IN THE THIRTEENTH JUDICIAL CIRCUIT COURT
FOR HILLSBOROUGH COUNTY, FLORIDA
Criminal Justice and Trial Division

STATE OF FLORIDA **CASE NO.: 08-CF-009312**

v.

EDWARD ALLEN COVINGTON, **DIVISION: J/TD2**
Defendant.
_____/

FINAL ORDER DENYING MOTION TO VACATE JUDGMENT OF CONVICTION AND SENTENCE

THIS MATTER is before the Court on Defendant's Motion to Vacate Judgment of Conviction and Sentence, filed on February 28, 2019, pursuant to Florida Rule of Criminal Procedure 3.851. *See* Fla. R. Crim. P. 3.851(c)(1). On April 29, 2019, the State filed its initial response. On October 25, 2019, the Court granted an evidentiary hearing on claims I-A, I-B, in part, I-C, I-D, I-E, I-F, in part, I-G, II-B, in part, II-C, and II-D and reserved ruling on claims I-H and IV. On December 16, 17, 18, and 19, 2019, and September 24, 2020, the Court held an evidentiary hearing on those claims. On November 30, 2020, the parties submitted written closing arguments. After considering Defendant's motion,[1] the State's response, the court file, and the record, as well as the testimony and evidence presented during the evidentiary hearing, and the written argument of counsels, the Court finds as follows.

CASE HISTORY

On October 24, 2014, Defendant pleaded guilty to first degree murder (counts one, two, and three), abuse of a dead human body (counts four, five, and six), and animal cruelty (count

[1] Defendant filed supplements or amendments to his claims on July 18, 2019, and August 2, 2019. The Court refers to Defendant's motion and his supplemented or amended claims collectively as Defendant's motion, and the State's initial response and responses to Defendant's supplemented claims collectively as the State's response.

seven), and waived a penalty phase jury. On May 29, 2015, the trial court sentenced Defendant to death on counts one, two, and three, to fifteen years in prison on counts four, five, and six, and to five years in prison on count seven, concurrently. The Florida Supreme Court affirmed Defendant's convictions and sentences and, on March 19, 2018, the Supreme Court denied certiorari. *See Covington v. State*, 228 So. 3d 49 (Fla. 2017), *cert. denied*, 138 S. Ct. 1294 (2018).

FACTUAL BACKGROUND

The Florida Supreme Court summarized - and the record reflects - the factual background as follows:

> In May 2008, Lisa Freiberg lived in Lutz, Florida, with her two children, seven-year-old Zachary and two-year-old Heather Savannah, and her boyfriend, Edward Allen Covington. Covington met Lisa through an online dating site and moved into her home in April 2008. On May 11, 2008, Covington murdered Lisa, Zachary, and Heather Savannah. He also killed the family dog, Duke.
>
> Three days before the murders, Lisa's mother, Barbara Freiberg, noticed that Heather Savannah had a swollen lip. When Barbara asked about it, Covington said that he must have caused it by rubbing too hard when wiping Heather Savannah's face. The next day, Friday, May 9, 2008, Barbara noticed that Heather Savannah also had hand prints and bruises on her buttocks and that the inside of her swollen lip was cut. Barbara photographed Heather Savannah's injuries and showed them to Lisa later that day. Barbara told Lisa that she believed that Covington was responsible for the injuries. Zachary and Heather Savannah spent the night with Barbara that night. When Lisa picked the children up around noon the next day, Lisa told Barbara that Covington said that it had to have been the babysitter who caused Heather Savannah's injuries.
>
> Around 2 p.m. that Saturday, Covington's probation officer, Stephanie Laureno, stopped by Lisa's home to see Covington. Covington, Lisa, and the children were all home at the time. According to Laureno, Covington appeared calm, did not say anything that was alarming or concerning, and his interactions with Lisa and the children seemed normal.

That evening, Tom Fish, who is Lisa's ex-boyfriend and Heather Savannah's father, asked Lisa to bring the children to his mother's house for family pictures. Lisa and Covington brought the children to Fish's mother's house, but Covington did not go into the house at first. At some point, Covington did go into the house and visited with Fish and his family for about forty-five minutes. During the visit, when Zachary referred to Fish as "Tom–Tom," Covington corrected Zachary and insisted he address Fish as "sir." Covington explained that he believed in being strict with children. Fish did not observe anything unusual about Covington's speech or demeanor.

The following day was Mother's Day, and Barbara was surprised that she did not get a call from Lisa. On Monday, May 12, 2008, when Lisa did not drop the children off at the babysitter's house as expected, Barbara and her husband drove over to Lisa's house to check on her. When Barbara opened the door and looked into the house, she saw Zachary's deceased, nude body and called 911.

Law enforcement responded to the scene and found the home in complete disarray. The furniture was turned over and there was blood on the floors, walls, and surfaces in every room except the bathroom. In addition to Zachary's body, they found the bodies of Heather Savannah, Lisa, and the dead dog at various locations throughout the house. Heather Savannah had been dismembered and decapitated. Zachary's genitals had been mutilated. Lisa's body was in the doorway of the master bedroom, with a bloody handprint on the wall nearby. The dog's body was on the floor in Heather Savannah's bedroom. Two hammers and five knives that appeared to have been used in the murders were found and collected. A mesh bag containing bloody clothing was found under the mattress in the master bedroom.

Law enforcement found Covington in a closet in one of the bedrooms. He indicated that he had taken a number of pills. Depakote and Seroquel pills prescribed to Covington were found in the house. Covington was medically cleared by paramedics at the scene but transported to the hospital for further diagnosis and clearance. As he was being transported to the hospital, Covington looked back and stated, "I can't believe what I've done." After Covington was released from the hospital on May 14, 2008, he was transported to the Sheriff's Office, where he was interviewed by detectives and confessed to the murders.

Covington was indicted for three counts of first-degree murder, three counts of abuse of a dead body, and one count of cruelty to

an animal. A jury was sworn and opening statements were heard on October 22, 2014. On the first day of trial testimony, October 23, 2014, Covington announced that he wanted to change his pleas to guilty and waive a jury for the penalty phase. The trial court would not accept Covington's guilty pleas at that time but instead appointed two experts to evaluate Covington's competency to plead guilty. The evaluations and the doctors' reports were completed that evening.

When court reconvened the next day, Covington was given time to meet with his attorneys and his family. Covington then reaffirmed his desire to plead guilty and waive a penalty phase jury. Covington's counsel supported his decisions to plead guilty and waive a penalty phase jury. The court then conducted a comprehensive plea colloquy with Covington during which the court thoroughly informed him about the rights he was waiving. Covington indicated both verbally and in writing that he understood the consequences of his pleas, that although he was on psychiatric medications, there was nothing that would impair his understanding of his decision, and that he was not being threatened or coerced into entering the pleas. The trial court accepted Covington's pleas of guilty to all seven counts as charged in the indictment. Covington reaffirmed his desire to waive a penalty phase jury, and the trial court accepted his waiver. The parties stipulated that as part of the penalty phase, the trial court should consider the testimony of the four witnesses who had testified during the abbreviated guilt phase.

Covington's May 14, 2008, interview with detectives was played at the penalty phase. In the interview, Covington said that he met Lisa through an online dating site in August 2007, and they hit it off. He said that he had been living with Lisa on and off but officially started living with her a couple of weeks before the murders and everything was going great. He said Lisa and the children loved him. He talked about the days leading up to the murders. He said that he and Lisa were having problems potty-training Heather Savannah and that she had not been eating properly. He knew that Barbara had seen marks on Heather Savannah and that she thought he was abusing the children. Barbara told Lisa that she did not want Lisa to take the children back home while Covington was there. Covington denied abusing the children and said it "really, really ticked [him] off" that Barbara thought he was. He admitted that he had hit Heather Savannah on the leg when she picked up a cell phone a couple of days before the murders but said he did not mean to hit her hard. He also admitted that the marks could have occurred when he

spanked Heather Savannah, but he said he did not realize he spanked her that hard.

Covington said that Lisa picked up the children from Barbara's on Saturday afternoon, the day before the murders. Covington prepared lunch for the children and dinner for the four of them. They ate dinner around 6 p.m. and then took the children to visit with Fish's family. While the children and Lisa were visiting, Covington said he needed to go check his mailbox and left, but he actually went to buy and smoke crack cocaine.

According to Covington, when they got home around 9:30 p.m. or 10 p.m., the children went to bed, and Covington and Lisa had a drink together and had sex. Covington then played a computer game. He and Lisa went to bed around midnight or 1 a.m. Before bed, Covington said he "took a handful of Seroquel" because he was "dog tired" and it had not been as effective recently. He said he took roughly 1,000 milligrams of Seroquel (including four 200–milligram, extended release pills), which he described as "a hundred [milligrams] over the max[imum] safe dose." Covington said when the Seroquel works properly, "it's like turning off a light switch. ... [A]ll the extra thought ... shuts off, everything goes quiet." The extended release Seroquel was new to Covington and he said the first time he took one 200–milligram pill, the effects lasted twenty-six hours. Covington said that Lisa fell asleep in his arms. Covington initially told the detectives that he did not know what happened next, but he then admitted that he "kind of" remembered what happened the next morning and described what he said he remembered about the murders.

Covington said that Lisa and Zachary were still in bed around 10:30 Sunday morning when he found Heather Savannah awake and lying on the couch in the living room. Covington asked Heather Savannah "what she was doing up and she just started to cry." He said "that is the last recollection of being in control I know of" and the next thing he remembered was all the chaos and killing. He said that he killed Heather Savannah first, that he "hurt her the most," and that he "cut her in half" with a bread knife. He said the first thing he did was cut Heather Savannah's throat, "the jugular," while she was lying on the couch and he was standing over her. He used four back-and-forth motions. He said he then "literally ripped Savannah in half," "almost like carving a pig." He said he had to get her undressed in order to cut her in half. He believed she was dead at that time but could not be sure. He also decapitated Heather Savannah and set her head by the front door. Although he initially said Heather Savannah was crying, he later

said she never yelled or cried. He specifically remembered that the bread knife he used on Heather Savannah was bent in the process. When asked about a bite mark on Heather Savannah's arm, he said he may have left that the night before, because she was biting Zachary and in order to "break[ ] her on that[,] ... we would bite her back."

After he killed Heather Savannah, Covington remembered choking and strangling Lisa. He said he did not remember punching her but thought he might have because he remembered her having a bloody face. He said he used a two-and-a-half-inch-wide butcher knife and an upward motion to stab her in the chest, which he believed "probably perforated the heart and the lung."

Zachary was still asleep in his top bunk when Covington stabbed him. Zachary did not say anything during the stabbing, and Covington thought that was because he stabbed Zachary's heart. He thought he stabbed Zachary three times, once in the back and twice in the chest cavity. He remembered a "chopping knife" breaking off inside Zachary when it hit bone. Covington then brought Zachary to the living room and removed his scrotum and penis. He said that the mutilation did not have a sexual basis and that he used pliers to touch Zachary's penis.

Covington killed Duke last, by punching him and hitting him with a hammer.

Covington said that after Lisa was dead, he kept hearing her voice, so he cut her again. Then he "got what [he] could find of Savannah and Zachary and put 'em over by the front door." He remembered calling his ex-wife, Cheri, twice, but she did not answer, and he thought he may have left a message the second time he called.

Covington said that at some point he thought this must be a nightmare and that he better take some more Seroquel. He thought it was at that time that he took Depakote, aspirin, Tylenol, and caffeine. He vaguely remembered falling down in the closet while he was looking for clothes. The next thing he remembered was the police officers telling him to get out of the closet. He did not know how long he had been in the closet but remembered that it was daylight when he went in.

Covington described himself to detectives as a time bomb that had been waiting to explode and finally blew up. He said he did not know why he blew up because Lisa, Zachary, and Heather Savannah did nothing wrong.

Dr. Leszek Chrostowski, the medical examiner who performed the autopsies, testified about the causes of the victims' deaths and the injuries they received.

Lisa's death resulted from a knife wound to her neck, which transected her trachea, esophagus, and left common carotid artery. It was a gaping wound, eleven centimeters long, which appeared to have been made by a back-and-forth sawing motion with a knife. Prior to the infliction of the fatal wound, Lisa suffered severe injuries to her face, which were likely caused by a beating. Lisa had contusions and abrasions to her shoulders and chest, a five-inch cut and stab wound to her left breast, a superficial, eight-centimeter laceration across her abdomen, which extended into a twenty-eight-centimeter abrasion, and contusions on her right foot, all of which were inflicted when she was still alive. She also had multiple cuts to her hands and fingers, which were consistent with defensive wounds. She suffered a perimortem skull fracture, consistent with blows from the smaller hammer found at the scene, which caused the whole area at the base of her skull to become fragmented. Based on the fact that there were multiple injuries on all of Lisa's body surfaces in different planes, Dr. Chrostowski opined that Lisa was conscious during the attack, moving around and trying to escape the injuries. Stab wounds to her abdomen and pubic region were inflicted after her death.

The cause of Heather Savannah's death was a cut to the front of her neck. Prior to the infliction of the fatal wound, Heather Savannah was severely beaten—her cheek was cut down to the bone, the top of her head was cut with a knife in a scalping motion, and both of her femurs were fractured. The femur fractures were spiral fractures, which Dr. Chrostowski said is "a hallmark of child abuse" that results from "jerking" a child. Dr. Chrostowski opined that the leg fractures and head trauma occurred when Heather Savannah was "grabbed by the legs and hit against something." After death, Heather Savannah's body was fragmented. She was decapitated and her torso was cut from the genital region through the chest. Her right leg and hip were entirely removed from the body. Heather Savannah also suffered postmortem fractures to her tibia and fibula and multiple stab wounds to her chest and abdomen.

Zachary died as a result of five stab wounds to his neck and back, which caused internal injuries to his vessels and organs, including his heart. Prior to his death, Zachary's skull was fractured in a manner consistent with blows from the larger hammer found at the

scene. Prior to the infliction of the fatal wounds, Zachary was also stabbed in the sacral region, during which the knife broke and the blade was left embedded in the bone. A different knife was later used to inflict the fatal stab wounds. A large, gaping wound to the front of Zachary's body, which exposed some of his internal organs, was inflicted perimortem. After Zachary was dead, his genitals were removed, additional stab wounds were inflicted to his chest and back, and decapitation was attempted.

Dr. Chrostowski also determined that the blows to Duke's head were consistent with the larger hammer found at the scene.

At the penalty phase, Covington presented mitigation mainly through his parents and several experts, including Dr. Daniel Buffington, a clinical pharmacologist; Dr. Alfonso Saa, a psychiatrist; Dr. Valerie McClain, a psychologist; Dr. Harry Krop, a psychologist; and Dr. Bala Rao, a psychiatrist.

The evidence presented in mitigation established that when Covington was a newborn in 1972, he was given a massive overdose of an antibiotic, which caused him to permanently lose thirty percent of his hearing. The hearing loss was especially upsetting to Covington because it prevented him from becoming a Navy pilot. But Covington received a settlement from the hospital and used the money to hire a private flight instructor and obtain a pilot's license at the age of seventeen. Covington was a good student and did not get into trouble in school. He was employed with the Florida Department of Corrections (DOC) from 1996 to 2006.

Covington has a long history of mental health issues and substance abuse beginning at age fifteen, when he was first hospitalized for mental health treatment, diagnosed with a "chemical imbalance,"[3] and prescribed medication. He was later diagnosed with bipolar disorder and hospitalized on a number of occasions over the years. Covington was not always compliant in taking his prescribed medications and would self-medicate with drugs and alcohol. While working for the DOC, Covington was abusing cocaine and opiates. Covington stopped working for the DOC because he was getting very paranoid due to his cocaine use. Covington described cocaine to Dr. Krop as "like a mistress, like a siren calling to me." Covington told Dr. Krop that he spent $200–250 per week on cocaine during the same time period in which he complained that his psychiatric medications were financially unavailable to him. Covington admitted that he was aware for years prior to the murders that every time he used alcohol and cocaine it triggered a

rage reaction in him and could cause him to lose control, but he drank almost a half-liter of alcohol and used crack cocaine the night before the murders anyway.

A few weeks before the murders, in April 2008, Covington was involuntarily committed under the Baker Act. Sometime between the end of March and the April commitment, Covington had discontinued his prescribed medications, but the medications, including Seroquel and Depakote, were reinitiated during the April commitment. However, Covington admitted during evaluations conducted before trial that he had again stopped taking his medications about a week before the murders because he was unhappy that they were causing him sexual dysfunction.

Covington's mental health records indicated a pattern of providing false information to mental health professionals in order to manipulate the system to get what he wanted. When Covington was committed in April 2008 after cutting his arm, he told the healthcare providers at the hospital that he only hurt himself to get his medications and said, "You have to abuse and work the system." But Covington later told Dr. Rao that the hospitalization was actually prompted by a crack binge, after which he became psychotic and paranoid.

Dr. McClain was retained by the defense to evaluate Covington for competency, sanity, and mitigation. She diagnosed Covington with bipolar disorder I, alcohol dependence or moderate-use alcohol disorder, cocaine use disorder, and intermittent explosive disorder. She described Covington as an intelligent man. She believed that Covington was self-medicating with cocaine and alcohol and noted that his mental health records revealed that virtually every time he was hospitalized from the time he was fifteen years old, cocaine or alcohol abuse was involved. Dr. McClain opined without elaboration that Covington qualified for both mental health statutory mitigators. *See* § 921.141(6)(b), Fla. Stat. (2014) ("The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance."); § 921.141(6)(f), Fla. Stat. (2014) ("The capacity of the defendant to appreciate the criminality of his or her conduct or to conform his or her conduct to the requirements of law was substantially impaired.").

Dr. Krop was also retained by the defense to evaluate Covington. Dr. Krop diagnosed Covington with bipolar disorder II, polysubstance abuse disorder, and possibly intermittent explosive disorder. Dr. Krop thought Covington might have intermittent

explosive disorder based on certain violent incidents in his history, including a time when Covington broke his sister's nose, held a gun to her head, and slammed her into the wall, an incident with a property manager, and the killing and dismembering of his ex-wife's cats. Dr. Krop conducted neuropsychological testing on Covington and found no frontal lobe deficits.

Covington told Dr. Krop that the morning of the murders, he came out of his room to find the phone so that he could make a call and get more drugs and that he went into a rage when he saw Heather Savannah playing with a cell phone. Covington told Dr. Krop that the rage he felt towards Heather Savannah before the murders was so extreme because he was coming down from crack cocaine and alcohol. When Dr. Krop asked Covington why he killed Zachary, Covington said that he had no motive and "was just a coldblooded killer at the time."

Dr. Krop opined that Covington qualified for both statutory mental health mitigators. He stated that Covington's extreme mental or emotional disturbance was due to stress relating to being on felony probation for an unrelated charge, his issues with Lisa's mother, his concern that the Department of Children and Families might become involved with Lisa's family, his unemployment, and his substance use.

Dr. Rao also evaluated Covington for the defense. Dr. Rao diagnosed Covington with bipolar disorder II and also opined that he qualified for both statutory mental health mitigators. When Covington discussed with Dr. Rao the events surrounding the homicides, he admitted that he picked up Heather Savannah and threw her at the couch and that she probably hit the wall. He said that Lisa then came out of the bedroom because she heard Heather Savannah screaming and that was when he attacked Lisa. The State called two psychiatrists in rebuttal - Dr. Wade Myers and Dr. Emily Lazarou.

Dr. Myers diagnosed Covington with antisocial personality disorder (ASPD) with traits of sexual sadism and cocaine use disorder. Dr. Myers noted that during his relationship with Lisa, Covington told his ex-wife that Lisa and her children were a burden and that he would really like to get rid of them and get back together with her. Dr. Myers also described examples of Covington's significant history of violence, including violence toward his sister (breaking her nose), violence toward his ex-wife (knocking several of her teeth out and breaking her wrist), the joy

he got out of hurting people when he played football, and his assault on another inmate.

Dr. Myers believed that Covington's cocaine abuse was misdiagnosed as bipolar disorder. Dr. Myers reviewed Covington's mental health records and saw multiple indications of a history of bipolar disorder, but Dr. Myers took that to mean that Covington was telling the healthcare providers that he had bipolar disorder and it was his self-report that was documented in the records. Although records from many of Covington's commitments under the Baker Act indicated a bipolar diagnosis, Covington tested positive for cocaine during many of those admissions, and Dr. Myers explained that bipolar disorder cannot be diagnosed while someone has cocaine in his system and appears manic. Dr. Myers stated that every time Covington went to the hospital under the Baker Act he was agitated, hostile, threatening, angry, and appeared manic, and within a day or two, he was polite and cooperative even though mania does not go away within two days.

Dr. Myers concluded that Covington did not qualify for either statutory mental health mitigator. Covington told Dr. Myers that he knew he should not have smoked crack the day before the murders but did so anyway. Covington said that he can handle cocaine, but when he mixes cocaine and alcohol, he really has problems. While playing his computer game the night before the murders, Covington took on a leadership role over other players, which Dr. Myers said showed that he had a high degree of cognitive functioning. The only delusion or hallucination that Covington described was hearing Lisa's voice after she was dead, at which point Covington said he got a knife and stabbed her some more to make sure she was dead. Dr. Myers believed that Covington took an overdose of medication after the murders in order to manipulate law enforcement into thinking that he was suicidal and mentally ill. Dr. Myers described Covington as "a very, very bright man." Dr. Myers mentioned that as Covington was being led out of the house after the murders, he stepped on Lisa's corpse, which indicates a lack of remorse.

Dr. Lazarou diagnosed Covington with ASPD, borderline personality disorder, severe cocaine use disorder, alcohol use disorder, moderate opiate use disorder, and psychopathy. Based on her interviews with Covington and review of the records and evidence, it was her opinion that Covington does not suffer from bipolar disorder. She explained that the basis for her opinion is that mania which is not caused by substance use must exist for a bipolar disorder diagnosis, but Covington has never had mania that

was not substance-induced. She opined that Covington's manic episodes were a side effect of his cocaine use, not a psychiatric illness. Dr. Lazarou did not believe that Covington qualified for either statutory mental health mitigator.

As to the murder of Lisa Freiberg, the trial court concluded that three aggravating circumstances were proven beyond a reasonable doubt: (1) the capital felony was especially heinous, atrocious, or cruel (great weight); (2) Covington was previously convicted of another capital felony or of a felony involving the use or threat of violence (great weight); and (3) the capital felony was committed while Covington was on felony probation (minimal weight).

As to the murder of Zachary Freiberg, the trial court concluded that four aggravating circumstances were proven beyond a reasonable doubt: (1) Covington was previously convicted of another capital felony or of a felony involving the use or threat of violence (great weight); (2) the victim of the capital felony was a person less than twelve years of age (great weight); (3) the capital felony was committed while Covington was on felony probation (minimal weight); and (4) the victim of the capital felony was particularly vulnerable because Covington stood in a position of familial or custodial authority over the victim (great weight).

As to the murder of Heather Savannah Freiberg, the trial court concluded that five aggravating circumstances were proven beyond a reasonable doubt: (1) the capital felony was especially heinous, atrocious, or cruel (great weight); (2) Covington was previously convicted of another capital felony or of a felony involving the use or threat of violence (great weight); (3) the victim of the capital felony was a person less than twelve years of age (great weight); (4) the capital felony was committed while Covington was on felony probation (minimal weight); and (5) the victim of the capital felony was particularly vulnerable because Covington stood in a position of familial or custodial authority over the victim (great weight).

The trial court found that two statutory mitigating circumstances were established: (1) the capital felony was committed while Covington was under the influence of extreme mental or emotional disturbance4 (moderate weight); and (2) Covington has no significant history of prior criminal activity (moderate weight).

The trial court also found that twenty-four nonstatutory mitigating circumstances were established: (1) Covington suffers from bipolar disorder, intermittent explosive disorder, and cocaine and alcohol

abuse disorder (great weight); (2) Covington's capacity to conform his conduct to the requirements of the law was diminished due to his mental illness and his voluntary use of cocaine and alcohol5 (moderate weight); (3) Covington's mother suffered with gestational diabetes during her pregnancy with him and delivered prematurely (no weight); (4) Covington suffers a life-long hearing loss due to an antibiotic overdose at the age of three weeks (no weight); (5) Covington had two major head injuries resulting in loss of consciousness at ages seven and twelve (no weight); (6) Covington was diagnosed and treated for sleep apnea due to obesity (no weight); (7) Covington went through gastric bypass surgery to improve his physical health (no weight); (8) Covington suffered several medical complications following his gastric bypass surgery, which led to additional surgeries to repair abdominal obstructions (no weight); (9) Covington was a good high school football athlete and graduated with average grades (no weight); (10) Covington received a private pilot's license at age seventeen (no weight); (11) Covington was rejected from entering the Navy due to hearing loss, which deeply affected his future goals (no weight); (12) Covington earned numerous training certificates before and during his ten years of employment with the DOC and he was subsequently accepted into an electrical apprenticeship program (minimal weight); (13) Covington was awarded a certificate of appreciation in 1999 for assisting law enforcement in a domestic incident by coming to the assistance of the adult and child victims (moderate weight); (14) Covington has the ability to form positive friendships (minimal weight); (15) Covington" parents love and care for him and have been constant sources of support and will continue to support him (minimal weight); (16) Covington did not resist law enforcement and cooperated with detectives during the investigation of the murders (moderate weight); (17) Covington expressed remorse during his initial interviews with detectives, to expert witnesses, and directly to the Freiberg family (moderate weight); (18) Covington's risk for violence decreases with every year of incarceration based on a published research study (minimal weight); (19) Covington's risk for violence will decrease with stabilization of his psychotropic medications (minimal weight); (20) Covington is intelligent and can help others through education (no weight); (21) Covington has a diagnosis of bipolar disorder and can be helpful to prison medical staff as they treat others with similar symptoms (no weight); (22) Covington and his parents want to work to increase public awareness of bipolar disorder and the need for access to low-cost medications for treatment (no weight); (23) Covington has conformed to incarceration and has had no disciplinary actions since 2012 (minimal weight); and (24) Covington pleaded guilty

> and acknowledged responsibility for the deaths of a mother and her children, thereby sparing the family of the victims the trauma of a trial (moderate weight). The trial court rejected two proposed nonstatutory mitigating circumstances - that a death sentence should not be based on emotions and that society can be protected and justice served by a sentence of life without parole - finding that they constituted argument rather than mitigating factors.

Covington v. State, 228 So. 3d 49, 52-61 (Fla. 2017) (footnotes omitted); *see also* ROA at 15/2975-80, 81/4444-77, 83/4574, 83/4576-78, 83/4580-4627, 83/4634-36, 83/4638-41, 83/4643-45, 85/4749-4915, 87/4981-5061, 87/5067-83, 87/5067-83, 87/5101-20, 88/5128-5200, 90/5388-5456, 91/5464-77, 91/5482-5530, 91/5541-5651, 92/5668-5682).

DEFENDANT'S MOTION

In his motion, Defendant raises various claims and sub-claims, including allegations of ineffective assistance of counsel. In *Strickland v. Washington*, 466 U.S. 668 (1984), the U.S. Supreme Court provided the following standard for determining ineffective assistance of counsel:

> The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.

. . . .

> A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction or death sentence has two components. First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing the errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

Strickland, 466 U.S. at 686-687. To prove counsel performed deficiently, "the defendant must show that counsel's representation fell below an objective standard of reasonableness." *Id.* at 687-688. "A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Id.* at 689. "Thus, a court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." *Id.* at 690. "[T]he test when assessing the actions of trial counsel is not how, in hindsight, present counsel would have proceeded." *Bradley v. State*, 33 So. 3d 664, 671 (Fla. 2010).

As to prejudice, the test is whether "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694.

CLAIM I

TRIAL COUNSEL WAS INEFFECTIVE DURING THE PENALTY AND SENTENCING PHASE, THUS DENYING MR. COVINGTON HIS RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

A. Trial counsel was ineffective for failing to object to and adequately rebut Dr. Myers' and Dr. Lazarou's so-called diagnosis of antisocial personality disorder and to refute and to object to the use of the bad character evidence of Mr. Covington being a psychopath.

In claim I-A, Defendant alleges counsel was ineffective for failing to object to and adequately rebut the trial testimony of the State's experts, Dr. Emily Lazarou and Dr. Wade

Myers, who diagnosed Defendant with antisocial personality disorder (ASPD) and testified that Defendant "was not experiencing emotional disturbance impacting appreciation of wrongfulness or capacity to conform conduct to the requirements of the law at the time of the offense conduct." Defendant contends that at an evidentiary hearing, Dr. Mark Cunningham will testify that ASPD "does not rebut a profound psychological disturbance" and sets forth the substance of Dr. Cunningham's proposed testimony. Defendant contends, "Expert testimony could have clarified that, contrary to the testimony of Dr. Lazarou, antisocial personality disorder is not 'a way of life.'" Defendant asserts expert testimony would have explained that "a personality disorder, including antisocial personality disorder, is a psychological disorder, having an etiology in hereditary predisposition, neuro-developmental vulnerabilities, traumatic exposures, dysfunctional family relationships, and community context." Defendant contends that if counsel had not performed deficiently, there is a reasonable probability of a different outcome.

In its response, the State contends the record reflects "defense counsel adequately addressed the issue of antisocial personality disorder." The State argues that trial counsel sufficiently refuted the testimony of Dr. Lazarou and Dr. Myers through its own defense experts, Dr. McClain, Dr. Krop, and Dr. Rao, who diagnosed Defendant with bipolar disorder, intermittent explosive disorder, and/or alcohol and substance abuse disorder. The State further alleges the defense experts ruled out ASPD or found Defendant's history inconsistent with a diagnosis of ASPD. The State further argues that the trial court gave great weight to the mitigators that Defendant suffered from bipolar disorder and intermittent explosive disorder, therefore, Defendant cannot demonstrate prejudice.

Evidentiary Hearing

During the December 17, 2019, evidentiary hearing, Defendant presented the testimony of Mark Cunningham, Ph.D., ABPP, a board-certified clinical and forensic psychologist. Dr. Cunningham's curriculum vitae, June 13, 2019, report, and December 2, 2019, supplemental report were entered as Defense exhibits 9, 10, and 11, respectively. Dr. Cunningham interviewed Defendant on November 5, 2018, for about 4.5 hours. (EH at 330). Dr. Cunningham did not question Defendant about the instant offenses, but relied on Defendant's recorded statement as it is the account "most proximate to the incident" and therefore "most reflective" of what Defendant remembered about the offenses. (EH at 330-32). Dr. Cunningham was retained to identify what psycho-legal perspectives could have been offered at the penalty phase, and he focused on Defendant's moral culpability. (EH at 328-30, 332).

Dr. Cunningham testified that during a penalty phase, the State typically introduces testimony regarding ASPD or psychopathy to "provide a clinical personification of a malignantly evil heart," as the State did here through the testimony of Dr. Myers and Dr. Lazarou. Dr. Cunningham testified that ASPD and psychopathy do not rebut or diminish mitigation because ASPD, which is a diagnosis within the DSM-V, "can exist side by side" with psychological disorders and ASPD is not "willfully selected." (EH at 338-39). Dr. Cunningham explained that ASPD "arises out of hereditary neurodevelopmental factors, including ADHD and conduct disturbance and head injuries and neurodevelopmental traumas, out of disruptive early life attachment, traumatic experience in childhood, corruptive community influences." (EH at 339). Dr. Cunningham testified Dr. Lazarou incorrectly described ASPD as "a way of life" as opposed to a disorder that has a hereditary component and "occurs in someone without their selection." (EH at 344-45).

Dr. Cunningham further testified regarding issues with Dr. Lazarou's scoring of Defendant on the Hare Psychopathy Checklist Revised (PLC-R), which is based on observations, responses to a twenty-item semi-structured interview, and collateral data. (EH at 347). Dr. Cunningham noted he was not provided a scoresheet reflecting how she assessed her scores or what she scored Defendant. (EH at 352-54). Dr. Cunningham testified psychopathy is not a diagnostic category in the DSM-V, rather it is "generally understood to represent with a score above 30 or 33, a more severe end of the antisocial personality disorder continuum." (EH at 348, 350). He noted that about 75% of the adult male prison population meet the criteria for ASPD, but only about one-third of that 75% meet the criteria for psychopathy. (EH at 350). Dr. Cunningham scored Defendant a 12 on the PCL-R. (EH at 355-56).

Dr. Cunningham opined that neither ASPD nor psychopathy explained Defendant's behavior here, instead Defendant "was profoundly psychologically disturbed during the capital conduct." (EH at 356-70). Dr. Cunningham further explained why it is disputable whether Defendant meets the criteria for ASPD, and cited insufficient evidence of a conduct disorder before Defendant was fifteen years old and Defendant's successful tenure as a corrections officer. (EH at 369-75).

Although Dr. Cunningham acknowledged that trial counsel provided "extensive testimony" from the defense's experts regarding Defendant's history, diagnosis and treatment for bipolar disorder, he opined that counsel "did not elicit testimony that cogently outlined factors supporting the presence of mood disorder and rebutting the diagnostic skepticism of Dr. Lazarou and Dr. Myers." (EH at 405). Dr. Cunningham set forth the factors supporting the presence of bipolar disorder, i.e., "hereditary, onset, historical diagnosis, symptoms during custody and for sobriety, and . . . diagnostic precision. (EH at 405-18).

During the December 18, 2019, evidentiary, Defendant's lead penalty phase counsel, Theda James, Esquire, testified that she was aware the State's experts were going to testify Defendant had ASPD, and she considered psychopathy to be encompassed within ASPD. 486-89). To rebut the State's experts, she filed a motion to preclude the State from presenting testimony or evidence of future dangerousness, ASPD, and the motion was granted. (EH at 487). Ms. James also testified that she further requested her experts "be prepared to rebut the State's experts' testimony that Mr. Covington was a psychopath and suffered from antisocial personality disorder, which they did during their testimony in the penalty phase." (EH at 488-89). Ms. James cited to the testimony of Dr. McClain, Dr. Krop, and Dr. Rao, who each ruled out ASPD. (EH at 489-90). Ms. James further testified that she did not request her experts to administer the Hare psychopathy test to Defendant because her experts were aware they needed to rebut the State's experts and she relied on her experts' knowledge and professional judgment rather than telling them how to do so. (EH at 489-91).

Penalty Phase Testimony

During the penalty phase, Defendant presented the testimony of several mental health practitioners and experts who diagnosed Defendant with or treated him for bipolar disorder. Dr. McClain, Dr. Rao, and Dr. Harry Krop, explained and defended their diagnosis of bipolar disorder, explained how they had ruled out ASPD, and testified that bipolar disorder can co-occur with ASPD. (ROA at 88/5128-5200, 88/5130-67, 90/5388-5456, 91/5482-5530, 91/5541-5564). Beth Weaver, M.D., also testified that Defendant was diagnosed with both bipolar disorder and ASPD at the jail and was being treated for the bipolar disorder and anxiety, and Dr. Amado Suarez, who diagnosed and treated Defendant treatment for bipolar disorder, also defended his diagnosis of bipolar disorder. (ROA at 91/5466-77, 89/5297-5340).

The State's experts opined that Defendant had been misdiagnosed with bipolar disorder when he actually had ASPD. Wade Myers, M.D., a board certified forensic psychiatrist, testified he diagnosed Defendant with ASPD and cocaine use disorder and he explained how he arrived at his diagnosis; Dr. Myers opined that Defendant's cocaine abuse was misdiagnosed as bipolar disorder and explained how he ruled out bipolar disorder. (ROA at 91/5547-5559, 5564-76). Emily Lazarou, M.D., a board certified adult and general forensic psychiatrist, diagnosed Defendant with ASPD, borderline personality disorder, cocaine use disorder - severe, alcohol use disorder, and opiate use disorder - moderate, and testified he met the criteria for psychopathy as well. (ROA at 92/5668). Dr. Lazarou explained why she did not believe Defendant has bipolar disorder and why he met the criteria for her diagnoses. (ROA at 92/ 5668-73).

Findings and Conclusions

After considering Defendant's motion, the State's response, the court file, and the record, as well as the testimony and evidence presented during the evidentiary hearing, and the written argument of counsels, the Court finds Defendant has failed to meet his burden under *Strickland.* First, the Court finds the testimony of Ms. James to be very credible. Specifically, the Court finds credible Ms. James' testimony that she was aware the State's experts were going to opine that Defendant had APSD, which she believed also included psychopathy. In anticipation of such testimony, Ms. James requested that her experts be prepared to rebut the State's experts. Although Ms. James did not specifically request that her experts administer the Hare psychopathy test to Defendant, the Court finds no deficiency in Ms. James' performance because "defense counsel is entitled to rely on the evaluations conducted by qualified mental health experts, even if, in retrospect, those evaluations may not have been as complete as others may desire." *Darling v. State*, 966 So. 2d 366, 377 (Fla. 2007).

Additionally, the penalty phase record reflects Dr. McClain, Dr. Rao, and Dr. Krop not only testified regarding their diagnosis of bipolar disorder, but also explained how they ruled out ASPD and that bipolar disorder and ASPD were not mutually exclusive. Ms. James further presented the testimony of Dr. Weaver, who also testified that Defendant was diagnosed with both bipolar disorder and ASPD at the jail and, Dr. Suarez, who diagnosed and treated Defendant for bipolar disorder, and defended his diagnosis of bipolar disorder. Consequently, much of Dr. Cunningham's testimony refuting or even explaining ASPD is substantially cumulative of the testimony presented at the penalty phase. Even if Dr. Cunningham provided additional information or a different perspective regarding ASPD, the Court finds that the fact that a defendant has "produced more favorable expert testimony at his evidentiary hearing is not reason enough to deem trial counsel ineffective." *Jennings v. State*, 123 So. 3d 1101, 1116 (Fla. 2013). Based on the forgoing, the Court finds Defendant failed to establish that counsel performed deficiently under *Strickland.*

Moreover, the Court finds Defendant has failed to demonstrate prejudice. The trial court's sentencing order does not reflect that the trial court found Defendant had ASPD or was a psychopath; rather, Judge Fuente found "Mr. Covington suffered from a long-standing condition of bipolar disorder, intermittent explosive disorder, and cocaine and alcohol abuse disorder." ROA at 3355). Judge Fuente cited to the defense's witnesses and experts, and accorded that mitigating circumstance great weight. (ROA 3355). Consequently, even if defense counsel had presented Dr. Cunningham to rebut the State's experts' testimony regarding ASPD and psychopathy, there is not a reasonable probability the outcome of the penalty phase would have been different. **No relief is warranted on claim I-A.**

B. Trial counsel was ineffective for failing to develop and present evidence of Mr. Covington's severe mental illness as a bar to execution and to fully present Mr.

Covington's [sic] as a cogent integration or explanation of the tragic synergy of neurodevelopmental insult, mental illness, substance dependency, and substance-induced psychosis that supported this deterministic perspective. Thus, the Court did not hear testimony that would allow it to make an informed test of the role of unfettered volition as opposed to the influence of impairing bio-psycho factors in the capital conduct.

In claim I-B, Defendant refers to claim II below "for purposes of conciseness" as the facts that support both claims are the same. As such, the Court will address claim I-B under claim II-B below.

C. Trial counsel was ineffective for failing to fully develop and present substance abuse as [a] mitigating factor itself thus denying Mr. Covington his rights under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

In claim I-C, Defendant asserts, "Although there were countless mentions during the penalty phase of Mr. Covington's history of substance use, trial counsel failed to argue in the memorandum submitted to the court that Mr. Covington's drug use was also a distinct mitigating factor that should be considered independently of its interaction with his severe mental illness." Defendant alleges trial counsel "failed to educate the court on not only how his use of cocaine and alcohol was not a choice, but a mental disorder or disease as defined by the [DSM-5]."

Defendant further asserts trial counsel therefore allowed the State to present his "poly-substance use disorder as an aggravating factor and guide an inaccurate, uneducated, and scientifically unsupported picture of completely voluntary substance abuse to the court which therefore deeply affected his sentencing." Defendant asserts the State's experts "portrayed Mr. Covington as a psychopathic cocaine user who chose to abuse substances instead of take his medication."

Defendant cites to the sentencing order where the trial court found Defendant used drugs "recreationally" and that his capacity was "merely diminished due to his mental illness and his voluntary use of cocaine and alcohol." Defendant contends this "inaccurate testimony should

have never been presented and the defense should have asked their hired and experienced experts to discuss Mr. Covington's substance use disorder since they were all knowledgeable and informed on the matter."

Defendant asserts Dr. Cunningham testified that Defendant's "mental illness rendered his substance abuse a product of his illness, not a voluntary choice" as "[t]he most powerful factor is hereditary." Defendant posits that if counsel had not performed deficiently, "the trial court would have considered Mr. Covington's history of substance use disorder purely as mitigation and afforded it the appropriate weight."

The State alleges "substance abuse, standing alone, is not a particularly strong mitigating circumstance in this case." The State asserts "[c]ounsel decided the best course of action was to relate the substance abuse to the bipolar disorder" and this decision is rational and based on the information provided to the defense experts. The State further alleges Defendant cannot demonstrate prejudice where, in light of the "particularly weighty" aggravators in this case, Defendant's "substance abuse would not have affected the weight of the mitigation as it related to the aggravating factors."

Evidentiary Hearing

Dr. Cunningham testified that alcohol and substance abuse is not volitional, rather ,two of the most significant risk factors for alcohol and substance abuse are hereditary predisposition and a mood disorder. (EH at 422-23). Dr. Cunningham explained that substances "create a different metabolic reaction in different people, so when a person with mood disorder or hereditary predisposition uses drugs or drinks alcohol, it triggers an experience in them that is fundamentally unlike what it creates in me . . . so we each get a choice, but we don't get the same choice[,] [w]e get a choice that is shaped by our metabolism." (EH at 424-25).

Ms. James testified that, through their experts, the defense tried to present Defendant's addiction issues as mitigation. (EH at 492). Ms. James testified,

> Our three experts explained that co-morbidity is what usually happens when you have someone who is bipolar, they tend to self medicate with drugs and alcohol. And in Mr. Covington's case, they can do that even when they have their medication, but significantly in Mr. Covington's case when he did not have access to his medication, he would use drugs and alcohol to supplement, to try to stave off the symptoms he was having.
>
> So co-morbidity goes hand-in-hand with bipolar disorder, whether you're on medication or not, and that was explained by all three experts.

(EH at 492).

Dr. McClain confirmed that during the penalty phase, she testified that people with mental health disorders, such as bipolar disorder, often "ingest substances to self-medicate" so there is a comorbid or co-occurring substance use disorder (EH at 42).

Penalty Phase

During the penalty phase, Dr. McClain, Dr. Krop, Dr. Rao, Dr. Suarez, and Dr. Weaver, each testified that in addition to his bipolar disorder, Defendant had an alcohol, cocaine, and/or polysubstance abuse disorder. (ROA at 88/5130, 88/5190, 89/5310-12, 90/5395, 90/5408, 90/5441-42, 91/5475, 91/5485-87, 91/5527-28). The testimony reflected there was a high comorbidity of substance abuse disorders and bipolar disorder. (ROA at 88/5136-37, 88/5198, 89/5341-42, 90/5408-9, 91/5487, 91/5494).

The State's experts, Dr. Myers and Dr. Lazarou, also diagnosed Defendant with a cocaine use disorder. (ROA at 91/5564-65). The State further elicited testimony that Defendant was aware that he should not have been mixing drugs or alcohol with his medication, and that alcohol and/or cocaine precipitated his rage and violence. (ROA at 88/5173-74, 88/5192, 90/5445-47, 91/5506-5507, 91/5515-16, 91/5573-74).

Findings and Conclusions

After considering Defendant's motion, the State's response, the court file, and the record, as well as the testimony and evidence presented during the evidentiary hearing, and the written argument of counsels, the Court finds Defendant has failed to meet his burden under *Strickland*. The Court finds Ms. James's testimony to be very credible. Ms. James testified that she relied on her experts to advise her of Defendant's mental health mitigation. Each of the experts diagnosed Defendant with an alcohol and substance abuse disorder, and each expert testified that alcohol and substance abuse disorders and bipolar disorders are commonly comorbid. As such, the Court finds Defendant has failed to demonstrate that counsel performed deficiently under *Strickland*.

Additionally, in its sentencing order, the trial court found Defendant "suffered from a long-standing condition of bipolar disorder, intermitted explosive disorder, and cocaine and alcohol abuse disorder," and he accorded this circumstance great weight. (ROA at 17/3355). Consequently, the trial court was well aware Defendant had a cocaine and alcohol abuse disorder. Dr. Cunningham's testimony does not refute the testimony presented at trial that Defendant was aware his episodes of rage and violence were precipitated by his cocaine and alcohol use. Although the trial court found Defendant's cocaine and alcohol abuse was voluntary, the Court finds that in light of the evidence, the aggravators, and the mitigators presented, there is not a reasonable probability that Defendant would have received a life sentence had counsel presented Dr. Cunningham's testimony or argued that substance abuse was a mitigating factor in itself. **No relief is warranted on claim I-C.**

D. Trial counsel was ineffective for utilizing the qEEG scan instead of the firmly established, *Frye*-tested and approved PET scan, for failing to notify the court of the *Grady Nelson* case in support of the admissibility of the qEEG scan. Furthermore, the trial court violated *Lockett, Eddings, Hitchcock,* and *Chambers* in refusing to consider the qEEG scan as mitigating evidence in support of life over death thus

denying Mr. Covington his rights under the Fifth, Sixth, Eighth and Fourteenth amendments to the United States Constitution.

In claim I-D, Defendant contends the trial court's granting of the State's motion to exclude qEEG evidence "was devastating to the defense case for life." Defendant asserts the trial court "not only entirely discounted the qEEG scan evidence establishing that Mr. Covington had brain damage and impulse control disorders, he completely barred its admission under *Frye* grounds." Defendant asserts the trial court's ruling "was contrary to *Porter v. Florida*, 130 S. Ct. 449 (2009)."

Defendant further asserts trial counsel was ineffective where counsel should have chosen to employ "the firmly established, *Frye*-tested and approved PET scan to establish brain damage adversely affecting Mr. Covington's impulse control" rather than the qEEG scan. Defendant asserts that in light of *State v. Mendoza*, a 2011 Florida Supreme Court case upholding a trial court's ruling "*Frye*-barring" a postconviction qEEG scan as well as the lack of any Florida Supreme Court ruling on the admissibility of qEEG scans, "the more prudent and reasonable decision by trial counsel . . . would have been to obtain a PET scan rather than a qEEG scan." Defendant further asserts that trial counsel should have presented evidence to the trial court regarding the Miami-Dade County case *State v. Grady Nelson*, F05-00846, wherein Circuit Judge Hogan Scola found qEEG evidence was admissible under *Frye*.

Defendant further contends that once Defendant waived his right to a jury recommendation, counsel should have moved to admit the qEEG evidence to the trial court. Defendant further alleges trial counsel was ineffective for failing to argue that refusal to consider this mitigating evidence violated his right to a fair trial under *Lockett*, *Eddings*, *Hitchcock* and *Chambers*. Defendant contends that if counsel had obtained a PET scan, it would have shown

"significant brain impairment that would have been highly mitigating" and there is a reasonably probability the outcome would have been different.

In its response, the State alleges Defendant's allegations of trial court error are procedurally barred. The State alleges that because trial counsel referenced the *Grady Nelson* case in its motion to admit qEEG testimony, that allegation is refuted by the record. The State further contends Defendant has failed to present "any evidence that any reasonable attorney would have ordered a PET scan of Covington's brain and that failure to do so was objectively reasonable." The State further alleges Defendant was allowed to and did put on evidence regarding his mental illness and alleged brain injury, and he has failed to establish prejudice.

Evidentiary Hearing

During the evidentiary hearing, Defendant presented the testimony of Frank Balch Wood, PhD, a neuropsychologist, who was tendered as an expert in neuroimaging and neuropsychology. Dr. Wood advised that Defendant's history of explosive behavior "could be subject to corroboration by the PET scan and that would help fill out the evidence about his mental state and behavior." (EH at 88). Dr. Wood testified that that there is a facility in Jacksonville with a scanner that has a 500-pound weight limit and it has been available since 2008.

A PET scan of Defendant was conducted on June 1, 2019. Dr. Wood interpreted Defendant's PET and CT scan, and confirmed Defendant's previous MRI which showed "atrophy that was somewhat excessive for his age at the time." (EH at 93-94). Dr. Wood described the areas of hypometabolism or dysfunction and summarized his conclusions as follows:

> Auditory dysfunction is clearly corroborated and explained causally by the findings on the CT scan and the PET scan in the auditory cortex.

> This network that I've been describing, medial temporal, that is to say uncus amygdala, and ventromedial frontal, and anterior cingulate is in Mr. Covington's case isolated in its dysfunctionality.
>
> So his whole brain is not dysfunctional, but this part is; and that A, corroborates explosive violence, as you saw. That's just patches of this dysfunction, as is consistent with the remote effect of traumatic brain injury.
>
> And, again, C, the psychoses he reports are, in my opinion, more like schizophreniform psychosis than bipolar disorder. I can't rule out bipolar, but I think the evidence for a schizophreniform dysfunction or illness is stronger than bipolar evidence.

(EH at 121-22). Dr. Wood testified that as that "thinning of the brain tissue in the left auditory cortex for most right-handers is a risk factor for psychosis, in particular for auditory hallucinations. . . . [which is] a possible mechanism for some of his reported hallucinations." (EH at 103). Dr. Wood further explained that the hypoactivity of the anterior cingulate, which "organizes and commits an organized behavior to the muscles of the body," is related to "impulsive, reactive aggression, not to carefully planned aggression." (EH at 116-17).

Based on his evaluation of Defendant's PET scans and the deficiencies and structural abnormalities of Defendant's brain, Dr. Wood further opined that Defendant met the criteria for both of the statutory mental health mitigators as well as the legal criteria for insanity. (EH at 117-19, 137-38). On cross-examination, Dr. Wood acknowledged that when he interviewed Defendant, he did not ask Defendant about the instant offenses or his mental processes at the time of those offenses, or when he started to hear auditory hallucinations, but was still able to form an opinion regarding insanity. (EH at 136-37).

Dr. Wood also opined that Dr. Chichkova was essentially wrong in finding nothing significant about Defendant's "mild diffuse brain atrophy" and Dr. Murtaugh was wrong in

advising Ms. James that a PET scan would not be helpful. (EH at 144-45). Dr. Wood noted, "We all have opinions that are different." (EH at 145).

Dr. Wood also opined that in light of the abuse described in Dr. Cunningham's reports (which were based on Dr. Lazarou's notes), he could not rule out that the abuse "was part of the reason why his brain was changed in the very ways we are talking about." (EH at 118-19). However, Dr. Wood acknowledged that he was not able to confirm within a reasonable degree of psychological certainty that the corporal punishment inflicted upon Defendant caused his brain dysfunction. (EH at 127).

Defendant also presented the testimony of Darren Miller, a PET scan technologist with Precision Imaging Center in Jacksonville, Florida. Mr. Miller acknowledged that different PET scan machines have different weight limits and, typically, girth rather than weight is the limiting factor. (EH at 712, 715). Mr. Miller testified that his facility has a PET scan machine with a 450-pound weight limit and the facility has had the same machine since he began working there in 2008 or 2009. (EH at 712-13). Mr. Miller conducted the PET scan of Defendant in 2019 and there were no issues with Defendant's weight or girth. (EH at 712).

During the December 18, 2019, evidentiary hearing, Ms. James testified a qEEG scan was administered to Defendant, and a *Frye* hearing was held because the qEEG scan was new and novel in this circuit. (EH at 465-66). Ms. James wanted to introduce the qEEG scan as "extra corroboration," in addition to Defendant's medical records, to support their position that Defendant suffered from a serious mental illness, bipolar disorder. (EH at 467).

Ms. James testified that she was not familiar with *Mendoza v. State*, 87 So. 3d 644 (Fla. 2011), but she aware of *Grady Nelson*, the Miami-Dade County case where the trial court found qEEG testing admissible; Ms. James testified she cited to the Miami-Dade County order in her

motion and provided it as an attachment. (EH at 467-69). Following the *Frye* hearing here, however, the trial court ruled the qEEG scan was inadmissible in the penalty phase, and the trial court's ruling was unambiguous. (EH at 465, 502). The State introduced exhibits 19A-D, Ms. James' motions and written arguments seeking to admit the qEEG in the penalty phase, filed by Ms. James

Ms. James testified that early in the case, she considered retaining neurologists to determine whether there was any brain dysfunction or neurological injury that could be mitigating evidence. (EH at 516). She retained Dr. John Tanner, a neurologist, to discuss an MRI or PET scan; Dr. Tanner wrote a prescription for a PET scan but consultation with him ended when he moved to Mexico. (EH at 517).

Ms. James testified that she further consulted with Dr. Harry Krop, whom she has worked with on all of her capital cases. (EH at 496). The State introduced exhibits 5A-5J, memoranda or notes related to Dr. Krop and Dr. Krop's deposition. (EH at 519-20). Dr. Krop conducted neuropsychological testing of Defendant, but found no neuropsychological or frontal lobe deficits. (EH at 520-26). Dr. Krop further advised Ms. James that neuropsychological testing is the "gold standard" or best diagnostic tool in determining whether there is frontal lobe or cognitive impairment. (EH at 526-27). Although he was not certain whether any useful information would be produced, Dr. Krop recommended an MRI or CAT scan of Defendant (EH at 523-24, 527).

Ms. James further consulted with Rossitzka Chichcova, MD, a neurologist at Tampa General Hospital, who recommended an MRI and an EEG of Defendant. (EH at 530-31, 538-39). The MRI report reflected some mild diffuse atrophy but Defendant's brain was within normal limits. (EH at 531, 540). Dr. Chichcova did not believe the mild diffuse atrophy to be a

significant finding. (EH at 532-33, 542). Likewise, Defendant's EEG was normal. (EH at 531, 550). Dr. Chichcova's report reflected Defendant had a psychiatric disorder and polysubstance abuse, but his neuropsychological examination was normal; she opined that Defendant's issues were psychiatric, not neurological. (EH at 539, 543). Documents reflecting the defense's communications with Dr. Chichcova were entered as State's exhibits 6A-6G. (EH at 536-37).

In the fall 2012, Ms. James started consulting with another neurologist, Dr. Gerald McCraney. (EH at 551-67). The State introduced exhibits 8A-8O, pertaining to the defense's consultations with Dr. McCraney. Ms. James testified that Dr. McCraney reviewed various records and raw data provided to him, and opined that the Defendant suffered from bipolar disorder as well as a cocaine addiction, which together resulted in his "hyper violence," and the murders were committed "in the throws [sic] of drug-induced insanity." When the defense asked him about a PET scan, Dr. McCraney responded that he doubted a PET scan "would be revealing." (EH at 556-59). Dr. McCraney also believed a qEEG was not useful in determining bipolar disorder, instead, "neurospych testing is the best way to determine brain function." (EH at 561). Ms. James ultimately decided not to call Dr. McCraney as a witness because he reviewed the MRI and Dr. Chichcova's report and found nothing compelling, he did not do any testing of his own or meet with Defendant, and he had not returned their message requesting a conference call. (EH at 564-66).

Dr. McCraney further suggested that Ms. James consult with a neuroradiologist, Dr. Reed Murtaugh, for further study of the MRI. (EH at 567). During a September 30, 2013, phone conversation, Dr. Murtaugh advised that Defendant's brain and ventricles were normal; he noted a "[t]iny" area in the white matter but it was not significant; he indicated that a 3.0 Tesla MRI, would be better for assessing traumatic brain injury, but further noted that due to Defendant's

size, "likely no machine would be large enough." (EH at 568-69). Dr. Murtaugh further advised that a PET scan "is not useful in detecting traumatic brain injury." (EH at 569).

Next, Ms. James consulted with Dr. Wu, who had experience testifying regarding the detection of brain damage with PET scans, about a possible PET scan of Defendant. (EH at 570). A memo dated July 18, 2013, reflected that Dr. Wu advised that a PET scan would show abnormalities in individuals with bipolar disorder, i.e., decreased frontal lobe and occipital lobe metabolism. (EH at 571). Dr. Wu further noted, however, some facilities have a 300-pound or 350-pound weight limit and that Defendant may need to be weaned off his medication for a short time because it may show up as artifact in the scan. (EH at 572-73). When Ms. James indicated Defendant should not be weaned off his medications, Dr. Wu advised that the scan could still be conducted, but Depakote may reduce the temporal lobe abnormality and produce a false negative. (EH at 572-73). Ms. James testified that she was concerned about weaning Defendant off from his medications as Defendant had previously been confrontational with the detention deputies at the jail, received a disciplinary report, and felt paranoid that some of the detention deputies were targeting him. (EH at 573). Additionally, Dr. Weaver had informed Ms. James' of the continuous adjustments to Defendant's medications at the jail. (EH at 573, 595-96). Ms. James also considered that Defendant's previous violent/rage episodes, such as the instant offenses and the cat mutilations, occurred when Defendant was without his medications. (EH at 574). Ms. James testified she was concerned that weaning him off his medications might trigger episodes of rage or violence, which could affect Defendant's health as well as this case. (EH at 574). Ultimately, Ms. James decided not to pursue a PET scan because the scan was sensitive to medications, there were security and transportation issues, and Defendant was too heavy or large. (EH at 470-71, 574-75).

Additionally, Ms. Holt testified that, in light of statements made by Defendant and his father, Defendant's demeanor, activities, and his behavior at the jail, the Hillsborough County Sheriff's Office had some concerns about Defendant's "inability to keep his behavior at a certain level." (EH at 219-21). Ms. Holt also testified that the defense had concerns weaning Defendant off of his medication because they "had a substantially difficult time in trying to stabilize his moods through medication" and that there was also "a weight issue." (EH at 220). Ms. Holt was certain they could work out security and transportation issues with the Sheriff's Office, but "the biggest two concerns that ultimately played into this decision" were Defendant's weight and weaning him off of his medications. (EH at 222-23). Ms. Holt testified that when they consulted Dr. Wu and he brought up the issue of the medication it "caused us great pause when he indicated that based on his experience and his expertise in the area, that the validity of the testing was always attacked if people were under the medication, and so he would recommend that he be weened [sic] from it."

As to the weight limit issue, Ms. Holt testified that they attempted to discuss the weight issue with both Defendant and his parents and suggested to his parents that they put less money in his canteen fund. (EH at 223, 226-27). As to the medication issue, Ms. Holt further testified that "it was very clear to us that when he was not on the proper dosage of medication, he had problems controlling his behavior." (EH at 227). The defense was concerned because "Mr. Covington continued to express concerns over his rage and his sadistic thoughts, and we really didn't think it was in his best interest to take him off any medication that kept him stabilized, especially over a significant period of time." (EH at 227). The defense did not want to take the risk that weaning Defendant off his medication would affect his behavior to the point where he would be aggressive or combative at the jail again. (EH at 228).

Finally, Lawrence Holder, M.D., a board certified radiologist and nuclear medicine technician, testified that there are "no accepted uses for PET imaging in psychology or behavioral areas." (EH at 670). He noted there is "research going on in the use of the PET imaging in traumatic injury, but there are no generally accepted standards." (EH at 670). Dr. Holder further noted there are no known "specific patterns of PET images that correspond and correlate to neuropsychological diagnosis." (EH at 671). Dr. Holder reviewed Defendant's PET scan images, and found his PET scan was normal with "some very mild normal age-related changes." (EH at 673). Dr. Holder also reviewed Defendant's CT and found it too was normal. (EH at 674). Dr. Holder also reviewed the MRI report which noted "mild diffuse brain atrophy" and agreed it was not a significant finding because the brain changes as a person ages beginning in the mid-thirties. (EH at 678). Dr. Holder further testified "there is no established pattern or finding on PET brain scans to allow a diagnosis of insanity." (EH at 703).

Penalty Phase

A review of the court file reflects that on June 11, 2012, Ms. James filed "Defendant's Motion to Admit Evidence of Quantitative Electroencephalogram (qEEG) for Second Phase Mitigation," as well as an amended motion on June 18, 2012. (ROA at 7, 1318-26, 1335-63). On June 21, 2012, the State filed its response, and a *Frye* hearing was conducted on October 1 through October 3, 2012. On October 8, 2012, the trial court directed the parties to submit written argument and, on October 16, 2012, the trial court entered a supplemental interim order directing them to file written additional arguments. Ms. James filed Defendant's written argument in support of admission of qEEG evidence for penalty phase on November 8, 2012, and a reply to the State's argument on January 10, 2013. On February 11, 2013, the trial court rendered its "Order Denying Defendant's Motion and Amended Motion to Admit Evidence of

Quantitative Electroencephalogram (qEEG) Testing and Granting the State's Motion to Exclude Testimony Regarding Quantitative Electroencephalogram (qEEG)."

Findings and Conclusions

After considering Defendant's motion, the State's response, the court file, and the record, as well as the testimony and evidence presented during the evidentiary hearing, and the written argument of counsels, the Court finds Defendant has failed to meet his burden under *Strickland.*

The Court first finds that to the extent Defendant is alleging the trial court erred in excluding the qEEG results, such claims of trial court error should have been raised on direct appeal and are procedurally barred in the instant postconviction motion. *See* Fla. R. Crim. P. 3.851 (c) ("This rule does not authorize relief based on grounds that could have or should have been raised at trial and, if properly preserved, on direct appeal of the judgment and sentence."); *see e.g.*, *Downs v. State*, 740 So. 2d 506, 509 (Fla. 1999) (finding claims "could and should have been raised on direct appeal and thus are procedurally barred.").

The Court further finds, as to Defendant's allegations of ineffective of assistance of counsel, Defendant has failed to meet his burden under *Strickland.* The Court finds credible the testimony of Ms. James and Ms. Holt, and their testimony is corroborated by the State's exhibits. The Court finds no deficient performance in Ms. James' efforts to introduce the qEEG scan, which was novel in this circuit at the time. The Court notes that the *Mendoza* court did not address whether qEEG was admissible under *Frye*, but only found the postconviction court did not abuse its discretion in excluding the qEEG test because it "had not passed the *Frye* test at the time Mendoza was tried" in 1992. *See Mendoza*, 87 So. 3d at 666. Therefore, *Mendoza* would not have precluded nor discouraged counsel here from attempting to introduce qEEG evidence in Defendant's trial.

Additionally, Ms. James' written arguments in support of her request for admission of the qEEG reflect that she cited to the *Grady Nelson* case, as well as *Lockett* and *Eddings*. The Court further finds no merit in Defendant's argument that counsel should have renewed the motion to admit qEEG evidence once Defendant waived the jury. In its supplemental order, the trial court specifically directed the parties to file argument as to "whether, assuming *arguendo*, the Court concludes that the proposed evidence does not satisfy the *Frye* standard for admissibility, such evidence should notwithstanding be admissible in a death penalty second phase sentencing proceeding, or in a *Spencer* hearing proceeding...." Therefore, the trial court considered whether the qEEG was admissible outside the presence of a penalty phase jury, and its order clearly found the qEEG did meet not the *Frye* test, therefore, it was inadmissible in the penalty phase. "Since counsel cannot be deemed ineffective for pursuing futile motions, trial counsel cannot be deemed to have performed deficiently in this regard." *Gordon v. State*, 863 So. 2d 1215, 1219 (Fla. 2003).

The Court finds credible Ms. James' testimony that from the outset of this case, the defense considered neuroimaging to corroborate possible brain dysfunction. The Court further finds credible Ms. James' testimony that Dr. Krop advised her that neuropsychological testing is the "gold standard" in evaluation of brain dysfunction, but Defendant had no frontal lobe or cognitive deficiencies. Ms. James then obtained an MRI and an EEG of Defendant, and both were found to be normal by additional experts retained by the defense. Ms. James further contacted Dr. Craney and, at his suggestion, Dr. Murtaugh. After reviewing the MRI and Dr. Chckova's report, Dr. McCraney did not find anything compelling, doubted that a PET scan would be helpful, and advised Ms. James that "neuropsych" testing is the best way to determine function. Dr. Murtaugh likewise advised that a PET scan is not useful in detecting traumatic

brain injury. Even after being advised by their experts that a PET scan would probably not be revealing, Ms. James contacted Dr. Wu about a PET scan. Dr. Wu, however, advised that Defendant should be weaned off of his medications before the scan, or the results may be vulnerable to its detractors. The Court finds both credible and reasonable Ms. James' and Ms. Holts' concerns about weaning Defendant off of his medications even for a few days. After considering the advice of their experts, that neuropsychological testing is the "gold standard" for determining brain function, that a PET scan was unlikely to be revealing, the difficulty in finding a PET machine to accommodate Defendant's size or weight, potential security and transportation issues, and especially in light of Dr. Wu's recommendation that Defendant should be weaned off of his medication and Defendant's extensive and documented psychiatric history and issues with aggression and violence when not on proper medication, and the ongoing adjustments to Defendant's medication at the jail, Ms. James ultimately decided not to pursue a PET scan. The Court finds her decision was reasonable under the circumstances, therefore, Defendant has failed to show that counsel performed deficiently. *See Occhicone*, 768 So. 2d at 1048 ("[S]trategic decisions do not constitute ineffective assistance of counsel if alternative courses have been considered and rejected and counsel's decision was reasonable under the norms of professional conduct.").

Additionally, the Court finds Defendant has failed to establish that he was prejudiced by counsel's deficient performance. "[A] subsequent finding of organic brain damage does not necessarily warrant a new sentencing hearing." *James v. State*, 489 So.2d 737 (Fla.1986). "However, a new sentencing hearing is mandated in cases which entail psychiatric examinations so grossly insufficient that they ignore clear indications of either mental retardation or organic brain damage." *Id.* Here, there is no evidence that any of Defendant's psychological or

neuropsychological examinations were in any way "grossly insufficient" or that any indicators of brain damage or dysfunction were ignored. The subsequent finding of brain dysfunction here does not warrant a new penalty phase.

Additionally, the Court finds more credible Dr. Holder's testimony that the PET and CT scans were normal, which is consistent with previous reports finding that Defendant's neuropsychological testing, MRI, and EEG were also normal. The Court further notes that in its sentencing order, the Court accorded great weight to Defendant's "long-standing condition of bipolar disorder, intermittent explosive disorder, and cocaine and alcohol abuse disorder," and moderate weight to the mental health mitigators that the offenses were committed while Defendant was under the influence of extreme mental or emotional disturbance, and that his capacity to conform his conduct to the requirements of the law was diminished. In light of the evidence, the aggravators, and the mitigators presented, even if counsel had obtained a PET scan and presented the testimony of Dr. Wood, there is not a reasonable probability that Defendant would have received a life sentence on any count. **No relief is warranted on claim I-D.**

E. Trial counsel was ineffective for failing to move to sanitize/redact the videotaped interrogation played to the trier of fact thus denying Mr. Covington his rights under the Fifth, Sixth, Eighth, and Fourteenth amendments to the United States Constitution.

In claim I-E, Defendant alleges counsel was ineffective for failing to sanitize/redact the recorded video interrogation which referenced numerous "unduly prejudicial and inflammatory matters, including collateral offenses...." Defendant asserts trial court "should have attempted to redact any discussion on the video-taped interrogation about [his] prior violence towards women, children and animals." Defendant cites to his statements regarding a physical altercation with his ex-wife, and incidents of his attempts to discipline Savannah. Defendant further asserts counsel should have moved to redact the officers' "speculative suggestions" that the offenses were

sexually motivated or whether he had sex with two-year old Savannah. Defendant asserts, "Mr. Covington certainly denied this, but there is absolutely no reason why the defense should permit this suggestion to reach the judge who would be making the decision for life or death." Defendant further contends that the State appeared willing to redact the unduly prejudicial statements, and the defense should have worked with the State on an "acceptable, stipulated, redacted version of the interrogation." Defendant contends the trial court cited many of these incidents in his sentencing order, and the defense "should have moved to exclude this unduly prejudicial evidence so that it could not be considered by the sentencer." Defendant further asserts the defense was ineffective for calling retired Cpl. Roger Amick and Matthew Martinez with Tampa Fire Rescue to testify regarding the cat mutilation incident, which "was far from mitigating." Defendant argues he was unfairly prejudiced as the trial court referenced these incidents in its sentencing order.

In its response, the State asserts counsel made a reasonable strategic decision not to redact or sanitize the video as "defense experts relied heavily on Covington's past behavior, including the cat mutilation incident, to support a diagnosis of bipolar disorder." Additionally, Lisa's mother's accusation that Defendant was abusing Savannah was one of the "stressors" that led to Defendant's "uncontrolled aggression." Nevertheless, the State asserts it recognizes "the Florida Supreme Court's endorsement of an evidentiary hearing for ineffective assistance of counsel claims related to penalty phase issues."

Evidentiary Hearing

During the December 18, 2019, evidentiary hearing, Ms. James acknowledged that Defendant's videotaped interrogation included various subjects - such as the prior cat mutilations, child abuse, Defendant being the abuser, collateral offenses Defendant committed,

and the suggestion that Defendant's crimes were sexually motived - that were not mitigating. (EH at 456-58). Ms. James further testified that the defense was already aware those factors "were going to be a problem," and the defense focused on using those factors as mitigation to show they were actually symptoms of his very serious mental health issues. (EH at 459-60). She explained her penalty phase theme as follows:

> So my theme during penalty phase was his long-standing mental health condition, how he used medication to control that, and during the ten years that he worked for the Department of Corrections, they provided him with mental health or medical benefits which allowed him to afford that medication. And once he left that job, he did not have access to the medication. And how he would cut himself to get back into the hospital so he could get access to the medication.
>
> So my theme was how the mental health system really failed Mr. Covington. He knew he had a problem. And when he went to the hospital he would tell them that, he couldn't afford his medication, he had no medical benefits.
>
> So . . . my theme was indicting the medical community because everyone knew he had problems. Even the last time he was Backer Acted, they only kept him three days. They knew he had serious problems in 2005 when he mutilated the cats.

(EH at 449-50).

Ms. James further testified that "the bottom line for second phase was we knew that a lot of this stuff was going to come in any way through the testimony of our medical experts when they did the detail[ed] history of his mental health episodes." (EH at 463).

During the December 17, 2019, evidentiary hearing, Mr. Peacock testified that he made a strategic decision to allow admission of the unredacted statement "under an argument of completeness." (EH at 309-10). Mr. Peacock further testified that in establishing mitigating circumstances, many of the subjects at issue were testified to by Dr. McClain, who testified regarding the long chronology of Defendant's mental health history, including his "prior

substance abuse, manic depressive based violent acts or suicidal acts, including the cat killing." (EH at 310-11).

Ms. Holt also testified that the defense strategically decided to allow admission of the unredacted recording and "the context was, let the judge hear the entire matter because then we could counter it in some way." (EH at 234).

Penalty Phase

At the penalty phase, the State introduced Defendant's recorded statement to officers, and defense counsel provided a transcript of the interrogation to the trial court. (ROA at 85/4746-47, 4749-4915). Assistant Public Defender Mike Peacock further waived any objection to the collateral crimes referenced in Defendant's statement. (ROA at 85/4747).

Findings and Conclusions

After considering Defendant's motion, the State's response, the court file, and the record, as well as the testimony and evidence presented during the evidentiary hearing, and the written argument of counsels, the Court finds Defendant has failed to meet his burden under *Strickland.*

The Court notes that "[t]he issue is not what present counsel or this Court might now view as the best strategy, but rather whether the strategy was within the broad range of discretion afforded to counsel actually responsible for the defense." *Occhicone v. State*, 768 So. 2d 1037, 1049 (Fla. 2000). The Court finds credible the testimony of Mr. Peacock, Ms. Holt and Ms. James. The Court finds credible their testimony that after their motion to suppress Defendant's recorded statement was denied, they made the strategic decision to allow the unredacted statement to be admitted for purposes of completeness and in support of the defense's mitigation theme. The Court further finds credible Ms. James' testimony that the defense was aware of the statements at issue and that they were problematic, but she focused on using those statements as

mitigation to support the severity of Defendant's mental health issues. The Court finds credible Ms. James' testimony that she wanted to portray such facts as symptoms of Defendant's serious mental illness, and the Court finds those statements were consistent with defense's penalty phase theme that the mental health system had failed Defendant. Consequently, the Court finds Mr. Peacock's and Ms. James' decision to allow admission of the unredacted statement was reasonable under the circumstances. As such, Defendant has failed to demonstrate that counsel performed deficiently. *See Occhicone*, 768 So. 2d at 1048 ("[S]trategic decisions do not constitute ineffective assistance of counsel if alternative courses have been considered and rejected and counsel's decision was reasonable under the norms of professional conduct.").

The Court further finds Defendant has failed to demonstrate prejudice where the unredacted statements at issue, including the drug use and cat killings, were raised in the testimony of the defense's mental health experts to explain Defendant's extensive mental health history and in support of their diagnoses. Even if counsel had moved for a redacted version of the recorded statement, and redacted references to collateral crimes and other inflammatory or prejudicial statements, there is not a reasonable probability that Defendant would have received a life sentence on any count. **No relief is warranted on claim I-E.**

F. Trial counsel was ineffective for waiving pretrial motions/objections thus denying Mr. Covington his rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. The State also denied Mr. Covington due process under the Fourteenth amendment to the United States Constitution and contributed to trial counsel's ineffectiveness.

In claim I-F, Defendant cites to trial counsel's waiver to "any objections to the collateral crimes that are mentioned." Defendant contends "defense counsel waived objections to all of Mr. Covington's statement to police as well as all evidence of collateral crimes committed by him . . . . [which] caused the trial court to hear damning evidence that contributed to the finding

of aggravators and discounting of mitigators." Defendant asserts Defendant's statements were "offered at the penalty phase to support aggravators and counteract mitigators." Defendant cites to the testimony regarding prior allegations of child abuse, statements from Defendant's confession, and evidence regarding Defendant's prior drug use. Defendant alleges the finding of the "heinous, atrocious, and cruel" aggravator and that he victims were vulnerable because he was in a position of familial authority were supported by and based on Defendant's admissions. Defendant also alleges that the testimony regarding his prior drug use "allowed the State to discount the credibility of [the] mitgation." Defendant further alleges counsel "failed to preserve for appellate review Mr. Covington's various motions to suppress and motions to exclude collateral crime evidence."

The State asserts, "As with the previous sub-claim, a strategic reason for waiving an objection to the content of the video is suggested by the record."

Evidentiary Hearing/Penalty Phase

After trial commenced, Defendant pleaded guilty to the offenses as charged and, pursuant to the colloquy and plea form, waived all defenses, including insanity, and all objections made in pre-trial motions, including "objections to the admissibility of certain items of evidence that have been raised" pre-trial or that would be raised in the course of the trial. (ROA at 15/2975-80, 81/4444-77).

During the evidentiary hearing, Mr. Peacock and Ms. Holt testified that Defendant waived the objections raised in his pretrial motions and his possible defenses when he pleaded guilty. (EH at 207, 233-35, 304-6).

Findings and Conclusions

After considering Defendant's motion, the State's response, the court file and the record, as well as the testimony and evidence presented during the evidentiary hearing, and the written argument of counsels, the Court finds Defendant has failed to meet his burden under *Strickland.*

To the extent Defendant is alleging counsel was ineffective for failing to properly preserve the motions/rulings for purposes of appeal, such allegations do not show the necessary prejudice under *Strickland. See Strobridge v. State,* 1 So. 3d 1240 (Fla. 4th DCA 2009) ("However, failure to preserve issues for appeal does not show the necessary prejudice under *Strickland.* The prejudice in counsel's deficient performance is assessed based upon its effect on the results at trial, not on its effect on appeal.").

To the extent Defendant is alleging counsel was ineffective for failing to continue to object and waiving any objections to admission of Defendant's statements to police as well as evidence of collateral crimes committed by him, the Court finds Defendant has failed to show counsel performed deficiently. As previously noted, "[a] fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Strickland*, 466 U.S. at 689. The Court finds credible the testimony of Ms. Holt and Mr. Peacock that Defendant pleaded guilty to the offenses and waived his pretrial objections.

Additionally, as discussed in claim I-E above, defense counsel allowed the unredacted recorded statement to be admitted for purposes of completeness and in support of the defense's mitigation theme. Ms. James was aware of the statements at issue and that they were problematic, but she focused on using those statements as mitigation to support the severity of

Defendant's mental health issues and those statements were consistent with her penalty phase theme that the mental health system had failed Defendant. As found above, defense counsel's waiver regarding the collateral crimes in the recorded statement was a reasonable strategic decision. Likewise, the statements at issue here were relied on by the defense experts to support their diagnoses, and the statements were consistent with the defense's mitigation theme as discussed in I-E above. Defense counsel's waiver of all objections to Defendant's other statements and other evidence of collateral crimes was also reasonable under the circumstances. As such, the Court finds Defendant has failed to establish that counsel performed deficiently.

The Court further finds Defendant has failed to demonstrate he was prejudiced by counsel's alleged deficient performance. As noted above, the statements cited by Defendant in his motion were referenced by Defendant's mental health experts to explain Defendant's extensive mental health history, including his substance abuse disorder, and support their findings that Defendant qualified for the statutory mental health mitigators. The Court finds there is not a reasonable probability that, but for counsel's alleged deficient performance, Defendant would have received a life sentence on any count. **No relief is warranted on claim I-F.**

G. Trial counsel was ineffective for failing to interview and present evidence from important people from Mr. Covington's past, and for failing to present evidence that, as a child, he was physically abused by his father.

Defendant asserts counsel failed to contact and call the following persons to inform the relevant experts and testify:

1. Robert Atkins, Defendant's maternal cousin, would have testified regarding an incident in adolescence where Defendant was playing Russian roulette and shot himself in the head with a firearm. Defendant contends Mr. Atkins noticed that Defendant's family never talked about that incident, which is significant "because it showed Defendant lacked the intervention and support to deal with the mental health issues that Defendant during adolescence." Additionally, Defendant posits "[h]ad the family been more open

during this period, Mr. Covington would have been better able to deal with his issues and trauma and grow into a stable adulthood." Mr. Atkins did not know Defendant to consume drugs or alcohol during his adolescence.

2. Sherry Atkins, Defendant's maternal cousin, would have testified that Defendant's parents "could have done more to help" Defendant with his mental health issues in adolescence. "This is significant because proper intervention during [his] adolescence would have helped [him] avoid a bad outcome in life and avoid criminal activity."

3. John Mulligan, Defendant's best friend in high school, would have testified that prior to the events at issue, Defendant reached out and mentioned he "needed to get out of here." This is significant because it demonstrates Defendant was having "difficulties before the murders and was reaching out to a trusted friend for help." Mr. Mulligan would have further testified Defendant "was a protector and would stand up for weaker people," thereby providing good character evidence that "severely undermines the State's theory of [a]ntisocial personality disorder, psychopathy and sexual sadism."

4. Tommy Clark, another high school best friend, would have testified Defendant was not violent and did not engage in fights during high school. Defendant previously visited Mr. Clark in South Carolina and admitted he was using drugs and was in a relationship he wanted to leave. Such testimony would show Defendant "had reached out for help throughout his life, even if the right help never came."

5. Kathy Bush, who dated Defendant for about six months when they were nineteen or twenty years old, would have provided an example of Defendant having a positive relationship with a woman. She would have testified she did not know Defendant to use drugs or alcohol, and he was sweet and compassionate but spoiled by his parents. Again, this testimony would have refuted the State's theory that Defendant was merely a psychopath.

Defendant contends that if counsel had contacted these witnesses, there is a reasonable probability of a different outcome.

Defendant further alleges that Dr. Lazrou's notes reflect descriptions of child abuse counsel he suffered at the hands of his father. Defendant asserts the notes reflect such statements as "He got the belt," "the paddle broke on me," "beat black and blue – 10 min[utes] straight – not able to sit for 2 days."

In its response, the State notes trial counsel presented fifteen witnesses in mitigation, including his parents, experts Dr. McClain, Dr. Krop and Dr. Rao, and Dr. Buffington, as well

Dr. Weaver, Dr. Suarez, Dr. Saa, an EMT who responded to his previous suicide attempts, and two friends of Defendant's who testified Defendant was nice, likeable, and not violent or a bully and did not abuse cocaine or alcohol. The State asserts the Russian roulette incident was raised in the testimony of Defendant's mother and the experts. The State asserts counsel is not ineffective for failing to call witnesses whose testimony would be cumulative. The State also asserts there "is no reasonable likelihood that the sentencing court would have weighed the aggravators and mitigators differently had the testimony of these additional witnesses been presented."

Penalty Phase

In addition to the experts and practitioners described above, during the penalty phase, Defendant presented the testimony of Melissa Ann Pulianas and William Taylor. Ms. Pulianas worked with Defendant at the Department of Corrections, and they were friends for about two years. (ROA at 89/5363). She testified that Defendant treated her courteously and kindly, he was "one of the nicest people" she had met, and she considered him one of her closest friends here before she moved to Indiana. (ROA at 89/5363-64). Ms. Pulianas testified there was a time when she was depressed and considered suicide, and Defendant was her "shoulder to cry on and the person who told me . . . that there was a way out of everything and rock bottom doesn't mean it's always going to be rock bottom." (ROA at 89/5367-68). She never saw any temper or rage issues with Defendant or any violent behavior. (ROA at 89/5365-66). Ms. Pulianas further testified that she was "absolutely dumbfounded" when she learned about the instant offenses, and that there was nothing that would have even given her even "the slightest indication that anything like this could have ever happened. (ROA at 89/5369).

Mr. Taylor was friends with Defendant in high school. Mr. Taylor testified Defendant was "a very good friend" who would "do anything in the world for ya [sic]." (ROA at 89/5373). Mr. Taylor testified everyone liked Defendant and he did not know Defendant to get in any trouble, or to be violent or a bully. (ROA at 89/5373-75). Mr. Taylor testified he was "blown away" by the news of the instant offenses and never saw any "red flags" that something like this might happen. (ROA at 89/5377).

During the penalty phase, there was no testimony or evidence reflecting that Defendant was physically abused by his father.

Evidentiary Hearing

During the December 19, 2019, hearing, Defendant presented the testimony of Katherine Black, who was eighteen or nineteen years old when she dated Defendant from approximately April or May 1992 until January 1993. (EH at 606-7). Ms. Black testified she was close with the Covington family. (EH at 607). She lived with them for four to six months, and spent Thanksgiving and Christmas in 1992 with the Covington family; after Christmas, Defendant and his sister spent time with her family in North Carolina. (EH at 607-8, 611). Defendant was about two years older than Ms. Black, and she described their relationship as "a normal teenage relationship." (EH at 608). Ms. Black described Defendant as "compassionate, always willing to help anybody." (EH at 608). For example, when they would roller skate in Tampa, he would help teach strangers how to skate. (EH at 608). During her time with Defendant, she did not ever see him use drugs or alcohol, take any medications, behave violently towards her, or have any abnormal emotional reactions, bouts of depression, or racing speech. (EH at 609, 611-12). Although Defendant was about twenty years old at the time, he still lived with his parents and asked for permission to go out and do things; he would get upset or pout if they did not want him

to do something, but he always listened to and respected them. (EH at 609-10). Defendant never told Ms. Black that his father abused him, and although she saw Defendant's father sometimes "pop him" on the shoulder to get Defendant's attention, she did not witness any behavior she considered abusive. (EH at 610-11).

During the evidentiary hearing, Defendant did not present any testimony or evidence related to Robert Atkins, Sherry Atkins, John Mulligan, or Tommy Clark.

As to Defendant's allegations regarding counsel's failure to present testimony or evidence that he was physically abused by his father, Defendant presented the testimony of Dr. Cunningham, who cited to Dr. Lazarou's notes referencing Defendant's statements about instances of spankings, getting his "butt beat," breaking the paddle and "graduating" to the belt, etc... (EH at 614-15). Dr. Cunningham testified that child abuse or maltreatment is a risk factor for psychiatric disorders. (EH at 616). Dr. Cunningham further cited to various studies which reflect that "childhood abuse and neglect can seriously affect a person's physical and intellectual development and lead to problems in self-control; that abused and maltreated children [are] more likely than non-abused children to be arrested for delinquency, adult criminal behavior and violent criminal behavior." (EH at 615-18).

Ms. Holt testified that the defense team perceived that Defendant "idolized and worshipped his father, wanted to emulate his father." (EH at 179). Ms. Holt testified that although the defense was aware that Defendant "had been spanked by his father" and were aware of instances of emotional abuse by his parents, Defendant did not indicate to the defense "that there had been years of abuse with his father." (EH at 179-85). Ms. Holt testified that Defendant further minimized the severity of the "spankings" and "made it seem as it was just

something that was okay to go through based upon the circumstances of the time." (EH at 259-60).

Ms. Holt agreed that if they had evidence of physical abuse, it would have been important to present in the penalty phase. (EH at 186). Ms. Holt further noted that the "the greatest amount of physical abuse that the family dynamics reflected was not of Edward Covington by anyone," rather it was Defendant's physical abuse of his sister. (EH at 201). Ms. Holt further explained it was "very clear" to the defense that Defendant "wanted to have and enjoy a relationship, a close relationship with his parents and that he did not want . . . to do anything contrary to showing that he loved his parents and that his parents loved him." (EH at 183). Defendant did not want to publicly expose any violence within the family dynamic and was, to a certain extent, limiting matters to be presented at the penalty phase. (EH at 200-202, 260). Defendant "was very firm in how he wanted his family to be perceived or not perceived and he loved his parents, loved his family, didn't want to harm his sister for the future." (EH at 203). Ms. Holt further explained Defendant's family "was going to be the only connection to the outside world he was going to have if he was either sentenced to life or sentenced to death, and so those are some decisions that were made with Mr. Covington's acquiescence, and really, his direction . . . those were the things that he preferred." (EH at 203).

Ms. James testified that "the entire time I worked with him, [Defendant] never told me that his father physically abused him." (EH at 436). Defendant had a "buddy relationship" with his father, who was in the military and did not spend much time at home. (EH at 435-36). Although Ms. James acknowledged that she had seen Dr. Lazarou's notes, which referenced physical abuse by Defendant's father, Ms. James testified that she had no corroborating evidence

of physical abuse and she did not rely on that single reference found only in one State's expert's notes. (EH at 436-37). Ms. James explained,

> First of all, you don't present just because one person says something. You always look for corroboration because a statement is a statement. It's - - so I look for corroboration.
>
> None of the family members ever talked about him being physically abused. As a matter of fact, he was overindulged, okay. Even his sister never mentioned him being abused by the father. She mentioned Mr. Covington abusing her. The mother never mentioned the father being abusive to anyone in the household.
>
> I had no evidence, other than this one statement by Dr. Lazarou, that he was physically abused. Nothing from Mr. Covington himself or family members, nothing in any medical records.
>
> He was being seen for a long time having been diagnosed bipolar. Even as a child when he was admitted that first admission at 15, there nothing in there that would indicate he was abused as a child.
>
> So I had nothing to corroborate the State's expert, lone statement, that he was subject to abuse as a child.

(EH at 438-39).

Findings and Conclusions

After considering Defendant's motion, the State's response, the court file, and the record, as well as the testimony and evidence presented during the evidentiary hearing, and the written argument of counsels, the Court finds Defendant has failed to meet his burden under *Strickland*. As to the allegations regarding potential witnesses Robert Atkins, Sherry Atkins, John Mulligan, or Tommy Clark, because Defendant did not present any testimony or evidence regarding the substance of their testimony or whether they were available to testify at trial, the Court finds Defendant has failed to demonstrate that counsel performed deficiently in failing to call those individuals to testify during the penalty phase or that he was prejudiced by counsel's failure to do so. *See e.g.*, *Gorman v. State*, 738 So. 2d 966 (Fla. 1st DCA 1999) (affirming denial of claim that counsel was ineffective for failing to call doctor as a witness where defendant presented no

evidence that the doctor would have been available to testify at trial or that he would have testified in a manner favorable to the defense).

As to Kathy Bush/Katherine Black, the Court finds her testimony is largely cumulative to the penalty phase testimony of Ms. Pulianas and Mr. Taylor. The Court finds Defendant has failed to demonstrate that counsel performed deficiently in failing to call Ms. Black as a witness. Additionally, the Court notes that Judge Fuente found as a mitigator that Defendant "has the ability to from positive friendships." In light of the evidence, the aggravators, and the mitigators in this case, even if counsel had called Ms. Black to testify, the Court finds there is not a reasonable probability that Defendant would have received a life sentence.

As to the allegations that counsel was ineffective for failing to present evidence that Defendant as a child was physically abused by his father, the Court notes that "[t]he issue is not what present counsel or this Court might now view as the best strategy, but rather whether the strategy was within the broad range of discretion afforded to counsel actually responsible for the defense." *Occhicone*, 768 So. 2d at 1049. The Court finds credible the testimony of Ms. James and Ms. Holt. Specifically, the Court finds credible their testimony that neither Defendant nor any of his family members ever advised his defense team that Defendant was physically abused by his father. Additionally, Defendant minimized evidence of spankings or corporal punishment.

The Court further finds reasonable Ms. James' decision not to present evidence of child abuse where the only reference to the abuse was found in one of the State's expert's notes, and there was no other corroborating evidence. Finally, the Court finds credible Ms. Holt's testimony that Defendant limited or did not want the defense to present testimony regarding violence within the family dynamic as it was very important to Defendant that he maintain his relationship with his parents. The Court notes that "[c]ounsel's actions are usually based, quite

properly, on informed strategic choices made by the defendant and on information supplied by the defendant." *Strickland*, 466 U.S. at 691. "The reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions." *Strickland* at 691. Based on the foregoing, the Court finds counsel's strategic decision not to present such evidence was reasonable, therefore, Defendant has failed to establish that counsel performed deficiently. *See Occhicone*, 768 So. 2d at 1048 ("[S]trategic decisions do not constitute ineffective assistance of counsel if alternative courses have been considered and rejected and counsel's decision was reasonable under the norms of professional conduct.").

The Court further finds Defendant has failed to demonstrate prejudice. The Court notes that other than the references in Dr. Lazarou's notes, Defendant did not present any other testimony or evidence regarding physical abuse by his father. Even if the defense had presented testimony or evidence regarding the references in Dr. Lazarou's notes, in light of the evidence, the mitigators, and the aggravators presented, the Court finds there is not a reasonable probability that Defendant would have received a life sentence on any count. **No relief is warranted on claim I-G.**

H. Either separately or cumulatively Defendant was denied the effective assistance of counsel.

In claim I-H, Defendant alleges that his ineffective assistance of counsel allegations in claims I and II "either separately, or cumulatively . . . show that [he] was denied the effective assistance as of counsel guaranteed by the United States Constitution." In its response, the State argues that Defendant fails to identify the specific errors that either individually or cumulatively warrant postconviction relief, therefore, his claim is procedurally barred, legally insufficient, and without merit.

As the Court has herein denied each of the claims raised in Defendant's motion, the Court further finds relief is not warranted on claim I-H. *See Parker v. State*, 904 So. 2d 370, 380 (Fla. 2005) "[W]here the individual claims of error alleged are either procedurally barred or without merit, the claim of cumulative error also necessarily fails."); *Griffin v. State*, 866 So. 2d 1, 22 (Fla. 2003) ("[W]here individual claims of error alleged are either procedurally barred or without merit, the claim of cumulative error must fail.").

CLAIM II

MR. COVINGTON'S DEATH SENTENCE VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION BECAUSE MR. COVINGTON'S SEVERE MENTAL ILLNESS EXEMPTS HIM FROM THE DEATH PENALTY BASED ON EVOLVING STANDARDS OF DECENCY AND BECAUSE MR. COVINGTON'S CASE IS NOT THE MOST AGGRAVATED AND LEAST MITIGATED. THE PROCESS FOR DETERMINING MR. COVINGTON'S DEATH SENTENCE WAS INADEQUATE, THUS DENYING HIM DUE PROCESS UNDER THE FOURTEENTH AMENDMENT AND FURTHER VIOLATING THE EIGHTH AMENDMENT BY FAILING TO ACCURATELY DETERMINE WHETHER HIS CASE BELONGED IN THE CLASS OF CASES THAT MAY LEAD TO A DEATH SENTENCE. TO THE EXTENT THAT THE ARGUMENT THAT FOLLOWS COULD HAVE BEEN DEVELOPED AND PRESENTED BY TRIAL COUNSEL, TRIAL COUNSEL WAS INEFFECTIVE THUS DENYING MR. COVINGTON HIS RIGHTS UNDER THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

A. Evolving standards of decency prohibit Mr. Covington's death sentence because of his severe mental illness.

Defendant alleges his "death sentence is unconstitutional because evolving standards of decency have reached the point where someone suffering the severe mental illness that Mr. Covington does cannot constitutionally be sentenced to death." Defendant contends, his death

sentence "violates the Eighth and Fourteenth Amendments prohibiting cruel and unusual punishment and arbitrary and capricious imposition of the ultimate penalty as applied."

To the extent Defendant is alleging in grounds I-B and II-A that evolving standards of decency bar his execution due to his mental illness, the Court finds Defendant's claim is procedurally barred and has been previously rejected on the merits by the Florida Supreme Court. *See Carroll v. State*, 114 So. 3d 883, 886-87 (Fla. 2013) (finding Carroll's claim that his mental illness "places him within the class of persons, similar to those under age eighteen at the time of the crime and those with mental retardation, who are categorically excluded from being eligible for the death penalty" was untimely, procedurally barred and without merit); *Simmons v. State*, 105 So. 3d 475, 510-11 (Fla. 2012) (finding defendant's claim "that he is exempt from execution under the Eighth Amendment to the United States Constitution because he has mental illness and neuropsychological deficits" was both procedurally barred and without merit); *Johnston v. State*, 70 So. 3d 472, 484-85 (Fla. 2011) ("This Court has repeatedly held that there is no per se bar to imposing the death penalty on individuals with mental illness. . . . Specifically, this Court has recently considered and rejected the precise arguments that Johnston raises here regarding the evolving standards of decency in death penalty jurisprudence."); *Long v. State*, 271 So. 3d 938, 947 (Fla. 2019), *cert. denied sub nom. Long v. Florida*, 139 S. Ct. 2635 (2019) (rejecting Long's claim that evolving standards of decency require that he be exempted from the death penalty because of his severe traumatic brain injury, and noting it had rejected similar Eighth Amendment claims raised for the first time in postconviction proceedings as untimely, procedurally barred, and without merit, and declining to recede from its precedent). There is no legal authority which would permit or require this Court to find the Eighth Amendment

categorically bars Defendant's execution because he suffers from severe mental illness. **No relief is warranted on claim II-A.**

B. **A number of factors support a conclusion that Mr. Covington was profoundly psychologically disturbed (i.e., psychotic) during the capital conduct and these factors also support the conclusion that Mr. Covington was insane at the time of the offense under Fla. Stat. 775.027 and Fla. Jury Instructions 3.6(a).**

Defendant alleges that he was insane at the time of the offenses, and was ineffective for failing to present such evidence to the trial court. Defendant alleges Dr. McClain was prepared to testify that Defendant was insane at the time of the offenses and Dr. McClain testified at the penalty phase, but counsel never her asked about insanity. Defendant further alleges Dr. Wood and Dr. Cunningham opine that Defendant was insane at the time of the offenses. Defendant argues that the trial court heard evidence the two statutory mental health mitigators were applicable, but did not hear evidence Defendant also met the legal criteria for insanity.

Defendant asserts Dr. Cunningham will testify that nine factors indicate Defendant was psychotic at the time of the offenses, specifically, Defendant's extended history of diagnosis and treatment for bipolar disorder, his altered brain chemistry by ingesting excessive dosages of psychotropic medications and psychoactive substances, previous incident of decompensation with bizarre aggression when intoxicated (cat mutilation), the murders reflected an extraordinary departure from his behavior preceding the offenses and after he stabilized in the hospital afterwards, the horrifying and nonsensical post-mortem dismemberments of the children, his fragmented memory of the murders and dismemberments, his inability to specify a motive for the murders and dismemberments, his description to law enforcement that he heard Lisa Freiberg speaking to him after her murder (consistent with delusions and hallucinations), and Defendant's attempted suicide by overdose after the murders. Defendant alleges "[t]he totality of these

factors, and particularly the bizarre dismemberments of the children, provides strong evidence Mr. Covington was psychotic at the time of the offense."

Defendant asserts Dr. Wood also found Defendant's PET /CT scan findings "together do establish a relevant brain defect or disease, i.e., bilateral abnormal superior temporal lobe atrophy and hypometabolism" and opined that Defendant's behavior indicates he did not know what he was doing at the time of the offenses.

As to Defendant's assertion that the severity of his mental illness precludes a death sentence, the State asserts Defendant presented extensive mental health mitigation, including the testimony of seven physicians of various specialties. The State asserts the facts underlying this claim were already considered by the trial court, including Defendant's history of mental illness, previous head injuries, antibiotic overdose as an infant, complications from gastric bypass surgery, etc. The State contends, "The fact that Covington can now find an expert who will testify that he was suffering from psychosis does not sufficiently rebut the extensive testimony of the witnesses at the sentencing phase, none of whom diagnosed him with psychosis. Nor does it provide a basis for this Court to conclude that he is exempt from the death penalty."

As to the insanity issue, the State asserts Dr. McClain testified at a pretrial deposition that Defendant was insane at the time of the offenses. Therefore, the State argues, counsel's "decision to forego an insanity defense was a strategic and tactical decision." The State further describes the murders and Defendant's statements to detective and defense experts, and asserts, "There is nothing about Covington's description of events or recollections of the murders from which one could conclude that he did not understand what he was doing or that it was wrong." The State posits that Defendant "has failed to show that no reasonable attorney would have pursued the mitigation strategy that his attorneys did or that he would have received a life

sentence had his attorneys presented opinion testimony, that would have been rebutted, regarding his sanity at the time of the offenses."

Evidentiary Hearing

During the December 16, 2019, evidentiary hearing, Valerie McClain, a licensed psychologist specializing in forensic psychology and neuropsychology retained by the defense,[2] testified that she diagnosed Defendant with bipolar disorder I and intermittent explosive disorder. (EH at 14). Dr. McClain described the records she reviewed and summarized Defendant's psychiatric history, hospitalizations, and medication history; in addition to Defendant's medical/psychiatric records, Dr. McClain also reviewed discovery in this case as well reports of other psychologists, psychiatrists, and a toxicologist. (EH at 15-25, 38). Dr. McClain also interviewed Defendant before trial on July 27, 2012, September 14, 2012, and December 5, (EH at 2012. 25).

Based on her review of Defendant's medical records, discovery and other materials provided by the defense, and her interviews with Defendant, Dr. McClain opined that Defendant met the legal criteria for insanity at the time of the offenses, i.e., that he "was suffering from a mental infirmity at the time [of the offenses], namely [b]ipolar disorder, and also . . . secondarily [i]ntermittent exposive disorder; and that he . . . did not know what he was doing or its consequences and failed to appreciate the wrongfulness of his actions." (EH at 26, 39). Based on her interviews with Defendant regarding the offenses, he did not have a "clear linear recollection, but there was . . . a disconnect or dissociative type of features to his presentation of

[2] Dr. McClain's curriculum vitae was admitted as Defense Exhibit 1.

what he did recall." (EH at 26). Defendant did not deny what occurred, "but basically what he described is like not processing or being basically unable to think. . . . basically all hell broke loose." (EH at 27).

Dr. McClain noted that prior to the offenses, Defendant had recently been Baker Acted, released, and provided a supply of medication, but he was not yet stabilized on that medication. (EH at 27). Dr. McClain testified Defendant was in a hypomanic episode (elevated mood, racing thoughts, state of agitation) and "because of that state of mind [] he was not able to rationally process information or respond to the situation and/or possible stressors at the time in a rational manner; and he did have the history of having prior difficulties with what I would call explosive anger." (EH at 28).

In forming her opinion, Dr. McClain also considered the report of Dr. Buffington, a pharmacologist who opined that Defendant's ingestion of cocaine and alcohol prior to the murders could have escalated the mania. (EH at 29-30). Dr. McClain further testified that Defendant's ingestion of cocaine and alcohol before the murders did not "disqualify" him from an insanity defense as "the behavior itself stems from his mental health disorder as opposed to a situational type of thing from the substance abuse...." (EH at 30-31). Dr. McClain considered Defendant's chronic history of mental health disorders, his recent Baker Act (19 days before the offenses), and that he was not yet stabilized on his medications, that his medications would not be effective when mixed with alcohol or drugs, and Defendant's gastric bypass, which may have affected the absorption of Defendant's medication or the drugs. (EH at 30-32).

Dr. McClain testified that after she learned Defendant had pleaded guilty, she did not advise defense counsel that her opinion as to insanity had changed, and at the penalty phase, none of the attorneys asked about her opinion regarding insanity. (EH at 35-36, 57).

Dr. McClain also reviewed the reports of Defendant's postconviction experts; she testified that her findings were consistent with those of Dr. Cunningham, and that Dr. Wood's findings regarding the neuroimaging of Defendant "particularly helpful and compelling . . . [as] it did suggest certain areas of hypometabolism, hypermetabolism that were important as far as confirming some questions that I had that were not confirmed previously." (EH at 32-34).

As discussed in claim I-D above, Dr. Wood testified that based on his evaluation of Defendant's PET scans and the deficiencies and structural abnormalities of Defendant's brain, Dr. Wood further opined that Defendant met the criteria for both of the statutory mental health mitigators as well as the legal criteria for insanity. (EH at 117-19, 137-38).

Dr. Cunningham testified that the "most cogent explanation" for Defendant's behavior is that he was "profoundly psychologically disturbed during the capital conduct," i.e., psychotic, and cited to the nine factors described above and in his report. (EH at 356-75). Dr. Cunningham found Defendant met the criteria for the two statutory mental health mitigators and testified,

> So the totality of these factors, particularly the bizarre dismemberment of the children provide strong evidence that he was psychotic at the time of the offense, not just psychotic, but acutely disorganized in this thought processes and rationality. That kind of disorganization is inconsistent with the ability to appreciate the criminality of your conduct. In other words, [] you are [] kind of on autopilot without recognition of why or what you're doing. And with that degree of disorganization that's inconsistent with some part of your brain somehow standing back and rationally analyzing what the moral and criminal significance might be.
>
> And it also represents a substantial impairment in his ability to conform his conduct to the requirements of the law because he is operating under this disorganized state.
>
> . . . .
>
> The overarching gestalt that to me is overwhelmingly clear is that this is the behavior of a profoundly disorganized psychotic individual.

(EH at 367-68, 619-31). Dr. Cunningham further testified Defendant was legally insane at the time of the offenses and due to this psychosis, he did not know what he was doing or its consequence, and he did not know that his conduct was wrong. (EH at 378-80, 619-30).

Ms. James testified that insanity is a guilt phase issue. (EH at 441). Ms. James testified that she did not put on evidence of insanity at the penalty phase, but she "presented all of the evidence to support the two statutory mental health mitigators, which . . . encompass everything that you would [present] in an insanity defense short of an acquittal...." (EH at 441). Ms. James did not ask Dr. McClain about insanity because it was not an appropriate question for sentencing and she "had it covered under the two statutory mental health mitigators." (EH at 442, 447). Ms. James further testified that insanity is a first phase issue and Defendant waived that issue when he pleaded guilty. (EH at 445).

Ms. James testified that out of the seventeen doctors and experts she consulted with, only Dr. McClain found Defendant was insane at the time of the offenses. (EH at 442, 496-98). Dr. Rao and Dr. Krop both found Defendant was not insane. (EH at 467). Ms. James testified that she was aware that eliciting an opinion on insanity from Dr. McClain could potentially open the door on cross-examination for the State to elicit the opinions of Dr. Rao and Dr. Krop. (EH at 497). Ms. James was also aware the State's experts, Dr. Myers and Dr. Lazarou each opined Defendant was not insane. (EH at 498). Ms. James testified that she also consulted with Dr. Michael Maher, another expert who her office "always" uses in capital cases, and he also opined that Defendant did not meet the criteria for an insanity defense. (EH at 499). She also consulted with Dr. Donald Taylor, a psychiatrist, who evaluated Defendant and opined Defendant was not legally insane at the time of the offices. (EH at 499-500, 506). Ms. James also consulted with Dr. Santana, who specialized in psychiatry and pharmacology, and he advised Ms. James that

Defendant told him he did not hear any voices during the course of the homicides. (EH at 512-13).

Ms. Holt testified that insanity is an affirmative defense and "the elements of an insanity defense are the things that Dr. McClain testified to during the penalty phase." (EH at 206). Ms. Holt further testified "there was waiver of the insanity defense through the plea form and [] there was a waiver of all pretrial matters as a result of the plea form, that insanity is an affirmative defense, but that the elements of insanity through mental illness and mental disorder and how severe it might be is certainly something should be argued as mitigation." (EH at 206). Ms. Holt testified that although the insanity affirmative defense was waived when Defendant pleaded guilty, "all the underlying factors that led Dr. McClain to that opinion were presented to Judge Fuente." (EH at 207). Ms. Holt further noted they had a limited insanity defense as Dr. McClain was the only doctor who opined Defendant was insane at the time of the offenses. (EH at 187, 209).

Penalty Phase

As previously noted above, during the penalty phase, Dr. McClain, Dr. Krop, and Dr. Rao each testified that based on their diagnoses, the capital offenses here were committed while Defendant was under the influence for an extreme mental or emotional disturbance, and his capacity to appreciate the criminality of his conduct or conform his conduct to the requirements of the law was substantially impaired. Dr. Myers and Dr. Lazarou each testified that neither of those two statutory mitigators applied.

Findings and Conclusions

After considering Defendant's motion, the State's response, the court file, and the record, as well as the testimony and evidence presented during the evidentiary hearing, and the written argument of counsels, the Court finds Defendant has failed to meet his burden under *Strickland.*

The Court finds credible the testimony of Ms. James and Ms. Holt that they determined Defendant waived the affirmative defense of insanity when he pleaded guilty and they decided to proceed to the penalty phase with the intent to establish the two statutory mental health mitigators, which essentially encompass the criteria for insanity. The Court notes that although neither statute nor case law explicitly prohibits presentation of insanity during the penalty phase, insanity is an affirmative guilt phase defense, therefore, the Court further finds the defense's determination and strategic decision to present evidence of the two statutory mental health mitigators instead of insanity was reasonable. The Court further finds their strategy reasonable in light of the fact that Dr. McClain was the only one out of five doctors to opine that Defendant was insane, that defense counsel was aware that eliciting Dr. McClain's opinion insanity could potentially open the door to the State eliciting the opinion on insanity from Dr. Rao and Dr. Krop, and that the State's experts both opined Defendant was not insane. As such, the Court finds Defendant has failed to show that counsel performed deficiently. *See Occhicone*, 768 So. 2d at 1048 ("[S]trategic decisions do not constitute ineffective assistance of counsel if alternative courses have been considered and rejected and counsel's decision was reasonable under the norms of professional conduct.").

Additionally, even though Defendant has now found Dr. Wood and Dr. Cunningham to opine that Defendant was insane at the time of the offense, the Court notes the fact that a

defendant has "produced more favorable expert testimony at his evidentiary hearing is not reason enough to deem trial counsel ineffective." *Jennings v. State*, 123 So. 3d 1101, 1116 (Fla. 2013).

Finally, the Court finds Defendant has failed to establish that counsel's alleged deficient performance deprived him of a reliable penalty phase. During the penalty phase, Defendant presented extensive testimony and evidence regarding Defendant's mental health history and he met the criteria for the statutory mental health mitigators. Defendant has failed to establish that even if Defendant had presented the testimony of Dr. McClain, Dr. Wood and Dr. Cunningham, in light of the evidence, the aggravators, mitigators presented, there is not a reasonable probability that Defendant would have received a life sentence. **No relief is warranted on claim I-B or II-B.**

C. Whatever the etiology of the psychosis Mr. Covington demonstrated during the offenses, this profound psychological disturbance has enormous impact on his moral culpability, i.e., the psychological resources he brought to the offense.

Defendant cites to the presumptions under section 394.467, Florida Statutes (regarding involuntary placement). Defendant asserts "counsel was ineffective for failing to put forth evidence of these presumptions as mitigation and as part of a claim that Mr. Covington's execution is not permitted." Defendant posits, "Mr. Covington's defense could have elicited from mental health experts and argued to the Court that the profound psychological disturbance exhibit by [him] during the offense conduct reflected a greater degree of impairment than associated either with being a normally-situated 17 year old or a high functioning person with intellectual disability – neither of whom would be eligible for the death penalty."

The State argues section 394.467 is inapplicable. The State argues the law already "takes into account [the] fact that some mental illnesses and their effect on the individual may make the

person less morally culpable and not deserving of the death penalty," and Defendant presented a great deal of mental health mitigation to the trial court.

Evidentiary Hearing

Dr. Cunningham testified that whatever the etiology of his psychosis, the profound psychological disturbance at the time of the offenses has a very significant impact on his moral culpability. (EH at 375). Dr. Cunningham explained that "it's basically the notion that had law enforcement encountered him two minutes before these offenses begin, he would be mentally ill -- he would have been Baker Acted." (EH at 375-76). Defendant would have been Baker Acted because he "was exhibiting this psychotic organization with grossly disorganizing homicidal and dismemberment ideation...." (EH at 376). In other words, "[h]e would have been a patient, not an inmate on death row." (EH at 376).

Findings and Conclusions

After considering Defendant's motion, the State's response, the court file, and the record, as well as the testimony and evidence presented during the evidentiary hearing, and the written argument of counsels, the Court finds Defendant has failed to meet his burden under *Strickland*. The Court finds Defendant has failed to demonstrate that counsel performed deficiently in failing to elicit that his profound psychological disturbance was a mitigating factor considering Florida's mental health law. Additionally, in light of the evidence, the aggravators, and the mitigators presented the Court further finds that even if counsel had presented Dr. Cunningham's testimony, there is not a reasonable probability Defendant would have received a life sentence.

No relief is warranted on claim II-C.

D. The profound psychological disturbance present in Mr. Covington during the offenses reflected the pathological synergy of three factors.

1. Neurodevelopment complication and multiple brain insults.

2. Bipolar Disorder
3. Polydrug interaction

Defendant details the synergy of these factors and asserts trial counsel was ineffective "for failing to develop and fully present the information as fully detailed by Dr. Cunningham." Defendant asserts defense counsel failed to elicit testimony "linking up the adverse neurodevelopmental factors with behavioral outcomes and vulnerabilities." Defendant cites to Defendant's premature birth, antibiotic overdose when he was a newborn, and his history of head injuries. Defendant further cites to the interaction of the aforementioned brain functioning with his mood disorder, and then synergistically interacting with those two was his ingestion of cocaine, alcohol, Seroquel, and Depakote, at the time of the offenses.

The State asserts the allegations in the Defendant's motion are merely the "hindsight analysis and the opinion of yet another expert." The State asserts trial counsel is not deficient "merely because [postconviction] counsel found an expert who will opine that Covington suffers from psychosis, which is a symptom not a mental illness, at the time of the murders." The State asserts Defendant has failed to show that Dr. Cunningham's testimony cannot be viewed in isolation and in light of the evidence presented at trial, it is therefore unlikely that his opinion would have changed the outcome in this case.

Evidentiary Hearing

The Court incorporates the evidentiary hearing testimony as set forth in the above grounds. In addition to the testimony previously set forth, Dr. Cunningham testified in further detail regarding the synergistic effect of those three factors. (EH at 385-425).

Findings and Conclusions

After considering Defendant's motion, the State's response, the court file, and the record, as well as the testimony and evidence presented during the evidentiary hearing, and the

written argument of counsels, the Court finds Defendant has failed to meet his burden under *Strickland*. As indicated above, the Court finds Ms. James' testimony to be very credible. Ms. James consulted with seventeen practitioners and experts in preparation for the penalty phase and presented seven of those experts during the penalty phase, as well as several lay witnesses. As the Court detailed in grounds I-D and II-B above, Ms. James conducted a thorough investigation and presented extensive testimony and evidence to establish the two statutory mental health mitigators as well as other mitigation. Ms. James' investigation and presentation of mitigation was beyond reasonable. Much of Dr. Cunningham's testimony - including testimony regarding Defendant's premature birth, his antibiotic overdose, his head injuries, his bipolar disorder, mental health history, substance abuse history, and the interaction of his mood disorder with the ingestion of drugs, alcohol, and medication - establishing the three factors was substantially cumulative of the testimony presented during the penalty phase. Additionally, although Ms. James did not present her mitigation as "synergy" of the various interactions, the Court finds that the fact that a defendant has "produced more favorable expert testimony at his evidentiary hearing is not reason enough to deem trial counsel ineffective." *Jennings v. State*, 123 So. 3d 1101, 1116 (Fla. 2013). Based on the foregoing, the Court finds Defendant has failed to establish that counsel performed deficiently.

Additionally, Defendant has failed to establish prejudice. As noted above, the Court found in its sentencing order that Defendant "suffered from a long-standing condition of bipolar disorder, intermitted explosive disorder, and cocaine and alcohol abuse disorder," and he accorded this circumstance great weight. The trial court further accorded moderate weight to the mental health mitigators that the offenses were committed while Defendant was under the influence of extreme mental or emotional disturbance, and that his capacity to conform his

conduct to the requirements of the law was diminished. In light of the evidence, the aggravators, and the extensive mitigation presented during the penalty phase, even if counsel had presented the testimony of Dr. Cunningham regarding the pathological synergy of Defendant's neurodevelopmental complication and brain insults, his bipolar disorder, and polydrug interaction, there is not a reasonable probability Defendant would have received a life sentence on any count. **No relief is warranted on Claim II-D.**

CLAIM III

THE PROCEEDINGS IN MR. COVINGTON'S CASE WERE INADEQUATE TO DETERMINE WHETHER HIS CASE WAS ONE OF THE MOST AGGRAVATED AND LEAST MITIGATED THUS VIOLATING THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION. DENYING MR. COVINGTON *HURST* RELIEF VIOLATES EQUAL PROTECTION UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS.

Defendant cites to *Hurst v. State*, 202 So. 3d 40 (Fla. 2016), and asserts "that the right to a jury trial found in the United States Constitution required that all factual findings be made by the jury unanimously under the Florida Constitution and that the Eighth Amendment's evolving standards of decency and bar on arbitrary and capricious imposition of the death penalty require a unanimous jury fact-finding...." Defendant further alleges he was denied his Sixth Amendment right to a jury trial and the procedure employed here "was constitutionally inadequate to place Mr. Covington's case in the most aggravated and least mitigated." Defendant contends that "[n]ot allowing a jury was inherently unreliable and violated the Eighth and Fourteenth Amendment's bar on cruel and unusual punishment and arbitrary and capricious punishment." Defendant alleges that denying him a new trial based on *Hurst* would also violate his right to Equal Protection under the Fourteenth Amendment "and his right against arbitrary

infliction of the punishment of death under the Eighth Amendment to the Constitution of the United States."

In its response, the State asserts this claim is procedurally barred and meritless. The State asserts "the Florida Supreme Court has already determined that Defendant's penalty-phase jury waiver was voluntary." The State further argues that *Hurst* is inapplicable here and Defendant is not entitled to *Hurst* relief.

The Court agrees that the instant claim is procedurally barred and without merit. *See Covington*, 228 So. 3d at 69 ("A defendant like Covington who has waived the right to a penalty phase jury is not entitled to relief under *Hurst*."); *Mullens v. State*, 197 So. 3d 16, 40 (Fla. 2016) ("Mullens cannot subvert the right to jury factfinding by waiving that right and then suggesting that a subsequent development in the law has fundamentally undermined his sentence."); *Brant v. State*, 284 So. 3d 398, 399-400 (Fla. 2019) ("Since issuing *Mullens*, we have consistently reaffirmed the principle that a defendant who waves his or her right to a penalty phase jury is not entitled to relief under the *Hurst* decisions."); *Allred v. State*, 230 So. 3d 412 (Fla. 2017) ("This Court has consistently relied on *Mullens* to deny *Hurst* relief to defendants that have waived the right to a penalty phase jury."); *Twilegar v. State*, 228 So. 3d 550 (Fla. 2017) ("As the circuit court correctly recognized, the *Hurst* decisions do not apply to defendants like Twilegar who waived a penalty phase jury."); *Knight v. State*, 211 So. 3d 1, 5 n. 2 (Fla. 2016) (rejecting Defendant's *Hurst* claim and noting "Knight waived his penalty phase jury and, thus, is not entitled to relief."); *Quince v. State*, 233 So. 3d 1017 (Fla. 2018) ("We have since consistently relied on *Mullens* to deny *Hurst* relief to defendants who waived a penalty phase jury."); *Hutchinson v. State*, 243 So. 3d 880, 884 (Fla. 2018) ("*Hurst* relief is not available to individuals who waived their right to a penalty phase jury."). **No relief is warranted on claim III.**

CLAIM IV

CUMULATIVE ERROR

In claim IV, Defendant alleges, "If not individually, the sum total of all of the aforementioned constitutional errors warrants relief in this case." In its response, the State argues that Defendant fails to identify the specific errors that either individually or cumulatively warrant postconviction relief, therefore, his claim is procedurally barred, legally insufficient, and without merit.

As the Court has herein denied each of the claims raised in Defendant's motion, the Court further finds relief is not warranted on claim IV. *See Parker*, 904 So. 2d 370 at 380 ("[W]here the individual claims of error alleged are either procedurally barred or without merit, the claim of cumulative error also necessarily fails."); *Griffin*, 866 So. 2d at 22 ("[W]here individual claims of error alleged are either procedurally barred or without merit, the claim of cumulative error must fail.").

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

Defendant has thirty days from the date of rendition to appeal this order. A timely filed motion for rehearing shall toll the finality of this order.

DONE AND ORDERED in chambers in Tampa, Florida, on this 28th of December, 2020.

MICHELLE SISCO
Circuit Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of this order has been furnished to David Dixon Hendry, Esquire, CCRC-M, 12973 North Telecom Parkway, Temple Terrace, FL 33637-0907, by U.S. mail;

Marilyn Beccue, Esquire, Office of the Attorney General, 3507 East Frontage Road, Suite 200, Tampa, FL 33607, by U.S. mail; Jay Pruner, Esquire, Office of the State Attorney, 419 North Pierce Street, Tampa, FL 33602, by inter-office mail, on this _____ day of December, 2020.

_____

Deputy Clerk