flight therefrom" and "prior conviction of a violent felony," were not duplicative, where prior conviction factor was not based on robbery underlying "committed while engaged in the commission of a robbery" factor but was based on defendant's previous felony conviction for indecent battery on 14-year-old child.

1 Cases that cite this headnote

17 **Sentencing and Punishment**

Harmless and Reversible Error

Trial court's improper citing of duplicative aggravating sentencing factors of "committed to avoid arrest" and "victim was a law enforcement officer" in prosecution for murder was harmless error, though no limiting instruction was given regarding duplicative aggravating circumstances, where three valid aggravating factors existed and mitigating evidence was negligible.

10 Cases that cite this headnote

18 **Sentencing and Punishment**

Harmless and Reversible Error

Any error by sentencing judge in failing to properly consider all nonstatutory mitigating circumstances in imposing death sentence was harmless error; valid aggravating circumstances strongly outweighed negligible nonstatutory evidence submitted by defendant.

5 Cases that cite this headnote

19 **Sentencing and Punishment**

Sentence or Disposition of Co-Participant or Codefendant

**Sentencing and Punishment**

Law Enforcement Officer

Death penalty could be imposed upon defendant convicted of murder, even though codefendant only received life sentence; defendant shot police officer at least four times at close range though officer never removed his gun from holster, and mitigating factors were insufficient to outweigh aggravating factors.

3 Cases that cite this headnote

20 **Criminal Law**

Necessity of Ruling on Objection or Motion

Defendant's claim on appeal that trial judge erred in failing to grant pretrial request for Magnetic Resonance Imaging (MRI) test to determine whether defendant had brain tumor, which could constitute mitigating factor, was procedurally barred where trial judge reserved ruling on request and apparently never issued ruling.

11 Cases that cite this headnote

**Attorneys and Law Firms**

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*733 Robert A. Butterworth, Atty. Gen. and Celia A. Terenzio, Asst. Atty. Gen., West Palm Beach, for appellee.

**Opinion**

PER CURIAM.

Lancelot Armstrong appeals his convictions of robbery, attempted first-degree murder, and first-degree murder and his sentences of life imprisonment for the robbery and attempted first-degree murder convictions and death for the first-degree murder conviction. We have jurisdiction. Art. V, § 3(b)(1), Fla. Const. For the reasons expressed, we affirm Armstrong's convictions and sentences.

The record reflects the following facts. In the early morning hours of February 17, 1990, Armstrong called a friend

and asked him to go with him to rob Church's Fried Chicken restaurant. The friend refused. According to several employees of Church's, around two o'clock that same morning, Armstrong and Michael Coleman came to the restaurant asking to see Kay Allen, who was the assistant manager of the restaurant and Armstrong's former girlfriend. The restaurant employees testified that Allen did not want to see Armstrong and asked him to leave. Armstrong and Coleman, however, remained at the restaurant and eventually Allen accompanied Armstrong to the vehicle he was driving while Coleman remained inside the restaurant. The employees additionally testified that Allen and Armstrong appeared to be arguing while they were sitting in the vehicle.

Allen testified that, while she was in the car with Armstrong, he told her he was going to rob the restaurant, showed her a gun under the seat of the car, and told her he might have to kill her if she didn't cooperate. Coleman then came out to the car, and Armstrong, Coleman, and Allen went back into the restaurant. Allen was responsible for closing the restaurant, and by this time, the other employees had left. Coleman and Armstrong ordered Allen to get the money from the safe. Before doing so, she managed to push the silent alarm. Shortly thereafter, Armstrong returned to the car. Coleman remained in the restaurant with Allen to collect the money from the safe.

Other testimony reflected the following facts. When the alarm signal was received by the alarm company, the police were notified and Deputy Sheriffs Robert Sallustio and John Greeney went to the restaurant where they found Armstrong sitting in a blue Toyota. Greeney ordered Armstrong out of the car and told him to put his hands on the car. After Greeney ordered Armstrong to put his hands on the car, Greeney holstered his gun to "pat down" Armstrong. Sallustio then noticed movement within the restaurant, heard shots being fired from the restaurant and from the direction of the car, and felt a shot to his chest. Apparently, when the movement and shots from the restaurant distracted the officers, Armstrong managed to get his gun and began firing at the officers.

According to Allen, when Coleman noticed that police officers were outside the building, he started firing at the officers. Allen took cover inside the restaurant, from where she heard Coleman firing more shots and heard a machine gun being fired outside the restaurant. Sallustio was shot three times, but still managed to run from Armstrong and radio for assistance. When other officers arrived, they found Greeney dead at the scene. Greeney had died instantly. Allen was found inside the restaurant; Coleman and Armstrong had fled.

That same day, Armstrong told one friend that he got shot and that he returned a shot; he told his girlfriend that a police officer had asked him to step out of his car and that, when he did so, the officer pulled a gun on him and tried to shoot him; and he told another friend that someone shot him while trying to rob him. Thereafter, Armstrong and Coleman fled the state but were apprehended the next day in Maryland. Before being apprehended, Armstrong had two bullets removed from his arm by a Maryland doctor.

A number of shell casings were recovered from the scene. All of the bullets removed from Sallustio and Greeney were fired from a nine-millimeter, semi-automatic weapon; Greeney had been shot from close range. Evidence reflected that Armstrong had purchased *734 a nine-millimeter, semi-automatic weapon the month before the crime. Armstrong's prints were found in the blue Toyota as well as on firearm forms found in the car. Additional ballistics evidence reflected that the shots fired from the restaurant did not come from a nine-millimeter, semi-automatic weapon. This indicated that only someone near the car could have fired the shots that wounded Sallustio and killed Greeney. Additionally, testimony was introduced to show that Armstrong was seen with a nine-millimeter, semi-automatic gun right after the incident. Armstrong was convicted as charged. [1]

At the penalty phase, the State presented evidence showing Armstrong's prior conviction of indecent assault and battery on a fourteen-year-old child. Armstrong presented evidence from a number of witnesses in support of the following nonstatutory mitigating circumstances: (1) he had significant physical problems during childhood (he was dyslexic but a good student and had a brain hemorrhage when he was a baby); (2) helped others and had a positive impact on others (routinely assisted his grandmother, brothers and sisters, both financially and emotionally; was a good father and provider to his son; trained others to do carpentry work and was a positive influence on those he assisted); (3) was present as a child when his mother was abused and would come to her aid; (4) could be productive in prison (was an excellent carpenter and plumber); (5) is a good prospect for rehabilitation; (6) codefendant received a life sentence; (7) the alternative sentence is life imprisonment without the possibility of parole; (8) Armstrong is religious (attends church); and (9) Armstrong failed to receive adequate medical care and treatment as a child (had a brain hemorrhage when he was a baby but, due to finances, did not receive the medical attention he needed).

The jury recommended death by a nine-to-three vote. The trial judge found no statutory mitigating circumstances and four aggravating circumstances: (1) prior conviction of a violent felony; (2) committed while engaged in the commission of a robbery or flight therefrom; (3) committed for the purpose of avoiding arrest or effecting an escape from custody; and (4) murder of a law enforcement officer engaged in the performance of official duties. The trial judge sentenced Armstrong to death for the murder of Officer Greeney, to life imprisonment for the attempted murder of Officer Sallustio, and to life imprisonment for the armed robbery.

Armstrong raises a total of twenty-four issues in this appeal, nine of which pertain to the guilt phase of the trial and fifteen of which pertain to the penalty phase proceeding. [2]

***735** ***Guilt Phase***

In his first conviction issue, Armstrong contends that a new trial is required because Kay Allen lied about material facts at trial. During the course of the trial, Kay Allen mentioned that she became pregnant with twins during the time she was dating Armstrong but that he was not the father of the twins. She also stated that, when she was in the car with him outside the restaurant on the night of the incident, he showed her the nine-millimeter, semi-automatic machine gun and threatened her with the gun. After the trial, Allen underwent a blood test, which determined that Armstrong was the father of the twins. She also began communicating with Armstrong in prison.

Thereafter, at the hearing on a motion for new trial, Allen testified that she had lied at trial about Armstrong's not being the father of the twins. Additionally, she testified that she thought Armstrong was innocent, that Armstrong never threatened her, and that she never actually saw the gun but knew it was there because she "heard" it and knew that Armstrong always kept it under the seat. She additionally testified that she had mentioned to people in the prosecutor's office that Armstrong might be the father of the twins, but that they "went around it or something."

To rebut Allen's change in testimony, the prosecutor introduced testimony reflecting that Allen did mention to the victim-assistance counselor that Armstrong might, in fact, be the father of the twins, but that she did not do so until *after the trial.* The counselor advised her to get a blood test done to determine the identity of the twins' father. Additionally, testimony was introduced to show that Allen's statements at trial regarding the gun and Armstrong's behavior on the night of the incident were almost identical to the statements she had given to law enforcement officers immediately after the incident. They were also almost identical to the statements that she later gave to other officers and that she made during discovery.

Armstrong argues that Allen's change in testimony warrants a new trial because her testimony was crucial to the State's case-in-chief given that it was the only testimony that placed the murder weapon in Armstrong's possession during the robbery. Additionally, Armstrong contends that a new trial is warranted because a material misstatement in the testimony of a prosecution witness constitutes grounds for a new trial.

1 2 3 Recantation by a witness called on behalf of the prosecution does not necessarily entitle a defendant to a new trial. *Brown v. State,* 381 So.2d 690 (Fla.1980), *cert. denied,* 449 U.S. 1118, 101 S.Ct. 931, 66 L.Ed.2d 847 (1981); *Bell v. State,* 90 So.2d 704 (Fla.1956). In determining whether a new trial is warranted due to recantation of a witness's testimony, a trial judge is to examine all the circumstances of the case, including the testimony of the witnesses submitted on the motion for the new trial. *Bell.* "Moreover, recanting testimony is exceedingly unreliable, and it is the duty of the court to deny a new trial where it is not satisfied that such testimony is true. Especially is this true where the recantation involves a confession of perjury." *Id.* at 705 (quoting *Henderson v. State,* 135 Fla. 548, 561, 185 So. 625, 630 (1938) (Brown, J., concurring specially)). Only when it appears that, on a new trial, the witness's testimony will change to such an extent as to render probable a different verdict will a new trial be granted. *Id.* When taking the evidence of this case as a whole, we find that the trial judge correctly denied Armstrong's motion for a new trial. Allen's testimony was consistent from the time of the incident to the conclusion of the trial. Her testimony did not change until she found through a blood test that Armstrong was the father of her twins and until she began communicating with him after the trial. Additionally, even without her testimony, sufficient testimony exists to support, beyond a reasonable doubt, Armstrong's conviction, and it is not probable that a different verdict would be reached if Allen's change of testimony ***736** were to be introduced at a new trial. Consequently, we deny this claim.

4 In his second claim, Armstrong alleges that the State elicited inadmissible evidence under the guise of refreshing a witness's recollection. Specifically, Armstrong contends that a witness for the State testified that Armstrong never mentioned shooting a police officer; that over Armstrong's objection and under the guise of refreshing the witness's memory, the State presented the witness with the witness's

previous statement to the contrary; and that the witness then stated that the statement did not refresh her memory and that she did not remember stating previously that Armstrong told her he shot a police officer. Armstrong asserts that it was error for the prosecutor to reveal the contents of the statements used to refresh recollection and for the prosecutor to ask the witness if her out-of-court statement indicated that Armstrong had said he shot an officer. The record indicates, however, that it was the witness who revealed the contents of the prior statement. First, after the witness gave her version of Armstrong's behavior after the incident, the prosecutor asked the witness if she had said anything else about his behavior in earlier statements. The witness then replied, "I probably did but right now that's what I remember." At that point, the prosecutor properly showed the witness her prior statement and asked if the statement refreshed her memory. Thereafter, the witness stated, "I don't remember saying that he said that he shot the police officer." Because the prosecutor was properly attempting to refresh the witness's memory and because it was the witness and not the prosecutor who revealed the contents of the prior statement, we find no misconduct on the part of the prosecutor.

5 In his third claim regarding the conviction, Armstrong argues that the trial judge erred in refusing to allow an *in camera* review of the testimony that was provided to the grand jury. A review of the record reveals that the trial judge did allow Armstrong access to some of the grand jury testimony (see the next issue below), but that Armstrong failed to establish a predicate that the remaining grand jury testimony contained material evidence and failed to advise the court as to the possible usefulness of the grand jury testimony. Consequently, we deny this claim.

6 Next, Armstrong contends that the trial judge erred in allowing Officer Sallustio to testify at trial that Armstrong was the person who chased him because Sallustio's identification was tainted and the facts that he gave regarding the identification were different at trial from what he previously told the grand jury. The record reflects that Sallustio testified before the grand jury shortly after the incident. At that time, he was still hospitalized and was still taking medication. At the trial, he acknowledged that his testimony varied somewhat from what he told the grand jury. He stated that directly after the incident he could recall only a few details about the crime; however, as time passed his memory of the incident improved. Consequently, the jury was aware that his testimony had changed and the credibility of Sallustio's testimony was an issue for the fact-finder. Moreover, clear, direct evidence unquestionably places Armstrong at the restaurant on the night of the crime and physical evidence supports a finding that Armstrong fired the fatal shots. Therefore, we find this claim to be without merit.

7 In his fifth guilt-phase issue, Armstrong argues that hearsay evidence regarding the robbery was erroneously admitted at trial. At trial, Kay Allen was allowed to testify that Coleman ordered her to open the safe. We find this testimony was properly admitted as a verbal act forming the basis of Allen's subsequent action in opening the safe and pulling the alarm. *See, e.g., Zeigler v. State,* 402 So.2d 365 (Fla.1981) (testimony as to the conversation represented verbal act which formed basis for witness's subsequent action in securing revolvers and delivering them), *cert. denied,* 455 U.S. 1035, 102 S.Ct. 1739, 72 L.Ed.2d 153 (1982).

8 Armstrong also asserts that the State was erroneously allowed to elicit testimony from a witness that Armstrong told her, over a year before the shooting, that he hated police officers. According to Armstrong, this was impermissible bad character evidence, *737 was irrelevant to whether he committed the crime at issue, and requires a new trial. We find that this testimony was relevant and properly admitted to show Armstrong's state of mind to prove or to explain subsequent behavior. *Jackson v. State,* 498 So.2d 406 (Fla.1986), *cert. denied,* 483 U.S. 1010, 107 S.Ct. 3241, 97 L.Ed.2d 746 (1987); *State v. Escobar,* 570 So.2d 1343 (Fla. 3d DCA 1990), *dismissed,* 581 So.2d 1307 (Fla.1991).

9 Next, Armstrong contends that the instruction the trial judge gave to the jury on reasonable doubt denied Armstrong due process and a fair trial. No objection was made to this instruction at trial and, as such, this claim is procedurally barred. Moreover, we recently rejected this same claim in *Esty v. State,* 642 So.2d 1074 (Fla.1994), in which we specifically found the instruction at issue to be constitutional.

10 Armstrong also argues that the trial judge erred in allowing the State to proceed on a felony-murder theory when the indictment gave no notice of the theory. This claim has been repeatedly rejected by this Court. *Lovette v. State,* 636 So.2d 1304 (Fla.1994) (an indictment charging only premeditated murder is sufficient to allow the State to proceed on either premeditated or felony murder); *Bush v. State,* 461 So.2d 936 (Fla.1984), *cert. denied,* 475 U.S. 1031, 106 S.Ct. 1237, 89 L.Ed.2d 345 (1986); *O'Callaghan v. State,* 429 So.2d 691 (Fla.1983); *Knight v. State,* 338 So.2d 201 (Fla.1976).

11 12 In his final guilt-phase issue, Armstrong claims that his right to effective assistance of counsel and equal protection was violated because the trial judge refused to appoint two attorneys to represent him in this case. According to Armstrong, because of the complicated nature of this case, he was entitled to more than one attorney. We disagree. Appointment of multiple counsel to represent an indigent defendant is within the discretion of the trial judge and is based on a determination of the complexity of a given case and the attorney's effectiveness therein. *Makemson v. Martin County,* 491 So.2d 1109 (Fla.1986), *cert. denied,* 479 U.S. 1043, 107 S.Ct. 908, 93 L.Ed.2d 857 (1987). We note that, in making his request for co-counsel, Armstrong stated that additional counsel was needed to ensure that the case was properly investigated and to allow one counsel to represent him during the guilt phase and another to represent him during the penalty phase to guarantee a fair trial. In ruling on Armstrong's request, the trial judge specifically stated that another counsel was unnecessary and that Armstrong had been given "almost *carte blanche* " access to investigators to assist him. We find that the trial judge acted within his discretion in denying Armstrong's request.

***Penalty Phase***

In his first issue regarding the penalty phase, Armstrong argues that the trial judge formulated his sentencing decision before giving Armstrong an opportunity to be heard in violation of *Spencer v. State,* 615 So.2d 688 (Fla.1993). Armstrong admits that he was allowed to present argument of counsel and additional evidence at his sentencing hearing. He argues, however, that the trial judge prepared the sentencing order before the sentencing hearing, and, therefore, that the trial judge had already determined what Armstrong's sentence would be before arguments and evidence were presented.

13 14 In *Spencer,* 615 So.2d at 690, we stated:

> In *Grossman* [*v. State,* 525 So.2d 833 (Fla.1988), *cert. denied,* 489 U.S. 1071, 109 S.Ct. 1354, 103 L.Ed.2d 822 (1989) ], we directed that written orders imposing the death sentence be prepared prior to the oral pronouncements of sentence. However, we did not perceive that our decision would be used in such a way that the trial judge would formulate his decision prior to giving the defendant an opportunity to be heard. We contemplated that the following procedure be used in sentencing phase proceedings. First, the trial judge should hold a hearing to: a) give the defendant, his counsel, and the State, an opportunity to be heard; b) afford, if appropriate, both the State and the defendant an opportunity to present additional evidence; c) allow both sides to comment on or rebut information in any presentence or medical report; and d) afford the defendant an opportunity ***738** to be heard in person. Second, after hearing the evidence and argument, the trial judge should then recess the proceeding to consider the appropriate sentence. If the judge determines that the death sentence should be imposed, then, in accordance with section 921.141, Florida Statutes (1983), the judge must set forth in writing the reasons for imposing the death sentence. Third, the trial judge should set a hearing to impose the sentence and contemporaneously file the sentencing order.

In reversing the convictions at issue in *Spencer* and remanding that case for a new trial, we noted that the trial judge had not followed the sentencing procedure quoted above. The failure of the trial judge to follow that procedure in *Spencer,* however, was not the sole reason for our reversal in that case. In fact, in *Spencer,* the trial judge committed numerous errors, including the error of engaging in *ex parte* communications with the prosecutor regarding Spencer's sentence. We note that our decision in *Spencer* was decided several years after this case was tried. Further, although, in the instant case, the trial judge may not have followed the procedure we set forth in *Spencer,* we find no prejudice to Armstrong under the circumstances of this case. Almost all of the arguments and evidence Armstrong presented at the sentencing hearing had previously been heard by the trial judge, either at trial or at the hearing on Armstrong's motion for new trial, or were without merit. Moreover, the record reflects that the trial judge allowed Armstrong an opportunity to present evidence at the sentencing hearing. Additionally, none of the other errors at issue in *Spencer* are present here. We find that our decision in *Spencer*-being a change in procedure and not a change in the law-is to be applied prospectively only. We therefore hold that any defendant who was sentenced before our decision in *Spencer,* and who was provided a full and fair opportunity to present evidence at the sentencing hearing, cannot challenge, absent a showing of prejudice, a sentencing order on the grounds that the trial judge prepared the order before the sentencing hearing. Because the sentencing hearing in this case took place before our decision in *Spencer,* because Armstrong was provided with a full and fair opportunity to present evidence at the sentencing hearing, and because there has been no showing of prejudice by the fact that the trial judge prepared the sentencing order before providing Armstrong with the opportunity to be heard, we deny this claim.

In his second claim, Armstrong argues that several of the aggravating circumstances in this case are duplicative and that the trial judge should not have disallowed his requested limiting instruction on duplicate aggravating circumstances. Specifically, Armstrong contends that the aggravating circumstances of "committed for the purpose of avoiding arrest" and "murder of a law enforcement officer engaged in the performance of official duties" are duplicative because they are based on the same aspect of the crime; that is, that the law enforcement officer was killed to avoid arrest. Likewise, Armstrong argues that the trial judge should not have found both that the crime was "committed while engaged in the commission of a robbery or flight therefrom" and that Armstrong had a "prior conviction of a violent felony" because the "prior conviction" was based on the contemporaneous robbery.

15 16 In this case, the only evidence supporting the "committed to avoid arrest" aggravating circumstance was the fact that the victim was a law enforcement officer. Consequently, we agree that the aggravating factors of "committed to avoid arrest" and "victim was a law enforcement officer" are duplicative because both factors are based on a single aspect of the offense. Armstrong's argument, however, that the "committed while engaged in the commission of a robbery or flight therefrom" and "prior conviction of a violent felony" aggravators are also duplicative is without merit because the record reflects that Armstrong had a previous felony conviction for indecent battery on a fourteen-year-old child.

17 Because two of the aggravating circumstances in this case were duplicative, Armstrong argues that the trial judge erred in refusing to give the limiting instruction he requested regarding duplicative aggravating circumstances. *739 *Castro v. State,* 597 So.2d 259 (Fla.1992). He also contends that, in light of the duplicative factors, the death penalty is not warranted in this case. In *Castro,* we held that such a limiting instruction was warranted under these circumstances. We note, however, that the trial in this case occurred approximately one year before our decision in *Castro*. Moreover, at the time of the trial in this case, this issue was governed by *Suarez v. State,* 481 So.2d 1201 (Fla.1985), *cert. denied,* 476 U.S. 1178, 106 S.Ct. 2908, 90 L.Ed.2d 994 (1986), in which we determined that the failure to instruct a jury on duplicative aggravating factors is not reversible error when the trial court does not give the factors double weight in its sentencing order. Although the trial judge in this case *did* give the factors double weight in his sentencing order, we still find that the trial judge's improper doubling of two of the aggravating circumstances and failure to give the limiting instruction were harmless error beyond a reasonable doubt in light of the remaining three valid aggravating circumstances and the negligible mitigating evidence in this case.

18 Armstrong also contends that the trial judge erred in refusing to find certain nonstatutory mitigating factors and in failing to consider certain nonstatutory mitigating factors in his sentencing order. In his sentencing order, the trial judge stated:

> All [eleven] witnesses for the Defendant testified as to a troubled and sickly childhood; and to the extent of the Defendant's assistance to his family members; and to his general good character and religious upbringing.
>
> ....
>
> In summary, the Court finds that of the aggravating circumstances, four were applicable in this case. *As to mitigating circumstances, none may be applied to this case.*
>
> Based upon the preceding opinions of fact, and it being the opinion of this Court that there are sufficient aggravating circumstances existing to justify the sentence of death, and this Court *after weighing the aggravating and mitigating circumstances,* being of the additional opinion that *no mitigating circumstances exist to outweigh the aggravating* [orders that the death penalty be imposed].

(Emphasis added.) From the wording of the trial judge's sentencing order, it is does appear that he sufficiently considered the nonstatutory mitigating evidence presented in this case. He specifically stated that eleven witnesses testified on Armstrong's behalf and he specifically considered the testimony presented by those witnesses. After listing the testimony presented regarding nonstatutory mitigation, the trial judge stated that no mitigating circumstances applied to this case. Given that this statement followed the trial judge's listing of nonstatutory mitigating evidence, it appears that he was stating that no "statutory" mitigating circumstances applied to this case. Further, the trial judge specifically weighed the mitigating evidence against the evidence in aggravation, stating that "no mitigating circumstances exist to outweigh the aggravating" circumstances. Although the trial judge's articulation of how he considered the mitigating circumstances and aggravating circumstances is somewhat less than a model of clarity, we believe that he properly considered all nonstatutory mitigating circumstances in imposing the death sentence. In any event, however, we

find that any error was harmless beyond a reasonable doubt because, as indicated above, the three valid aggravating circumstances in this case strongly outweigh the negligible nonstatutory mitigating evidence submitted by Armstrong. *Parker v. Dugger,* 498 U.S. 308, 111 S.Ct. 731, 112 L.Ed.2d 812 (1991) (court may conduct a harmless error analysis or reweigh the remaining aggravating and mitigating circumstances even though the court has struck one or more of the aggravating factors).

**19** Armstrong next claims that the death penalty is not warranted in this case because codefendant Coleman received a life sentence. The facts of this case reflect that Armstrong shot Officer Greeney at least four times at close range even through Greeney never removed his gun from his holster to return fire. Further, as stated, the mitigating factors in this case are insufficient to outweigh the aggravating factors. This Court has repeatedly stated that, when the defendant is the shooter, the death penalty is ***740** not disproportionate even though a codefendant received a lesser sentence. *Mordenti v. State,* 630 So.2d 1080 (Fla.1994), *cert. denied,* 512 U.S. 1227, 114 S.Ct. 2726, 129 L.Ed.2d 849 (1994); *Downs v. State,* 572 So.2d 895 (Fla.1990), *cert. denied,* 502 U.S. 829, 112 S.Ct. 101, 116 L.Ed.2d 72 (1991).

**20** In his next claim, Armstrong argues that the trial judge erred in failing to grant his pretrial request for a Magnetic Resonance Imaging (MRI) test to determine whether Armstrong had a brain tumor, a fact which could have been used in mitigation. The record reflects that, at the pretrial competency hearing, four experts testified regarding Armstrong's competency to stand trial: three testified that he was competent to stand trial; one testified that he was incompetent to stand trial because of his inability to read and write and that an MRI might be helpful in identifying this deficit and other defenses. The trial judge reserved ruling on this issue and apparently never issued a ruling. Consequently, this issue is procedurally barred. *Richardson v. State,* 437 So.2d 1091 (Fla.1983) (failure to obtain ruling on motion fails to preserve issue for appeal); *State v. Kelley,* 588 So.2d 595 (Fla. 1st DCA 1991) (same). In any event, the record reflects that Armstrong was provided a reader during the course of the trial and that this issue went to Armstrong's competency to stand trial, and not to the presentation of mitigation.

The remaining issues raised by Armstrong regarding his sentence of death were either not properly preserved for appellate review, have been previously rejected by this Court, or are otherwise without merit.

Accordingly, for the reasons expressed, we affirm Armstrong's convictions of robbery, attempted first-degree murder, and first-degree murder and his sentences of life imprisonment for the robbery and attempted first-degree murder convictions and his sentence of death for the first-degree murder conviction.

It is so ordered.

GRIMES, C.J., OVERTON, SHAW, KOGAN and HARDING, JJ., and McDONALD, Senior Justice, concur.

Parallel Citations

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Footnotes

1 Coleman was tried and convicted separately and received a sentence of life imprisonment.

2 Regarding the guilt phase, Armstrong claims that: (1) a new trial is warranted because a witness lied about material facts at trial; (2) the State elicited inadmissible evidence under the guise of refreshing a witness's recollection; (3) the trial judge erred in refusing to allow an *in camera* review of the grand jury testimony; (4) the trial judge erred in denying Armstrong's motion to suppress identification testimony; (5) the trial judge erred in denying Armstrong's objection to hearsay statements introduced into evidence; (6) the trial judge erred by permitting the State to introduce certain character evidence; (7) the jury instruction on reasonable doubt denied Armstrong due process and a fair trial; (8) the trial judge erred in allowing the State to proceed on a felony-murder theory when the indictment gave no notice of the theory; and (9) Armstrong's right to effective assistance of counsel and equal protection was violated by the trial judge's refusal to appoint co-counsel. As to the penalty phase, Armstrong asserts that: (1) the trial judge formulated his sentencing decision before giving Armstrong an opportunity to be heard; (2) & (3) certain aggravating circumstances were duplicative and the trial judge erred in denying Armstrong's requested limiting instruction on duplicate aggravating circumstances; (4) & (5) the trial judge erred in refusing to find certain nonstatutory mitigating factors and in failing to consider certain nonstatutory mitigating factors in its sentencing order; (6) the death penalty is disproportionate in this case; (7) the trial court erred in not granting Armstrong's motion for a magnetic resonance imaging examination; (8) victim impact information was considered by the trial judge in sentencing Armstrong; (9) the trial judge improperly denied Armstrong's request for new counsel; (10) the trial judge erred in denying Armstrong's requested jury instruction that mitigating evidence does not have to be found unanimously; (11) the jury instruction given on sentencing minimized the jury's sense of responsibility, thus depriving Armstrong of a fair sentencing; (12)

the trial judge failed to adequately define nonstatutory mitigating circumstances; (13) the trial judge failed to instruct the jury on the correct burden of proof in the penalty phase; (14) Florida's death penalty statute is unconstitutional; and (15) the aggravating circumstances used in this case are unconstitutional.

EX. #. 78,

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July 20, 2012

Lancelot Armstrong
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Dear Mr. Armstrong:

It was a pleasure meeting with you on July 18. As we discussed, I am enclosing a copy of our cert petition and the State's brief in opposition. The United States Supreme Court has denied our petition, which means that the time for filing our 3.851 motion has begun. As I mentioned during our meeting, we have our first status hearing next Friday, July 27. I will let you know how it goes.

As always, please feel free to contact me or Ms. Day if you have any questions or concerns. Take care, and be well.

Best regards,

Nicole M. Noël