IN THE SUPREME COURT OF FLORIDA

DOMINICK OCCHICONE,

Appellant,

vs. **CASE NO. 93,343**

STATE OF FLORIDA,

Appellee.

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ANSWER BRIEF OF THE APPELLEE

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STATEMENT OF THE CASE AND FACTS

This is an appeal from the denial of postconviction relief to a capital defendant following an evidentiary hearing in the circuit court. In this Court's opinion in the direct appeal of Occhicone's convictions and death sentence, this Court summarized the facts as follows:

> In the early morning hours of June 10, 1986 Occhicone awakened his former girlfriend by knocking on the sliding glass door to her bedroom in a house she shared with her children and her parents. The woman refused to talk with him and he left. He returned an hour or so later, armed with a handgun, and cut the telephone lines and roused the household. When the woman's father confronted him outside the house, Occhicone shot him. The woman and her daughter fled the house while Occhicone was breaking into it through a locked door. Once inside Occhicone shot the woman's mother four times. A jury found Occhicone guilty of two counts of first-degree murder and recommended death for each count. The trial court sentenced Occhicone to life imprisonment for killing the woman's father and to death for killing her mother.

Occhicone v. State, 570 So. 2d 902, 904 (Fla. 1990), cert. denied, 500 U.S. 938 (1991).

During the trial, testimony revealed that Occhicone and his former girlfriend, Anita Gerrety, had had a stormy relationship that had ended around September, 1985 (DA-R. 246).[1] Anita lived

[1]References to the record in the direct appeal from Occhicone's convictions and sentences will be cited as "DA-R" followed by the page number; references to the record in the postconviction proceedings held below will be cited as "PC-R" followed by the

with her parents at the time of the murders, in June, 1986 (DA-R. 246). Her parents had not approved of her relationship with Occhicone (DA-R. 263). According to Anita, prior to the shooting Occhicone had been obsessed with getting back together with her; he also told her repeatedly that he was going to take those closest to her, her parents and children, and "blow them away starting with their kneecaps and working his way up, and leaving me for the last so I could watch" (DA-R. 264-5).

On June 10, 1986, Occhicone went to Anita's parents' house and knocked on her sliding glass door about 3:00 a.m. (DA-R. 247). Anita told him there was nothing to say, and that if he did not leave she would call the sheriff's office (DA-R. 248). He left, but then returned about 4:00 a.m. (DA-R. 249). She ignored him, then heard him knocking on her daughter's sliding glass door (DA-R. 249). She went to tell her father; he tried to call the sheriff's office but his phone was dead, so Anita went to her room and found her phone was dead also (DA-R. 250-1). It was later determined that the phone lines had been cut or ripped out (DA-R. 407, 412, 418). Her father went out through the garage (DA-R. 251). When he put up the door, Anita saw Occhicone walking toward the garage (DA-R. 251). Her father had a broomstick and was yelling; Occhicone raised his arm, pointed at her father, looked at her and grinned,

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then she heard a gunshot and saw a flash (DA-R. 253). Her father did not swing at or hit Occhicone with the broomstick; he was about four feet from Occhicone when he fell (DA-R. 253, 265).

Anita ran into the house and locked the door (DA-R. 255). Her mother was trying to get out to the garage, and Anita was trying to keep her inside, when Anita saw Occhicone up against the frosted glass door to the garage (DA-R. 256). Occhicone used his right hand, with the gun, to break the glass (DA-R. 258). Anita got her daughter out the front door and ran to a neighbor's house; she thought her mother was behind her, but she wasn't (DA-R. 259). She heard two gunshots (DA-R. 259). Her mother was shot repeatedly and killed (DA-R. 387, 597-8).

Anita's cross examination lasted more than twice as long as her direct testimony (DA-R. 243-266; 266-324). She was asked to relate various contacts she had with Occhicone after they had split up; she was also questioned about specific incidents of violence between them (DA-R. 273, 279-887, 288). She noted that he had visited her frequently in the early morning hours, at least twenty times before; there was nothing out of the ordinary about him coming over that morning (DA-R. 301-2). She was also asked extensively about Occhicone's history of drinking and her observations of him the night of the murders. She stated that he had always been a heavy drinker, she had seen him put down 15 beers

or more and still function (DA-R. 291-2). He also drank scotch and vodka, sometimes straight out of the bottle (DA-R. 292). Anita said that usually when Occhicone was drinking, his temper would get hotter (DA-R. 294).

Anita stated that she smelled alcohol and could tell Occhicone had been drinking when he first came to her house on June 10 (DA-R. 303, 313). When he came back at 4:00, she noticed he was staggering, but she did not recall having said that he could not stand up straight (DA-R. 314). When defense counsel recited from her deposition where she had said he was staggering and could not stand up straight, she indicated his difficulty was from walking up a hill and that he could stand perfectly straight in her driveway (DA-R. 315). She said she had seen Occhicone drink before on numerous occasions where he had staggered, but never to the point where he could not function (DA-R. 315). She believed that he was staggering that morning because he had been drinking alcohol (DA-R. 318).

Lily Lawson was a state witness that testified about threatening statements Occhicone had made towards Anita's parents and children a week or two before the murders (DA-R. 446). Lawson was a bartender at Shooters Bar, which Occhicone frequented, and testified on cross examination about his drinking habits (DA-R. 444, 448-455). According to Lawson, Occhicone came in every day

around 7:00 a.m., would start drinking, go home about 9:00 a.m. and come back about 10:30 or 11:00 a.m.; he would be there when she left at noon (DA-R. 449). He normally drank ten to fifteen alcoholic drinks, usually vodka with juice, soda or water (DA-R. 449). She would also see him at the bar when she worked afternoons, nights, and closings (DA-R. 450). He would leave periodically for a few hours, and then come back, off and on (DA-R. 451). Lawson knew that he also visited other bars during this time; she testified that he easily spent fifty or sixty dollars a day on alcohol (DA-R. 453). She noted that his drinking became much heavier after he and Anita broke up (DA-R. 454). He was extremely upset and depressed, talking about Anita constantly and crying often (DA-R. 451, 454). Lawson testified that Occhicone drank as she described seven days a week, for seven to nine months leading up to the shootings (DA-R. 455).

Cheryl Hoffman was another bartender that had worked at Shooters during the time Occhicone spent time there (DA-R. 464). She had also known Occhicone as a prior patron of a bar where Hoffman had worked ten years earlier (DA-R. 464). She testified that Occhicone had the same drinking habits when she knew him earlier; she had never seen him when he wasn’t drinking (DA-R. 469-70). Although she did not see him much when he was dating Anita, he came in regularly after they broke up (DA-R. 467-8). He was

usually there when she arrived for work at 11:00 a.m.; she could tell he had had a lot to drink by that time from the number of swizzle sticks in front of him (DA-R. 467). He would usually have a few more after she arrived, then go home and take a nap (DA-R. 467). Occhicone spoke repeatedly of killing Anita's parents and making her suffer, as he blamed her parents for their break up (DA-R. 466, 468).

Debra Newell was another bartender that knew Occhicone from Shooters (DA-R. 490). She was working on June 10, and noticed Occhicone come in the bar about 1:30 a.m. (DA-R. 491). He was there about an hour and had two drinks (DA-R. 491). According to Newell, Occhicone did not appear intoxicated when he came in or when he left (DA-R. 492-3). He was talking about working things out with Anita, and the last thing he said was that he was not going over there (DA-R. 492).

The owner of Shooters, William Anderson, testified that Occhicone was a regular patron that came in everyday, starting about nine months before the murders (DA-R. 509). Anderson noted that Occhicone's drinking habits were consistent, that he usually drank in the mornings and took off around noon (DA-R. 519). He stated that Occhicone had a tremendous capacity for alcohol, never appeared intoxicated, and that, although Anderson would have offered Occhicone a ride home if Anderson was concerned about his

ability to drive, that was never necessary (DA-R. 515-6).

The trial record also reflects that, after shooting Anita's parents, Occhicone walked very quickly back to his car, but abandoned it due to mechanical problems (DA-R. 355, 357, 368-9, 420). He ran away, throwing the gun into a neighbor's yard, and throwing away his driver's license just as sheriff's officers apprehended him, less than a mile from his abandoned car (DA-R. 376, 379, 436-40). While in jail, Occhicone told a cellmate that he had shot his girlfriend's parents; that he'd shot one four times, and the other two times; that his only mistake was not killing Anita as well; that he should have shot the parents long ago; and that he walked away and threw the gun in someone's back yard (DA-R. 563-4).

Prior to trial, defense counsel had advised the judge that there were two defense witnesses, Lily Lawson and Joanne Carrico, that had not checked in (DA-R. 30). Lawson had checked in with the State, but Carrico, a material witness, had not (DA-R. 30). Later, during the trial, the defense noted the addition of potential witness Audrey Hall (DA-R. 483). According to defense counsel, Hall was discovered late due to the State's failure to disclose her as someone with information about the murders; the defense learned of her from Anita's testimony, which made Hall's knowledge relevant (DA-R. 486). The judge noted he would hold a Richardson hearing at

the appropriate time (DA-R. 488).

After the State had presented all of its evidence, there was a discussion about scheduling (DA-R. 603). The defense attorneys indicated their intent to present a nurse from the jail (to testify that Occhicone had a bump on his head when admitted at the jail); a couple of other lay witnesses, including Audrey Hall; and then two psychiatrists (DA-R. 603-4, 639). The State intended to put two doctors on in rebuttal (DA-R. 604). The judge then conducted the Richardson hearing on witness Hall, as well as two defense penalty phase witnesses disclosed after the start of trial (DA-R. 605, 627). Defense counsel described Hall as a woman that lived in the house where Occhicone's car had been found; counsel believed that Hall would contradict Anita's testimony regarding Occhicone's visits to the victims' house (DA-R. 616). Counsel represented that Hall had initially told law enforcement that Occhicone had parked his car at her house numerous times, but that this statement had not been disclosed to the defense (DA-R. 616). After a short recess, however, counsel returned and stated he was withdrawing his request to use Hall as a witness (DA-R. 626). Defense counsel summarized the defense case as two lay witnesses, Joanne Carrico and Sophie Bernardo (the nurse), and two psychiatrists, Dr. Fireman and Dr. DelBeato (DA-R. 636, 638).

After the State rested, there was a discussion as to whether

the State would be permitted to question the defense psychiatrists on cross examination about statements that Occhicone had made in taped conversations with a court-appointed expert, Dr. Mussenden (DA-R. 652). Defense counsel Young advised the judge that a lot depended on the court's ruling, possibly even presenting the two lay witnesses (DA-R. 655). The court ultimately denied the defense oral motion to suppress the tapes, and counsel stated that, in light of this ruling, the defense would rest without presenting any witnesses (DA-R. 700).

The jury was instructed on voluntary intoxication as a defense, but convicted Occhicone of premeditated murder, as charged (DA-R. 841, 864). In the penalty phase, the State presented a sheriff's sergeant to testify about the facts of Occhicone's prior conviction for resisting arrest with violence (DA-R. 880-897). The defense presented two corrections officers to discuss Occhicone's exemplary, nonviolent behavior while in jail (DA-R. 905, 915). Joanne Carrico, a friend of Occhicone's, also testified extensively about Occhicone's history of using alcohol and other drugs (blood pressure pills, tranquilizers, and marijuana); his relationship with Anita and how Anita played games with Occhicone after their break up; his reaction to Anita telling him that she had gotten an abortion; his continued obsession with Anita; and the last conversation she'd had with Occhicone, just prior to the murders,

where he was upset, disturbed, and threatening to kill himself (DA-R. 929-956).

The defense also presented three expert witnesses. Dr. Donald DelBeato was a clinical forensic psychologist that testified that Occhicone was under an extreme disturbance at the time of the murders, which was aggravated by his alcohol consumption, and that his capacity to conform his behavior was diminished (DA-R. 958, 968-70). DelBeato did not review any background material prior to rendering his initial report on Occhicone's competence, but in order to identify Occhicone's state of mind at the time of the murders he read depositions, affidavits, medical reports, witness statements about Occhicone's heavy drinking; he had "boxes" of information available (DA-R. 976-78, 998, 1000). DelBeato noted that Occhicone's first wife had died in 1982, and knew the details of Occhicone's relationship with Anita and the extensive alcohol history involved (DA-R. 962-5, 1025).

Dr. Alfred Fireman, a psychiatrist, also testified that Occhicone had serious mental illnesses, including major depression and alcohol dependency (DA-R. 1033, 1038-44). Fireman noted that he had spent at least five hours with the defense litigation team and had reviewed depositions, reviewed the circumstances of the offense, and spoken with a family member to get background information (DA-R. 1038). He was initially asked to explore

sanity, and concluded that Occhicone "was suffering from serious and severe acute and chronic mental illness" (DA-R. 1038). Fireman testified that Occhicone could not appreciate the nature and quality of his actions at the time of the homicides; that he did not have the mental capacity to premeditate; and that he was under the influence of an extreme mental or emotional disturbance (DA-R. 1039, 1042-3). Fireman believed that Occhicone had gone to the Artzners' home to kill himself (DA-R. 1075).

Another psychiatrist, Dr. Stephen Szabo, testified that both statutory mental mitigators applied in this case due to the stress Occhicone was under as a result of his relationship with Anita (DA-R. 1174, 1177-8). In addition, Occhicone testified about his son (DA-R. 1224).

In rebuttal, the State presented several law enforcement witnesses that testified that Occhicone appeared to be cold sober at the time of his arrest and Dr. Gerald Mussenden, a clinical psychologist (DA-R. 1244, 1247, 1253, 1264, 1323). According to Dr. Mussenden, neither of the two statutory mental mitigating factors applied (DA-R. 1289). Mussenden agreed that Occhicone suffered from chronic alcoholism, alcoholic dependence, and depression (DA-R. 1296-97). According to the testimony, Mussenden had reviewed depositions provided by the State Attorney's Office prior to interviewing Occhicone (DA-R. 1268).

The jury recommended death sentences for both murders (DA-R. 1364, 1599-1600). The trial judge imposed a death sentence for the murder of Anita's mother, but imposed a life sentence for the murder of her father (DA-R. 1584-85). The judge noted three aggravating factors: prior violent felony conviction; committed during the course of a burglary; and cold, calculated, and premeditated (DA-R. 1646-47). In mitigation, the court found that Occhicone was under an extreme emotional disturbance at the time of the murders; that he was impaired in his ability to appreciate his actions, but not substantially impaired; that Occhicone was a heavy drinker; that Occhicone was an alcoholic suffering from depression; and that he was a good prisoner (DA-R. 1647-49). This Court approved the trial judge's findings in affirming the convictions and sentences. 570 So. 2d at 905-6.

On April 8, 1993, this Court denied a Petition for Writ of Habeas Corpus, wherein Occhicone alleged that a new sentencing was required because the instructions given to his jury defining the aggravating factors were unconstitutionally vague. Occhicone v. Singletary, 618 So. 2d 730 (Fla. 1993). Thereafter, Occhicone filed a motion for postconviction relief in the trial court (PC-R. V1/6-169). The court denied several claims summarily and ordered an evidentiary hearing on some aspects of Occhicone's claims of ineffective assistance of counsel (PC-R. V1/171-199; V2/222-326).

At the evidentiary hearing, all three of Occhicone's trial attorneys testified, as did another attorney they had consulted. Attorney Craig LaPorte stated that he had been practicing law about three years when Occhicone phoned him from jail the morning of his arrest (PC-R. V5/873-4). LaPorte had a general practice which included some criminal defense; however, he associated then-attorney (and now Circuit Judge) Bruce Boyer, due to Boyer's experience in capital cases (PC-R. V5/767, 768, 873-4). Closer to trial, Boyer contacted attorney Bruce Young, a former prosecutor, to help them try the case (PC-R. V5/772, 825, 874).

Bruce Boyer was the lead attorney in this case (PC-R. V5/788-9, 874). Boyer had worked as an Assistant State Attorney from 1978 to 1983, and had experience with a number of death penalty cases during that time (PC-R. V5/767-8). Bruce Young had also spent five to six years as an Assistant State Attorney in the Sixth Circuit, and was a lead trial attorney when he left that office for private practice (PC-R. V5/864-5). Young had tried a number of felony cases, and was involved in at least two dozen capital cases while at the State Attorney's Office (PC-R. V5/826, 865). The defense team employed two investigative firms to assist in their trial preparation; investigators were sent to the bars where Occhicone drank regularly in an attempt to find information (PC-R. V5/769, 790). In addition, they consulted with another experienced

criminal defense attorney in LaPorte's office, Pete Proly (PC-R. V4/658-61; V5/769-71, 832, 860-1, 879, 893-4, 902). The development of defense theories and the decisions as to which witnesses to present were determined as a team and in consultation with Occhicone (PC-R. V5/827, 859, 874-5, 882, 883).

Bruce Boyer testified that he believed the primary goal of the defense was to avoid the death penalty, to convince the jury that the alcohol involved made this a life case rather than death (PC-R. V5/772-3). He felt that they nearly accomplished this, given the close vote for death (PC-R. V5/773). They pursued an insanity defense, but the experts all felt that Occhicone was competent; there was no evidence which would support this defense (PC-R. V5/774-6). Boyer did not believe there was a viable guilt phase theory to offer, so focused on gearing the guilt phase toward proving the penalty phase (PC-R. V5/773). Although they did not concede guilt, they did not believe they could avoid a first degree murder verdict, and were fairly comfortable they would get to the penalty phase, so they used the guilt phase to set it up (PC-R. V5/791). Primarily this involved establishing a predicate of alcohol consumption and its affect on Occhicone in order to permit the experts to testify where they were wanted, which was penalty phase (PC-R. V5/773-4). They only intended to present guilt phase witnesses if necessary to establish the predicate for the experts

in penalty phase; however, they felt satisfied that they had accomplished this through cross examination of the State witnesses (PC-R. V5/777).

Bruce Young identified the defense theory as voluntary intoxication, or whatever else could be developed to negate premeditation (PC-R. V5/828, 829). He agreed that the defense was able to elicit beneficial testimony on the issue of premeditation during the State's case; however, he characterized the chance for success as "slim to none" (PC-R. V5/828, 829). He noted that they had mental health experts explore a voluntary intoxication or diminished capacity defense, and discussed using the experts in guilt phase as a contingency (PC-R. V5/830, 845). By the time the State rested, he believed the jury had heard everything they could bring out about Occhicone's alcohol consumption (PC-R. V5/849).

Craig LaPorte testified that the theory of defense was voluntary intoxication and/or diminished capacity (PC-R. V5/875). He also recalled they had explored an insanity defense, but felt it would be very difficult or impossible to establish (PC-R. V5/876). The initial focus was on getting a second degree murder conviction, and they were able to bring out helpful testimony about Occhicone's drinking habits and staggering just before the murders (PC-R. V5/877-8). He told Occhicone he thought they had a fifty-fifty chance of getting a second degree conviction on Mr. Artzner, but

the odds were worse on Mrs. Artzner (PC-R. V5/888).

The decision to rest without presenting any guilt phase witnesses was made after the State rested its case (PC-R. V4/659-61; V5/777, 828, 876). The advantages and disadvantages of putting on witnesses was discussed between Boyer, Young, LaPorte, Occhicone, and Pete Proly (PC-R. V4/659-61; V5/804-5, 827, 901-2). After assessing everything, they all agreed that there was nothing to gain from presenting any witnesses (PC-R. V4/660-1; V5/777, 827, 925). One consideration was the loss of the "sandwich" closing arguments, which all of the attorneys felt was important (PC-R. V5/777, 787, 831, 868, 881, 906). While acknowledging that argument is not evidence, the attorneys believed it would be more effective with this jury to have the attorney version put forth rather than additional witnesses (PC-R. V5/787, 831, 869).

In addition, Occhicone's taped statements to Dr. Mussenden had been provided prior to trial, and all of the attorneys were very concerned that these statements could be used against any experts they presented in guilt phase (DA-R. 655; PC-R. V5/803-4, 851, 853, 877). The judge had ruled against their motion in limine to keep the statements out, and they all discussed this factor in evaluating whether to call the experts in the guilt phase (DA-R. 700; PC-R. V5/804, 810, 851, 877). The statements were a concern because it was hard to understand how Occhicone could have drank a

quart of vodka and still have such detailed recall; because the jury would be hearing his confession, more or less, a continual reminder of how he had killed these two people; and because Occhicone's demeanor and use of profanity would offend some of the jurors, based on reactions the attorneys had observed with the jurors during the trial (PC-R. V5/807-10, 858, 877, 903, 919). All of the attorneys were concerned that Occhicone's vivid recall might negate the intoxication defense (PC-R. V5/814, 858, 925). In addition, the testimony which the experts had to offer would not be that beneficial in guilt phase and some was detrimental (PC-R. V5/804, 859). The attorneys also considered that putting the experts on in guilt phase would be dangerous, as they did not believe they could put them on twice, they would lose credibility with the jury (PC-R. V5/792, 815).

Boyer testified that the question of where Occhicone had parked his car was not a significant feature of the trial for them (PC-R. V5/783). It was not where he parked the car, but what this meant that was important, and it could be argued both ways (PC-R. V5/783-4). The defense was aware of Audrey Hall and had her under subpoena, but felt that her knowledge that Occhicone parked his car on June 10 the same place he always parked had come out in Anita's cross examination (PC-R. V5/782, 840, 886-7). In addition, presenting Hall would lead to detrimental evidence about

Occhicone's habit of leaving at 3:00, 4:00 in the morning, driving away fast and loud and annoying the neighbors (PC-R. V5/785). Young also recalled that the State had a witness, Cheryl Nickerson, that lived across the street from the victims and would testify that Occhicone usually drove his car right up to the Artzner residence when he visited Anita (PC-R. V5/860).

As to penalty phase, the defense was hoping to establish that the alcohol consumption made this case appropriate for life sentences (PC-R. V5/785). Occhicone had admitted using alcohol and marijuana but denied any cocaine use (PC-R. V5/806-7, 898-9). The attorneys intended to present two mental health experts, Dr. Fireman and Dr. DelBeato; two correctional officers to establish Occhicone's good prison behavior; and Occhicone himself, to get into the fact that he had a young child (PC-R. V5/786, 830). They all tried to find witnesses that would be able to establish mitigation from Occhicone's family history, but nothing helpful came about (PC-R. V5/797, 833-37, 882). Every witness suggested by Occhicone or anyone else would not testify or could not help them (PC-R. V5/862).

Boyer recalled speaking to several possible witnesses, including talking to Occhicone's niece on a regular basis, but was unable to develop anything (PC-R. V5/797). Young recalled having spoken with several potential witnesses as well, including family

members (PC-R. V5/833, 837). Young also recalled that the defense team had spoken with two priests, but they would not be helpful; one would only testify as to the church's position against the death penalty, and that his personal opinion was to the contrary (PC-R. V5/861). The other priest had feedback not favorable to the defense, so they declined to call him as well (PC-R. V5/861).

Craig LaPorte was primarily responsible for investigating mitigation through the family (PC-R. V5/797, 894). He relied on a number of things to investigate potential witnesses, including information from Occhicone, discovery, and the investigators (PC-R. V5/917). He relied significantly on Occhicone for past family background witnesses, since he would be the one to know them, as well as other family members (PC-R. V5/917). Occhicone's input was important, but not the only source they used (PC-R. V5/917).

LaPorte stated they had no one other than the witnesses that actually testified, any others would have been cumulative (PC-R. V5/895). He spoke with Occhicone and tried to develop life history witnesses and routinely wrote down any names which Occhicone gave them (PC-R. V5/892-3). He did not recall the names Kenny Volpe, Andy Kinash, or Brenda Balzano; these names were not in his notes or in any investigative reports (PC-R. V5/895). The names Mike Stillwagon and Patricia Cook were provided the night before penalty phase began; he tried to find out who they were, but didn't learn

much at that point (PC-R. V5/896). He was aware of Ann Montana, she was aware of Occhicone's relationship with Anita and prayed with him regularly (PC-R. V5/897). The defense was also aware of, and had deposed, Patricia Goddard, and knew that Occhicone had crashed his car at her house a couple of days before the murders (PC-R. V5/906, 920). They were not aware of Kimberly Schuh a/k/a Kimberly Connell at the time of trial (PC-R. V5/906-7).

Occhicone gave them the names of three priests; LaPorte recalled speaking with two priests, and Boyer had spoken to Father Behr (PC-R. V5/885-6, 915). LaPorte testified that he and Boyer went to Our Lady Queen of Peace and spoke with a Father Ed; he also had a brief telephone conversation with Father Madden (PC-R. V5/885). Father Madden did not want to become involved; LaPorte's notes on Father Ed reflected that he basically did not want to participate and that anything he had would be harmful to Occhicone (PC-R. V5/908-9). His notes reflected that Father Ed was at St. Vincent De Paul in Holiday, but LaPorte was sure he had gone to Our Lady Queen of Peace to see him (PC-R. V5/916). There was only one Father Ed that Occhicone told them about, and Occhicone had not been sure if the last name was Lamp or O'Connor (PC-R. V5/916). None of the priests gave any indication of helpful testimony (PC-R. V5/924).

Occhicone also presented Ann Montana, Patricia Goddard,

Kimberly Connell, Lily Lawson, Cheryl Hoffman, and Mike Stillwagon at the evidentiary hearing. Montana was a friend of Occhicone's prior to the murders and described his obsession with Anita; related how Anita would tease him; and stated that Occhicone was good with his son (PC-R. V6/980-984). Montana was not aware of allegations that Occhicone abused his son and did not know that he took his son into bars; in fact, she did not know he had a history of frequenting bars and said she had never smelled alcohol on him (PC-R. V6/987-992).

Goddard and her sister, Connell, discussed an incident where Occhicone ran his car into a palm tree in Goddard's front yard on June 8, 1986, damaging her roommate's car (PC-R. V6/997-1000; 1011-13). Occhicone was intoxicated at the time, and talked with the women for over an hour waiting for a deputy to arrive (PC-R. V6/999). Occhicone was upset, but not about the accident, about having broken up with Anita; he held her parents responsible for the break up (PC-R. V6/1000, 1005). Connell had an argument with her sister and left with Occhicone (PC-R. V6/1013-14). She observed Occhicone as he continued to drink throughout that day and night and into the next day (PC-R. V6/1014-16). They separated early in the afternoon of June 9, and she saw him briefly about 5:30 p.m. and then about 2:30 the next morning (PC-R. V6/1015-16, 1032). She testified that he was drunk when she saw him later, but

she did not testify to actually having seen him drink anything after the early afternoon of June 9 (PC-R. V6/1015-16). She also noted that he was able to drive his car and make decisions the whole time she was drinking with him (PC-R. V6/1019-26).

Mike Stillwagon testified that he went to Shooters around 6:30 or 7:00 p.m. on June 9 and saw Occhicone there (PC-R. V6/1072). Occhicone had a "slight buzz" at that time, and was getting on the verge of being drunk (PC-R. V6/1072). They left about 8:30 or 9:00 and went to Occhicone's house; Occhicone was able to drive without any problem (PC-R. V6/1073, 1078, 1079). Stillwagon thought Occhicone had a drink at home and could not remember if Occhicone had any other drugs at that time (PC-R. V6/1073). He borrowed Occhicone's car to go to the store, and when he got back, Occhicone had passed out so Stillwagon just left him the keys and left with a friend (PC-R. V6/1080, 1084).

Lily Lawson and Cheryl Hoffman were both bartenders from Shooters that had testified for the State at the trial (PC-R. V6/1040, 1056). Lawson testified that Occhicone had about ten shots of root beer schnapps and a vodka and cranberry drink when he was at Shooters on the morning of June 9 (PC-R. V6/1037-38). She saw him again when she went to the bar that evening to play darts; she noticed that he was intoxicated and saw him leave with a bottle of vodka sometime between 8:00 and 11:00 p.m. (PC-R. V6/1039).

Hoffman testified that she knew Occhicone had had five or six drinks when she arrived at noon on June 9, but that he appeared normal and was not staggering or slurring his speech (PC-R. V6/1055). She did not recall how much he had to drink after she arrived or when he left (PC-R. V6/1055). She noted that although Occhicone was an extremely heavy drinker, she had never seen him drink to the point where he didn't know what he was doing (PC-R. V6/1060).

Occhicone also presented Father Ed Lamp (PC-R. V4/622).[2] According to Father Ed, Occhicone and Anita came to him for premarital counseling in 1984 or 1985 (PC-R. V4/623). He met with them as a couple once or twice, and also met alone with Occhicone once or twice after they had broken up (PC-R. V4/6624). Father Ed noted there was complete and total incompatibility, constant arguments and disagreements, from the very beginning (PC-R. V4/624). He had them come back for a second session against his better judgment, and told them after that session that he would not marry them (PC-R. V4/625). Father Ed recalled that Occhicone had had two people in his family die, and thought he was emotionally unstable (PC-R. V4/626). One time, Occhicone came to a session after the break up with alcohol on his breath, and told Father Ed

[2]Father Lamp had been unavailable at the time of the evidentiary hearing and his testimony was presented at a later date to conclude the hearing (PC-R. V4/619; V7/1259).

that he had been drinking heavily (PC-R. V4/628). Father Ed referred him to Alcoholics Anonymous; he could not say that Occhicone was an alcoholic or that he had an alcohol problem (PC-R. V4/628, 633). Father Ed testified that he was not contacted by an attorney on Occhicone's behalf until 1987 (PC-R. V4/632, 644).

Occhicone's final witnesses were mental health experts. Dr. Gerald Mussenden and Dr. Alfred Fireman had both testified at the penalty phase of the trial, Mussenden for the State and Fireman for the defense (DA-R. 1033, 1264; PC-R. V7/1136, 1220). Mussenden had initially been appointed by the court prior to trial to determine competency; his opinion that Occhicone was competent had not changed at the evidentiary hearing (PC-R. V7/1194). However, he had changed his opinion with regard to Occhicone's mental state at the time of the murders, in that he now felt that Occhicone had an impulse control disorder and that the murders occurred during an isolated explosive episode (PC-R. V7/1147, 1154-55, 1195). He felt that this was a crime of passion, not necessarily premeditated, and would not have occurred if Occhicone had not had so much to drink that night (PC-R. V7/2254, 1162-3). Mussenden admitted that the facts of the case suggested that Occhicone may have gone to the victims' house intending to kill everyone, including himself, but also thought it was possible he only intended to kill himself and then lost control when Anita's father hit him with a stick (PC-R.

V7/1147, 1153-4).

On direct examination, Dr. Mussenden stated that he believed Occhicone had omitted important information at the time of his evaluation, and that Mussenden did not have the whole picture prior to testifying at the trial (PC-R. V7/1137, 1150). He stated that recent affidavits by Lily Lawson, Ann Montana, and Joanne Carrico (a/k/a Parmenter) were critical in enlightening him about Occhicone's chronic alcoholism and the taunting by Anita (PC-R. V7/1145-6, 1196). In response to a question from the court, he stated that at the time of the trial he had no knowledge that Occhicone was an extremely heavy drinker and under serious emotional disturbances due to his break up with Anita; there was no reference in his notes to any of this (PC-R. V7/1163). He did not recall any specific conversations about Occhicone having made prior threats to kill the victims (PC-R. V7/1173). However, he also admitted that he had no idea what information he had about this case at the time of trial, as he no longer had any copies of depositions that he may have reviewed (PC-R. V7/1165, 1173).

Mussenden admitted having received a letter from prosecutor Michael Halkitis shortly after he was appointed to examine Occhicone which indicated that nine depositions were enclosed for his review (PC-R. V7/1165-7). He noted that even if he had depositions indicating that Occhicone was a heavy drinker, he may

not have given this much consideration in making a sanity determination (PC-R. V7/1174). Furthermore, he acknowledged that his deposition prior to trial indicated that he had reviewed other depositions; that he was aware that Occhicone had history of heavy drinking, had prior suicide attempts, was upset and angry about the situation with Anita; and that he suggested at that time that Occhicone may or may not have gone to the scene with the intent to kill the victims (PC-R. V7/1174-5, 1200-1, 1204).

Mussenden acknowledged that the transcript of Occhicone's evaluation indicated significant recall of the night of the murders (PC-R. V7/1178-92, 1194). Occhicone had described specific songs he had listened to, and even the brand of cologne he put on prior to going to see Anita (PC-R. V7/1180-2). He did not recall Occhicone's tone of voice, but noted that he had used profanity (PC-R. V7/1176). He agreed that Occhicone's ability to talk to Anita and specifically recall the events demonstrated that he had adequate control of his behavior and thought processes (PC-R. V7/1194-5). He concluded that Occhicone's recall suggests that, even though he was drinking heavily, "he wasn't that intoxicated, meaning it didn't interfere with his cognitive processing. He could still recall things; that would indicate there was a lot more control there" (PC-R. V7/1212). However, the ability to remember details would not detract from Mussenden's conclusion that the

murders had been committed during an isolated explosive episode (PC-R. V7/1212).

Dr. Fireman testified that he had been retained by the defense to assess competency at the time of the murders, competency at the time of the trial, and sentencing issues (PC-R. V7/1221). When asked, at the evidentiary hearing, about Occhicone's ability to form a specific intent, Fireman admitted difficulty in defining intent and premeditation, but stated that Occhicone's capacity to meditate was substantially diminished and that he was intoxicated at the time of the homicides (PC-R. V7/1222). When asked if he had been consulted about assisting with the guilt phase of the trial, he stated that he had essentially offered his opinions and suggested he could offer "expert testimony in the area of diminished capacity by reason of intoxication" (PC-R. V7/1222). Fireman had been provided with extensive background material and was familiar with all of the relevant facts about these murders prior to the trial; he had also been provided with Mussenden's report and the transcript of his taped evaluation (PC-R. V7/1225, 1233). Although Fireman indicated that he did not believe that Occhicone had the cognitive ability to meditate on the night of the murders, he stated repeatedly that there was not an inability to premeditate, just a diminished ability; that he could not plan as well as if he had not been drinking (PC-R. V7/1236-8, 1246). There

was no bar to premeditation, just a diminished capacity (PC-R. V7/1238, 1246).

After Occhicone rested his case, the State called prosecutor Halkitis to testify (PC-R. V7/1260). Halkitis related that, as lead trial attorney prosecuting Occhicone, he sent a letter to Dr. Mussenden shortly after Mussenden had been appointed to determine competency (PC-R. V7/1307-8). The letter briefly outlined the facts of the case, recited Occhicone's prior criminal history, and noted that there were depositions enclosed for Mussenden's review (PC-R. V7/1308). Halkitis recalled that the depositions sent included ones from Anita Gerrety, Lily Lawson, Debra Newell, William Anderson, Joanne Carrico, and Det. Petroksy (PC-R. V7/1311-2). He also recalled that he met with Dr. Mussenden in Mussenden's Brandon office and that they discussed the voluntary intoxication defense, noting the amounts of alcohol that had been consumed (PC-R. V7/1311). They also discussed the abortion and its effect on Occhicone, as Halkitis believed that this would come out in the evidence (PC-R. V7/1311).

Following the evidentiary hearing, the parties submitted written closing arguments (PC-R. V3/541-90). Thereafter, the court entered an extensive order, denying all relief (PC-R. V4/594-605). The court concluded that no deficient performance had been demonstrated, and that no evidence had been presented which would

dictate a reasonable probability of a different outcome (PC-R. V4/604). This appeal follows.

SUMMARY OF THE ARGUMENT

I. The trial court's denial of Occhicone's ineffective assistance of counsel claims is well supported by the evidence presented at the evidentiary hearing, the trial transcript, and relevant case law. The trial court applied the correct law and made factual findings that are consistent with the record.

II. Occhicone was provided a full and fair evidentiary hearing. He has failed to demonstrate any abuse of discretion in the evidentiary rulings he challenges in this appeal.

III. The postconviction claims which were denied prior to the evidentiary hearing were subject to summary denial as procedurally barred, facially insufficient, and/or affirmatively refuted by the trial record. The trial court used appropriate legal standards and properly denied these claims.

ARGUMENT

ISSUE I

WHETHER THE TRIAL COURT ERRED IN DENYING OCCHICONE'S MOTION FOR POSTCONVICTION RELIEF FOLLOWING AN EVIDENTIARY HEARING.

Appellant Occhicone initially challenges the trial court's ruling to deny postconviction relief following the evidentiary hearing that was conducted below. The hearing involved various aspects of Occhicone's claims of ineffective assistance of trial counsel, including the failure to investigate and establish the defense of voluntary intoxication; the failure to call experts during the guilt phase of the trial; the failure to call Audrey Hall as a witness; and the failure to present available mitigation (PC-R. V2/228-233). However, the testimony at the hearing clearly failed to substantiate any suggestion that Occhicone was constitutionally deprived of adequate counsel in either the guilt or sentencing phase of his capital trial. Therefore, the trial court properly denied these ineffective assistance of counsel claims.

In Strickland v. Washington, 466 U.S. 668, 689 (1984), the United States Supreme Court established a two-part test for reviewing claims of ineffective assistance of counsel, which requires a defendant to show that (1) counsel's performance was

deficient and fell below the standard for reasonably competent counsel and (2) the deficiency affected the outcome of the proceedings. The first prong of this test requires a defendant to establish that counsel's acts or omissions fell outside the wide range of professionally competent assistance, in that counsel's errors were "so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." 466 U.S. at 687, 690; Valle v. State, 705 So. 2d 1331, 1333 (Fla. 1997); Rose v. State, 675 So. 2d 567, 569 (Fla. 1996). The second prong requires a showing that the "errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable," and thus there is a reasonable probability that, but for counsel's errors, the result of the proceedings would have been different. 466 U.S. at 687, 695; 705 So. 2d at 1333; 675 So. 2d at 569.

As to all of the claims of ineffectiveness presented, Occhicone's argument and the testimony from the postconviction hearing establish only that his current counsel disagree with trial counsels' strategic decisions. This is not the standard to be considered. Rutherford v. State, 24 Fla. L. Weekly S3 (Fla. Dec. 17, 1998) ("Strategic decisions do not constitute ineffective assistance if alternative courses of action have been considered and rejected"); Rose, 675 So. 2d at 570 (affirming denial of

postconviction relief on ineffectiveness claim where claims "constitute claims of disagreement with trial counsel's choices as to strategy"); Cherry v. State, 659 So. 2d 1069, 1073 (Fla. 1995) (noting "standard is not how present counsel would have proceeded, in hindsight, but rather whether there was both a deficient performance and a reasonable probability of a different result"); Bryan v. Dugger, 641 So. 2d 61, 64 (Fla. 1994); State v. Bolender, 503 So. 2d 1247, 1250 (Fla.), cert. denied, 484 U.S. 873 (1987). In reviewing Occhicone's claims, this Court must be highly deferential to counsel:

> Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proven unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. 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. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance.

Strickland, 466 U.S. at 689; see also, Rivera v. Dugger, 629 So. 2d 105, 107 (Fla. 1993) ("The fact that postconviction counsel would have handled an issue or examined a witness differently does not mean that the methods employed by trial counsel were inadequate or

prejudicial"); Mills v. State, 603 So. 2d 482, 485 (Fla. 1992); Stano v. State, 520 So. 2d 278, 281, n. 5 (Fla. 1988) (noting fact that current counsel, through hindsight, would now do things differently is not the test for ineffectiveness).

All three of Occhicone's trial attorneys testified at the evidentiary hearing. Attorney Craig LaPorte was called by Occhicone the morning of his arrest (PC-R. V5/873-4). LaPorte associated attorney Bruce Boyer, who in turn brought Bruce Young to the team (PC-R. V5/767, 768, 772, 825, 873-4). Boyer and Young were former prosecutors with extensive criminal experience, including capital trials (PC-R. V5/767-9, 824, 864-5).

The defense team employed two investigative firms to assist in their trial preparation; in addition, they consulted with another experienced criminal defense attorney in LaPorte's office, Pete Proly (PC-R. V5/769-71, 832, 860-1, 879, 893-4, 902). The development of defense theories and the decisions as to which witnesses to present were determined as a team and in consultation with Occhicone (PC-R. V5/827, 859, 874-5, 882, 883).

The attorneys testified that a possible insanity defense was rejected fairly early in the case, as the experts could not offer information to support the defense (PC-R. V5/774, 776, 876). Since there clearly was no question that Occhicone had committed the murders, a defense of voluntary intoxication/diminished capacity

was adopted (PC-R. V5/828, 845, 875-77). Occhicone has not taken issue with the decision to adopt this defense; rather, he disagrees with the particulars regarding how the defense was presented to the jury.

With these general facts in mind, Occhicone's allegations of ineffectiveness will each be considered in turn. As will be seen, Occhicone has failed to meet his burden of proving that his attorneys were constitutionally deficient in any way; furthermore, even if his attorneys had performed as he now alleges they should have, there would not have been any difference in the outcome of the trial.

A. Guilt Phase

1. Alleged Failure to Present Evidence to Support Voluntary Intoxication Defense

Occhicone's claim that his trial attorneys should have presented further guilt phase evidence of his intoxication at the time of the murders is without merit. Although Occhicone suggests that his attorneys failed to establish his level of intoxication at the time of the murders, he has not offered any evidence which could have added appreciably to the testimony that was adduced at trial.

In rejecting this claim, the trial court stated:

> In Paragraphs 11 and 12 of Claim II, the

defendant alleges trial counsel's failure to investigate and present evidence of defendant's alcohol and drug intoxication. In essence, the defendant's attorneys testified that, during the course of the trial, Anita Gerrety, the daughter of the two victims, testified that the defendant was a heavy drinker and was staggering on the night of the offense. Trial counsel also submitted that various bar personnel also testified on cross-examination that the defendant had been drinking heavily for several months prior to the murders and was despondent over the breakup over himself and Anita Gerrety. Trial testimony was also presented concerning Anita Gerrety's alleged pregnancy with the defendant's child and her indication that she was going to obtain an abortion. Trial counsel also indicate that the defendant never told them or their mental health experts about his cocaine use so they were not aware that they should investigate that particular angle. It was also noted that the extreme detail of the defendant's statements to mental health experts, particularly Dr. Mussenden, was inconsistent with an intoxication defense. Also inconsistent with the intoxication defense was the fact that the defendant had told several witnesses that he wanted to kill the victims and make Anita Gerrety watch. The Court further notes that there is clear evidence that the defendant cut the phone wires just prior to the murders and that he broke into the house and killed the female victim after having killed the male victim outside the home. Although the defendant testified that he broke into the house to call the police, it is hard to imagine that could have been his intent in view of the fact that he had previously cut the phone wires. Testimony was also presented by the defendant from Father Ed Lamp, a priest who had had dealings with the defendant and Anita Gerrety prior to the time of the murders. Although Father Ed Lamp would clearly have been available as a witness at the time of the trial, the evidence presented during the course of the hearings on this motion indicate

> that he would have had little to contribute other than the fact that the defendant was apparently obsessed with Anita Gerrety and that the defendant and Anita Gerrety were highly incompatible. As to the defense of intoxication, Father Lamp can only say that he noted the odor of alcohol on the defendant's breath once and tried to get the defendant to go to alcoholic's anonymous. Testimony was also presented by attorney Peter Proly, a partner of one of the trial attorneys involved in this case. Mr. Proly is an attorney with considerable experience in the field of criminal law and testified that the defense team contacted him at or about the time the State rested it's case to discuss with him the strategic considerations of calling witnesses on behalf of the defendant. It is clear from Mr. Proly's testimony that the defense team felt that they had established as much through cross-examination of the State's witnesses as they would have established by calling additional witnesses on behalf of the defendant and, under the circumstances, they and Mr. Proly felt that preservation of the defendant's right to open and close the final argument was more important than any minimal benefit they might have received from calling any additional witnesses.

(PC-R. V4/594-6).

The attorneys acknowledged at the evidentiary hearing that they were aware other evidence suggesting intoxication was available; they determined, however, since similar evidence had been brought out in the cross examination of the state witnesses, it would be more beneficial for the defense to forego presenting their own case and preserve their right to have the last word in closing arguments to the jury (PC-R. V5/777, 778, 792, 828, 829, 831, 849, 850, 874, 880, 901-2, 906). They recognized that closing

arguments are not evidence, but considered, based on the evidence available to them, that their arguments would be more persuasive to a jury than the evidence that could be presented (PC-R. V5/787, 868-9, 906).

Clearly, the conclusion not to present additional guilt phase evidence of intoxication was a strategic decision, not subject to being second-guessed in a postconviction proceeding. Strickland, 466 U.S. at 689; Rutherford, 24 Fla. L. Weekly at S4; Rose, 675 So. 2d at 569. A similar situation was at issue in Rose. In that case, trial counsel was faulted for not presenting guilt phase witnesses that claimed to have seen the victim alive after the time she was alleged to have been kidnaped by Rose. In affirming the denial of postconviction relief, this Court noted that defense counsel had testified that each of the witnesses had inherent problems.

> In light of counsel's testimony at the hearing, it is apparent that counsel was aware of the witnesses in question and knowledgeable about the pros and cons of calling them as witnesses. Based upon this knowledge, counsel made an informed strategic decision not to call them. In light of the strong likelihood that the State could have successfully impeached each of these witnesses, it is apparent that there was a reasoned basis for counsel's decision. Hence, the trial court did not err in concluding that Rose failed to demonstrate that counsel's performance was deficient.

675 So. 2d at 570. This reasoning applies equally in the instant

case to establish the lack of merit in Occhicone's argument.

Occhicone asserts that his defense team at trial should have presented Patricia Goddard, Kimberly Connell, and Mike Stillwagon and should have more thoroughly cross examined Lilly Lawson and Cheryl Hoffman in order to prove his intoxication at the time of the murders. It is important to keep in mind that the defense did establish through cross examination that Occhicone had been a very heavy drinker, consistently drinking daily at least a quart of vodka and spending $60 to $70 a day on alcohol (PC-R. 783, 798, 846-7, 900; see also DA-R. 448-451, 453, 467). This level of drinking had been maintained for a seven to nine month period prior to the murders (PC-R. V5/798, 847; DA-R. 455). In addition, the defense brought out Anita Gerrety's statements that when she saw Occhicone at the time of the murders she could tell he'd been drinking, he was staggering, and smelled of alcohol (PC-R. V5/878, 881, 901; DA-R. 314-318).

The murders in this case occurred at about 4:00 a.m. on June 10, 1986 (DA-R. 249). Although Anita testified about Occhicone being affected by alcohol at that time, none of the other witnesses he now claims should have been presented saw him at the time of the murders. Patricia Goddard met Occhicone on June 8 when he wrecked his car in her yard (PC-R. V/6/997-99, 1001). Occhicone appeared to have been drinking (PC-R. V6/999). Goddard did not offer any

testimony at the evidentiary hearing as to Occhicone's state of sobriety on the day of the murders, or even the day before the murders (PC-R. V6/997-1010). Thus, her testimony would not have added anything to that elicited by the defense at trial.

Kimberly Connell stated that she saw Occhicone "sometime" early in the morning of June 10, that he woke her up, and she saw him for fifteen or twenty minutes (PC-R. V6/1016). Connell stated Occhicone was intoxicated, as he had been every time she had ever seen him, since meeting him June 8 (PC-R. V6/1013, 1015-6). Since Connell could not say when, what, or how much Occhicone had been drinking, however, when she saw him late June 9 or early June 10, her testimony is consistent with, but does not add to, Anita's trial testimony that he had been drinking at the time of the murders.

As to the failure to present Goddard and Connell, the trial court held:

> In Paragraph 15 of Claim II, the defendant alleges that trial counsel were deficient in failing to call Ms. Schuh n/k/a Ms. Connell and Ms. Goddard to describe the wreck or wrecks of the defendant's car on June 8. Although there was very little testimony from defense counsel regarding these two witnesses, it is difficult to imagine that their testimony would have added any significant weight to the defense. Ms. Connell spent the night with the defendant on the night prior to the murders and clearly testified to his heavy drinking during that time period and beginning again, with very little sleep, on the morning of the murders.

> Ms. Connell also saw the defendant shortly prior to the murders and again can testify that the defendant was heavily intoxicated. Given the fact that Anita Gerrety, the murder victims' daughter, had already conceded that the defendant had been drinking heavily during the month leaving [sic] up to the murders, smelled of alcohol and was staggering on the night of the murders, it would appear that testimony provided by Ms. Connell and Ms. Goddard would be cumulative.
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> ...
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> Further, witness Connell testifies that the defendant arrived at her residence at about 2:30 a.m. on June 10th and was very intoxicated and upset. Although the defendant only stayed a few moments, it is clear that this would have been just prior to the murders. While it is undeniable that this is relevant and material testimony, it is once again difficult to imagine how this would have been anything but cumulative testimony. To emphasize again, the defense was highly successful in cross examining the State's witnesses and producing testimony that the defendant had been drinking heavily leading up to the time of the murders and in obtaining from the murder victim's own daughter the fact that at the actual time of the murders, the defendant was staggering and smelled of alcohol.

(PC-R. V4/597, 600-601).

Similarly, Mike Stillwagon, Lilly Lawson, and Cheryl Hoffman could not testify as to Occhicone's state of sobriety at the time of the murders. They had not seen Occhicone for hours prior to the murders (PC-R. V6/1039-40, 1055). Hoffman saw Occhicone while she was working at Shooters on June 9 between noon and 6:00 p.m.; she did not recall how much he drank (PC-R. V6/1055). Lawson last saw Occhicone when he left the bar with Stillwagon sometime between

8:00 and 11:00 p.m. on June 9 (PC-R. V6/1039-40).

According to Stillwagon, they left around 8:30; Occhicone had a "slight buzz" (PC-R. V6/1072, 1073, 1078). He noticed that Occhicone's car did not have all of the damage indicated in the sheriff's inventory of when the car was seized after the murders, but he admitted that it was dark outside, he had been drinking, and he did not really stop and inventory the damage to the car (PC-R. V6/1074-80). He did not remember whether Occhicone had anything to drink after they left (PC-R. V6/1078). When he left Occhicone's house shortly thereafter, Occhicone had passed out (PC-R. V6/1084). The fact that these witnesses had seen Occhicone apparently drunk earlier in the day did not add anything to Anita's testimony that he appeared to have been drinking at the time of the murders.

The trial court specifically found that any further evidence from Lawson would have been cumulative, and noted that serious consideration had been given to presenting her as a defense witness, as she was under a defense subpoena at the time (PC-R. V4/598). The court similarly found Hoffman's testimony as to Occhicone's heavy drinking and drinking close to the time of the murders to be cumulative (PC-R. V4/599). As to Stillwagon, the court stated:

> Mike Stillwagon also confirms that he was with the defendant at Shooters on the evening of June 9th, but he describes the defendant as having had a "slight buzz" and that the

> defendant was "on the verge" of being intoxicated. As to evidence concerning damage to the defendant's car, Stillwagon indicates that he did not inspect the defendant's car carefully and did not note all the damage to it. Once again, it is difficult to determine how any of this could have been other than cumulative to evidence otherwise produced during the course of the trial concerning the defendant's drinking habits and his heavy drinking at or about the time of the offense. It should also be noted that defense attorney Craig LaPort indicates that the defendant did not even tell his trial attorneys about Stillwagon and Cook until after the guilt phase of the trial.
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> ...
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> In Paragraphs 29 through 33 of Claim II, the defenses [sic] alleges ineffectiveness on the part of trial counsel for not thoroughly exploring an inventory sheet on the defendant's car which revealed more damage than Mike Stillwagon allegedly described earlier in the evening on June 9th. Obviously, this kind of evidence might support an argument that between the evening hours of June 9th and the early morning hours of June 10th, the defendant had even more accidents. ... Although the Sheriff's Office Inventory Sheet was produced, there is nothing to show how the damage occurred and, as previously demonstrated herein, Mike Stillwagon was quite vague in the damage he described and admits that he did not pay careful attention to the defendant's car. All in all, it is hard to see how this could have contributed much to the defense.

(PC-R. V4/600, 601).

Furthermore, Occhicone has failed to establish that defense counsel knew or reasonably should have known about Connell and Stillwagon as potential witnesses. LaPorte testified at trial that he learned about Stillwagon after the guilt phase had concluded

(PC-R. V5/896-7). He did not know of Connell, and her name was not reflected in any of the investigators' reports he had obtained (PC-R. V5/906-7). There is no suggestion that Goddard (whom the defense deposed prior to trial, see PC-R. V5/920) or Occhicone himself provided Connell's name to counsel. Thus, no deficient performance has been demonstrated; but even if counsel had located these witnesses as Occhicone now suggests, the outcome of the trial would not have changed since, as outlined above, their testimony would not have contributed to the defense.

Occhicone asserts that, because his attorneys failed to investigate and present evidence to support his intoxication defense, "the only" evidence presented to the jury about his alcohol consumption and state of mind on the day of the offense was from Debra Newell (Appellant's Initial Brief, p. 29). The trial court rejected this factual contention:

> In Paragraphs 13 and 14 of Claim II, the defendant alleges that the only evidence of defendant's intoxication on the day of the murders came from Deborah Newell, a witness for the State. Based upon the testimony presented, this allegation appears to be inaccurate. In addition to Deborah Newell, Anita Gerrety testified at trial that she smelled alcohol on the defendant's person and that the defendant was staggering on the night of the murders. It also appears that there was a great deal of testimony on cross-examination concerning the defendant's heavy drinking on a constant basis during the month leading up to the murders. It is difficult to imagine that the defense could have presented a much more potent witness than the daughter

> of the murder victims and former paramour of the defendant.

(PC-R. V4/596).

An attorney is not negligent for failing "to call everyone who may have information about an event. Once counsel puts on evidence sufficient, if believed by the jury, to establish his point, he need not call every witness whose testimony might bolster his position." Jennings v. State, 583 So. 2d 316, 321 (Fla. 1991). This Court has rejected the theory that the existence of cumulative testimony, not presented at trial, establishes ineffective assistance of counsel. Woods v. State, 531 So. 2d 79, 82 (Fla. 1988) (acknowledging that "more" is not necessarily "better," even in context of penalty phase mitigation). Since Occhicone has failed to offer any evidence which could have significantly added to his defense, he has not shown his attorneys were ineffective in their decision not to present their own guilt phase witnesses to support his voluntary intoxication defense.

Occhicone criticizes the trial court's order for dismissing this testimony as cumulative to Anita's testimony, asserting that Anita only suggested that Occhicone was intoxicated and that the specific level of intoxication was not established. However, none of the postconviction evidence can offer anything other than the suggestion already acknowledged. None of the purported witnesses can identify how much, when, or what Occhicone actually drank

before the murder.

The cases cited by Occhicone where defense counsel are faulted for having failed to investigate are not applicable on these facts. This was a case where Occhicone's defense was thoroughly investigated; attorneys talked to and deposed witnesses, investigators were sent to the bars where Occhicone used to drink, and witnesses were subpoenaed. The defense was successful in eliciting testimony to support their defense without having to present any witnesses, and after lengthy discussion and consideration, strategically chose not to call any lay witnesses to testify about Occhicone's intoxication on the night of the murders. No deficiency has been demonstrated with regard to counsel's performance; but since the evidence which is now being offered does not add significantly to that admitted at the time of trial, any possible deficiency could not have affected the outcome of the trial.

2. Failure to Present Expert Mental Health Witnesses

Occhicone's claim that his trial attorneys should have presented his mental health witnesses during the guilt phase to challenge the State's evidence of premeditation is also without merit. Once again, the testimony from the evidentiary hearing established that Occhicone's trial attorneys made a reasonable,

informed, strategic decision against presenting his mental health experts during the guilt phase of his trial. Therefore, his ineffective assistance of counsel claim premised on this decision must fail.

The trial court specifically rejected this claim:

> In Paragraphs 38 through 42 of Claim II, the defendant assigns as evidence of ineffectiveness of trial counsel, the failure of trial counsel to present expert testimony regarding the defendant's extensive use of alcohol and drugs and the effect that it may have had upon him. In response, trial counsel testify that there really wasn't any such testimony to present. They indicate that Dr. Mussenden did not think the defendant was intoxicated at the time of the incident and Dr. DelBeato opined that the defendant did not have any major mental disorder but simply had a personality disorder. In addition, they indicate the presentation of Dr. Mussenden's testimony would have exposed the extremely detailed tape recorded statement the defendant made, which would have been inconsistent with a defense of voluntary intoxication. When Dr. Mussenden was called as a witness during the hearing on this motion, he initially claims not to have known much of the testimony about the extent of the defendant's drinking and the depth of the defendant's dismay over his breakup with Anita Gerrety. Dr. Mussenden indicates that trial counsel never spoke to him except at his deposition. This testimony on the part of Dr. Mussenden is contradicted by the testimony of Assistant State Attorney Michael Halkitis who indicates that he sent depositions to Dr. Mussenden and had conversations with him on these topics. It is also clear that the defendant's statement would have exposed something concerning the extent of the defendant's drinking.

(PC-R. V4/602-3).

At the hearing, Occhicone's trial attorneys testified to several different reasons for deciding against using their mental health experts, Dr. Fireman and Dr. DelBeato, during the guilt phase. One reason was that there was very little chance of obtaining a verdict of less than first degree murder, even with these witnesses, and counsel reasonably believed it would be more beneficial to use them in penalty phase, where they thought they at least had a chance for a favorable jury recommendation (PC-R. V5/773-4, 791, 829-30). They did not think they could credibly offer the doctors at both phases of trial (PC-R. V5/792, 815). Furthermore, all of the mental health experts that could be presented by the defense or by the State in rebuttal had very damaging information that would be harmful to the defense (PC-R. V5/802-5, 815, 851-9, 876-7, 902-4, 919, 924). The desire to preserve the final closing argument was also a consideration (PC-R. V5/831, 881). Thus, the defense team knowingly weighed the pros and cons of presenting this testimony, resulting in a reasoned, informed decision, and no constitutional deficiency has been demonstrated with regard to this strategic decision (PC-R. V5/804, 830, 850, 859, 902).

In addition, the experts that testified at the hearing did not offer testimony that would have been beneficial in the guilt phase. Dr. Mussenden concluded that Occhicone was not intoxicated, but his

ability to premeditate was diminished because he was experiencing an isolated explosive episode; Dr. Fireman agreed that the ability to premeditate was not absent entirely, it was only diminished (PC-R. V7/1194-5, 1212, 1236, 1238, 1246). And although Occhicone claims that his attorneys never consulted with Dr. Fireman about providing useful guilt phase testimony, when he was asked at the evidentiary hearing if he had been consulted, Fireman stated

> I expressed essentially what I have said to you today about what I viewed to be the dynamics of the occurrence of the crime and defined roles for myself for service to that team of attorneys. And I believe they knew that they could access my expert testimony in the area of diminished capacity by reason of intoxication, albeit voluntary, and that they could access my testimony for going below the guidelines.
>
> And that if they explored the defense of not guilty by reason of insanity there were some things that I could say in the area of appreciate the nature and quality of his action and I could speak to the issues of cognition and impulse control and, so to speak, heat of passion, but that I was hesitant about the final absolute when the final question came to me whether I could be fully comfortable with the yesses to the NGRI defense, but I had no equivocation under diminished responsibility by voluntary intoxication.

(PC-R. V7/1222-3). Therefore, it is clear that Fireman was asked about providing relevant guilt phase testimony.

Once again, Occhicone's position presents merely a disagreement about trial strategy. In hindsight, he is nitpicking the careful decisions that were made at the time of trial. No

ineffective assistance of counsel had been established.

3. Failure to Present Audrey Hall

Occhicone's claim that his trial attorneys should have presented Audrey Hall as a defense witness is similarly without merit. Audrey Hall could have testified at trial that Occhicone routinely parked his car where it was found the night of the murders, and Occhicone claims this testimony should have been presented to rebut the State's argument that parking his car away from the victims' house on the night of June 10 demonstrated his premeditation.

The trial court specifically rejected this claim, noting:

> In Paragraph 43 of Claim II, the defendant alleges that trial counsel was ineffective for failure to contradict the state's evidence that the defendant parked his car in an unusual place just prior to the murders. The trial attorneys indicate that they had Ms. Hall under subpoena to say that the defendant parked his car in the usual place and could have used her even though she had not been properly listed as a witness, as long as the State got an opportunity to depose her before she testified. They further indicate that it wasn't necessary to use her since Anita Gerrety admitted on cross-examination that the defendant always parked where he parked on the night of the murders. Furthermore, the trial attorneys were aware of the fact that the state had Ms. Nickerson as a witness and that she was prepared to say that the location at which the defendant parked on the night of the murders was *not* where the defendant usually parked and that Ms. Nickerson would have been used as a rebuttal

> witness if Ms. Hall had been called by the defendant. As to Ms. Hall, there was some indication that she is presently suffering from Alzheimers, but no evidence of this was admitted. Basically, testimony concerning what Ms. Hall would have testified to was brought in as hearsay on the part of an investigator who had spoken to her. In view of the fact that hearsay would have been admissible in the penalty phase of the trial, this Court deems it appropriate to consider it at the hearings on this motions [sic]. Under those circumstances, it appears that Ms. Hall would have testified that the defendant parked in his usual spot on the night of the murders and that the defendant was a man with many problems. Once again, given the fact that Ms. Gerrety admitted on cross-examination that the defendant parked in the place he customarily parked, it would seem to have been unnecessary for the defense to give up the right to open and close the final argument to simply put on cumulative testimony. The Court is also doubtful about the over-all significance of where the defendant did or did not customarily park his automobile when visiting the victims' residence.

(PC-R. V4/603-4).

At the evidentiary hearing, the defense attorneys all believed that Hall was not presented because they had been able to elicit the same testimony in Anita's cross examination (PC-R. V5/784, 840, 887, 905). In addition, however, Bruce Young recalled that the State had a witness available, Cheryl Nickerson, that would have rebutted Hall's testimony and stated Occhicone routinely parked his car at the Artzner's house (PC-R. V5/860); Bruce Boyer also noted that presenting Hall would have led to detrimental testimony about Occhicone's routinely annoying the neighbors by driving away, loud

and fast, at 3:00 or 4:00 a.m. (PC-R. V5/785). The fact that the attorneys' memory is not perfectly clear ten years after the trial does not demonstrate they were constitutionally deficient during trial. The key is whether they had a reasonable basis not to use Hall's testimony, which they obviously knew about at trial (PC-R. V5/784, 840, 860, 886; DA-R. 483, 486, 616, 626). An attorney that makes an informed decision not to call a witness because he's aware that the State can impeach or rebut the witness is not constitutionally deficient. Rose, 675 So. 2d at 570.

In addition, given the more persuasive evidence of premeditation -- the prior threats to kill Anita's parents and make her watch, the cutting of the phone wires, the effort taken, with regard to Mrs. Artzner, to break through a locked door and shoot her four times -- evidence from Hall which may have rebutted the marginally relevant testimony of where Occhicone had parked his car (which itself could have been rebutted) would not have made any difference in the outcome of this case. Therefore, no deficiency or prejudice has been demonstrated by counsels' failure to present Audrey Hall's testimony at trial.

Even if this case had been tried as collateral counsel insists it should have been, the result would not have been any different. The evidence of premeditation presented at trial was very strong. There were numerous prior threats against the victims, including

threats to kill them in front of Anita, which is what actually ultimately occurred (PC-R. V5/811-2; DA-R. 264, 446, 466, 509). The phone wires to the house had been ripped out prior to the shootings (PC-R. V5/812; DA-R. 407, 418). As to Mrs. Artzner, Occhicone broke a jalousie glass and reached in, unlocked the door, went into the house, and shot her four times (PC-R. V5/910; DA-R. 256-258, 397-398, 597-598). Even Kimberly Connell, Occhicone's best hope for a witness to his intoxication, stated that he was able to drive and make rational decisions when she observed him intoxicated (PC-R. 1019-21, 1023, 1025, 1030, 1031, 1033). Furthermore, Occhicone's detailed recall suggests that he was not intoxicated. All of these facts were inconsistent with a credible defense of intoxication, and would have caused any reasonable fact finder to reject even an expert's opinion that Occhicone was too intoxicated to form an intent to kill. See, Jennings, 583 So. 2d at 319; White v. State, 559 So. 2d 1097, 1099 (Fla.), cert. denied, 516 U.S. 1017 (1995) (defendants' ability to recall and deliberateness of their actions inconsistent with intoxication defense). Given the strength of the State's case of premeditation, even if the defense at trial had presented the evidence of Occhicone's intoxication, the mental health experts, and the testimony of Audrey Hall, he still would have been convicted of first degree murder. Thus, he has failed to demonstrate that his

attorneys were deficient or that any possible deficiency could have prejudiced his trial. His claim of ineffective assistance of counsel in the guilt phase of his trial must be denied.

B. Penalty Phase

Occhicone's claim that his trial attorneys were ineffective during the penalty phase of his trial is also unpersuasive. His assertions that counsel failed to investigate and prepare is refuted by the trial and evidentiary hearing records. Clearly, counsel tried to develop family and life history witnesses, thoroughly explored mental mitigation, and presented the sad story of his relationship with Anita. His statements of a "glaring absence of any testimony at trial concerning Mr. Occhicone's state of mind and state of intoxication on the day of the offense" and that the only such evidence was from "mental health experts who were left to rely solely upon the self-report of Mr. Occhicone" (Appellant's Initial Brief, pp. 54, 55) are serious misrepresentations of the record. In fact, Mr. Occhicone's state of mind was explored by three mental health experts, and none of them relied solely upon his self-report in reaching their conclusions (DA-R. 973, 976-8, 998-1001, 1038, 1202-3).

Collateral counsel also suggests that Occhicone's friend, Ann Montana, and Father Ed Lamp should have been presented in the

penalty phase to offer further evidence of his obsession with Anita Gerrety and his emotionally distraught condition brought on by their breakup. It must be noted, however, that such evidence was admitted at length in the penalty phase through defense witness Joanne Carrico (DA-R. 925-956). At trial, Ms. Carrico testified that she had known Occhicone for about two years, that he was a steady bar customer of hers (DA-R. 930-31). He had been going out with Anita when Ms. Carrico met him, and he was always happy and bubbly (DA-R. 934). After they broke up, he was very depressed, moody, and listless (DA-R. 934). She described the ups and downs of Occhicone's relationship with Anita after the breakup, and how Anita would often go to his house, but hid it from her parents (DA-R. 937-38). She described helping Occhicone write a letter to Anita, asking her to leave him alone and stop calling if she wasn't going to stay with him (DA-R. 938). She had seen Occhicone minutes after Anita had told him about her alleged abortion; Occhicone was upset, crying, shaking, and vomiting (DA-R. 938-39). He talked about Anita for hours on end (DA-R. 939). During the week before the murders, Occhicone had called her, very upset, out of his mind, disturbed; he talked of killing himself (DA-R. 940). He was drinking a great deal of alcohol, mixing it with blood pressure pills, tranquilizers, and marijuana (DA-R. 941). In addition, there had been significant testimony of the stormy relationship

between Occhicone and Anita and Occhicone's drug and alcohol use admitted though other witnesses in the guilt phase (DA-R. 451, 454).

In light of the testimony by Ms. Carrico, defense counsel cannot be deemed ineffective for failing to present essentially the same testimony by Ann Montana. Jennings, 583 So. 2d at 321; Woods, 531 So. 2d at 82. The defense team was aware of Montana at the time of trial, and strategically chose to present this evidence through Carrico (PC-R. V5/897). This was a reasonable, informed decision, and no constitutional deficiency has been demonstrated in this regard. Rutherford, 24 Fla. L. Weekly at S4.

As to counsels' failure to present Father Ed Lamp, the attorneys testified at the evidentiary hearing that they contacted all of the priests named to them by Occhicone (PC-R. V5/841, 885, 915). They were provided three names, Father Ed, Father Madden, and Father Behr (PC-R. V5/915). Mr. LaPorte spoke with Father Madden over the phone; Madden did not want to become involved and could only have said that the Catholic church does not believe in the death penalty, but if asked, Madden would have offered his personal opinion to the contrary (PC-R. V5/861, 909). Thus, the defense declined to use him (PC-R. V5/861). Attorneys LaPorte and Boyer went to speak with a Father Ed in person, but he indicated he did not want to participate, and he also had information which

would be harmful to the defense (PC-R. V5/861, 915-6, 924). None of the priests gave any indication that they could provide helpful testimony, so they were not called at trial (PC-R. V5/924). Since a reasonable investigation was conducted, no deficient performance with regard to either Ann Montana or Father Ed Lamp has been shown.

Even if some deficiency is assumed with regard to either of these witnesses, no possible prejudice has been demonstrated. The most these witnesses could have offered was testimony cumulative to that presented by Joanne Carrico and a number of guilt phase witnesses. Thus, the outcome of the penalty phase proceeding would not have changed even if these witnesses had been presented. See, Provenzano v. Dugger, 561 So. 2d 541, 546 (Fla. 1990) (cumulative background witnesses would not have changed result of penalty proceeding); Routly v. State, 590 So. 2d 397, 401-402 (Fla. 1991) (additional evidence as to defendant's difficult childhood and significant educational/behavioral problems did not provide reasonable probability of life sentence if evidence had been presented); Mendyk v. State, 592 So. 2d 1076, 1080 (Fla. 1992) (asserted failure to investigate and present evidence of mental deficiencies, intoxication at time of offense, history of substance abuse, deprived childhood, and lack of significant prior criminal activity "simply does not constitute the quantum capable of persuading us that it would have made a difference in this case");

Lusk v. State, 498 So. 2d 902, 906 (Fla. 1986) (cumulative evidence would not have affected ultimate sentence imposed), cert. denied, 481 U.S. 1024 (1987).

On these facts, Occhicone has failed to meet his heavy burden of establishing either a deficient performance or a prejudicial effect with regard to either phase of his capital trial. His postconviction claim of ineffective assistance of trial counsel was properly denied.

ISSUE II

WHETHER THE TRIAL COURT DENIED OCCHICONE A FAIR AND FULL EVIDENTIARY HEARING.

Occhicone next challenges the adequacy of the evidentiary hearing conducted below. He claims that the trial judge erred by excluding testimony of purported mitigation witnesses and by permitting the prosecutor to testify at the hearing. However, Occhicone has failed to establish any abuse of discretion in these evidentiary rulings. Therefore, he is not entitled to relief in this issue.

A. Exclusion of defense mitigation witnesses

Occhicone initially attacks the trial court's ruling to exclude testimony from Kenny Volpe, Andy Kinash, and Brenda Balzano. These witnesses were proffered to have relevant life history information that allegedly could have been presented in mitigation at the time of trial. The court below ruled that these witnesses could not testify until evidence had been admitted which suggested that Occhicone's trial attorneys either knew or reasonably should have known about these witnesses (PC-R. V6/964-76, 1113, 1115). Since no such showing was ever made, the court was correct in excluding the proffered testimony by these witnesses.

Florida court rules recognize that evidence may have

conditional relevance; that is, evidence may only be relevant subject to proof of a preliminary fact. See, § 90.105(2), Fla. Stat. The testimony of Volpe, Kinash, and Balzano regarding Occhicone's family history involves such evidence. This testimony is not probative of the ultimate issue of whether trial counsel investigated this mitigation; it is only relevant as to what information may have been discovered had the investigation led to the discovery of these witnesses. In other words, the testimony at most could demonstrate *prejudice* rather than *deficient performance* on the part of trial counsel. The trial judge below considered conditionally admitting this testimony, and invited collateral counsel to lay a predicate of deficiency as a preliminary fact to satisfy the conditional relevance of this testimony. However, counsel was unable to proffer a sufficient nexus between trial counsel's performance and the discovery of these witnesses to establish such a predicate.

Thus, the substance of the testimony of these witnesses would not be relevant unless it had been established that the witnesses were reasonably available at the time of trial, and that the defense attorneys knew or reasonably should have known about these witnesses. Since that predicate was not established, the trial court correctly excluded this testimony.

Occhicone cites cases generally demonstrating that a defense attorney has an obligation to investigate and prepare for the

penalty phase of a capital trial. In this case, that was done. All of the attorneys talked to family members and tried to develop life history mitigation (PC-R. V5/797, 833-37, 862, 882, 892-5). They relied on a variety of sources, including Occhicone himself, to find potential witnesses (PC-R. V5/917). Yet they had not heard of the proffered witnesses, and Occhicone has never identified a specific deficiency in their investigation that led to the failure to find these witnesses. The witnesses are not family members, and collateral counsel has never revealed how the witnesses were discovered; instead, Occhicone simply asserts that as long as the witnesses were out there, and defense counsel did not find them, ineffectiveness has been proven.

Occhicone also alleges that he should have been allowed to present these witnesses under his general due process right to present his case. However, it is well established that this right is subject to the appropriate rules of procedure. In Chambers v. Mississippi, 410 U.S. 284 (1973), the Court recognized that an accused seeking to exercise his right to present witnesses in his own defense must comply with "established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence." 410 U.S. at 302. Because the witnesses in the instant case were properly excluded as irrelevant, Occhicone's reliance on Chambers is misplaced.

Since Occhicone has not demonstrated any relevance in the

history known by these witnesses, in light of his failure to show that trial counsel knew or should have known about them, the trial court properly excluded the proffered testimony.

B. Permitting testimony of prosecutor Halkitis

Occhicone also challenges the overruling of his due process objection when the State presented Assistant State Attorney Michael Halkitis as a witness at the evidentiary hearing (PC-R. V7/1260-1306). Citing Holloway v. State, 705 So. 2d 646 (Fla. 4th DCA), rev. denied, 717 So. 2d 538 (1998), he claims that allowing the dual role of prosecutor and witness violated his due process rights, "because the credibility of the witness is inappropriately buttressed by his position with the State and simultaneously undercut by his position as an advocate" (Appellant's Initial Brief, p. 63).

The trial court reviewed this situation extensively at the time of the hearing. The record reflects that Dr. Mussenden was called as a witness by Occhicone to establish that Mussenden's opinion on Occhicone's state of mind at the time of the offense could have been more favorable to the defense if he had been provided with more information prior to trial (PC-R. V5/938-9). Since the State did not have any notice that Mussenden would be a witness, the prosecutor was permitted to depose Mussenden in the middle of the hearing (PC-R. V5/948). When Mussenden testified the

next day, he stated that he had changed his opinion about Occhicone's mental state after reading affidavits provided by collateral counsel (PC-R. V7/1136-41, 1144-47). The relevant affidavits, prepared during the postconviction process, were by Lily Lawson, Joanne Parmenter, and Ann Montana (PC-R. V7/1138, 1144-45). Prosecutor Halkitis objected to Mussenden's reliance on the 1992 affidavits as opposed to what these same witnesses had said in 1986, noting that depositions had been provided to Mussenden prior to the trial (PC-R. V7/1141). Occhicone's attorney remarked that it should be clear to Halkitis what information Mussenden had in 1986, since Halkitis provided it (PC-R. V7/1142). The trial judge commented that Halkitis could bring this out on cross examination (PC-R. V7/1142).

During direct examination, Mussenden indicated that he did not believe that he had all of the necessary information to make a determination about Occhicone's mental state at the time of trial, and would have liked to have known about Occhicone's conflicted relationship with Anita and the extent of Occhicone's drinking (PC-R. V7/1137, 1146, 1149, 1163). In response to a question from the judge, Mussenden stated that he had no knowledge at the time of trial that Occhicone was an extremely heavy drinker and under serious emotional disturbance due to his difficulties with Anita (PC-R. V7/1163).

On cross examination, Mussenden recognized a letter that he

had received from prosecutor Halkitis prior to trial; the letter indicated that nine depositions were being sent for Mussenden's review (PC-R. V7/1165-66). However, Mussenden stated that he had combed his office and he had not been able to locate these depositions, they may have been misplaced or destroyed (PC-R. V7/1165). He acknowledged that his trial deposition and testimony clearly indicate that he had reviewed depositions prior to trial, but he had no memory of which depositions he had seen (PC-R. V7/1171, 1173, 1174). Mussenden did not keep any records or notes of calls or conversations he may have had with Halkitis, and he did not recall specific discussions about Occhicone making statements of his intent to kill Anita's family (PC-R. V7/1169, 1173). He testified that he had no idea what he may have known about this case in 1987 (PC-R. V7/1173).

Following Dr. Mussenden's testimony, Occhicone presented the testimony of Dr. Alfred Fireman (PC-R. V7/1219). Fireman was cross examined by prosecutor Scott Harmon (PC-R. V7/1236). Before recessing for the evening, the judge told the parties that he would like them to try to determine which depositions had been taken prior to the State's letter to Dr. Mussenden, and which of these may have involved Occhicone making threats against the victims, since Mussenden's pretrial deposition related that he had reviewed such statements in a deposition (PC-R. V7/1249-50). The court wanted to try to reconstruct what Mussenden may have had available

to him prior to trial (PC-R. V7/1249). The judge noted that prosecutor Halkitis had apparently provided the depositions to Mussenden, "[a]nd the Doctor, due to the extreme passage of time, quite understandably, doesn't have all the records that he, I, and all the rest of you would like him to have so we're going to have to do the best we can at reconstructing it" (PC-R. V7/1249-50).

The next morning, Occhicone rested his case and the State called prosecutor Halkitis as a witness (PC-R. V7/1259-60). Occhicone objected on a number of bases (PC-R. V7/1260, 1289). The State proffered that the need for this testimony arose when Mussenden testified the day before that he did not know at the time of trial that Occhicone was a chronic alcoholic, that there were prior threats to kill the victims, and that his relationship with Anita was so dysfunctional (PC-R. V7/1273). Halkitis would testify to his discussions with Mussenden about these things prior to trial, and would be able to identify at least six of the depositions that had been provided to Mussenden (PC-R. V7/1274). Halkitis stated that when Mussenden testified he did not know these things, Halkitis realized that he might have to be a witness, but at that point he was the only one prepared to cross examine Mussenden and it would have been impractical to have excused himself from representing the State at that point (PC-R. V7/1275). Mussenden's testimony had been a complete surprise (PC-R. V7/1275). It should be noted that, at the time of the hearing, Occhicone

conceded that the prosecutor could supply the names of the depositions which had been provided to Dr. Mussenden, but nothing more (PC-R. V7/1286).

The judge determined that the State was not aware of the need for Halkitis' testimony until Dr. Mussenden's mid-hearing deposition, and at that point it was too late to for anyone else to represent the State (PC-R. V7/1305). He noted that, if Mussenden's testimony was unexpected, the State was entitled to rebut it (PC-R. V7/1292). The judge commented that he had been surprised by Mussenden's testimony, because Occhicone's drinking was extensively known at the time of trial (PC-R. V7/1293). He also noted that he felt it was important to find out what Mussenden knew at the time of trial, because if he had all of this information then, the fact that he had now changed his mind would not be a sufficient basis for postconviction relief (PC-R. V7/1293). After reviewing Mussenden's mid-hearing deposition, the court overruled the objection to Halkitis' testifying, finding that by the time the State was reasonably aware of the need for Halkitis to testify, the problem had already been created (PC-R. V7/1305-6).

Occhicone has failed to demonstrate any abuse of discretion in the trial court's ruling permitting Halkitis to testify under the exceptional circumstances of this case. Although Occhicone relies on the general rule against the dual role of prosecutor/witness, courts have recognized permissive exceptions to this rule in

situations where the testimony is unavoidably necessary. See, Perez v. State, 474 So. 2d 398, 400, n. 4 (Fla. 3d DCA 1985).

This Court reviewed a similar issue in Scott v. State, 717 So. 2d 908 (Fla.), cert. denied, 119 S.Ct. 425 (1998). In that case, the trial prosecutor also represented the State at the postconviction evidentiary hearing. Prior to trial, Scott sought unsuccessfully to have the prosecutor disqualified, because Scott intended to use the prosecutor as a witness on Scott's Brady claim. The motion to disqualify was denied, and the prosecutor both represented the State and testified for Scott at the hearing. On appeal, this Court rejected the claim that the prosecutor's dual role in that case violated ethical and constitutional considerations. In so holding, this Court recognized that the concerns addressed by the witness/advocate rule were not implicated on the facts of that case, and that any contrary result would "bar many trial level prosecutors -- who may be the most qualified and best prepared advocates for the State -- from representing the State" in postconviction evidentiary hearings. 717 So. 2d at 910, 911.

One concern typically identified as being fostered by the advocate/witness rule is unfair prejudice to the other side, as the testimony may carry increased weight with the jury because it came from an advocate; another concern is juror confusion between advocacy and testimony. Scott, 717 So. 2d at 910, n. 8. Federal

courts have discussed particular concerns when the advocate/witness situation involves a prosecutor: a testifying prosecutor may not be a fully objective witness; the prestige of a prosecutor's office may artificially enhance his credibility as a witness; possible juror confusion between advocacy and testimony; and the need for public confidence, which requires avoiding any possible appearance of impropriety. See, United States v. Hosford, 782 F.2d 936, 938-9 (11th Cir.), cert. denied, 476 U.S. 1118 (1986); United States v. Edwards, 154 F.3d 915, 922 (9th Cir. 1998) (rules against prosecutorial vouching and dual advocate/witness roles "designed to prevent prosecutors from taking advantage of the natural tendency of jury members to believe in the honesty of lawyers in general, and government attorneys in particular, and to preclude the blurring of the 'fundamental distinctions' between advocates and witnesses"). All of these noted concerns are clearly diminished in the instant case by the fact that a trial judge, rather than a jury, was the fact finder at the evidentiary hearing. In United States v. Johnston, 690 F.2d 638, 644 (7th Cir. 1982), the court rejected the Government's argument that the advocate/witness rule did not apply to a proceeding tried by a judge rather than a jury, but acknowledged that "more flexibility" should be permitted in such cases since the risks were reduced without a jury.

There clearly is no absolute prohibition against a prosecutor testifying when exceptional circumstances require it. Several

courts have expressly sanctioned such testimony. Scott (prosecutor testified for defense in postconviction hearing); Johnston (prosecutor to testify for Government in pretrial suppression hearing); Shargaa v. State, 102 So. 2d 809 (Fla.)(prosecutor was State's first witness), cert. denied, 358 U.S. 873 (1958). In Williams v. State, 472 So. 2d 1350, 1352 (Fla. 2d DCA 1985), the court held that the trial judge should not have prevented the defense from laying a predicate for impeachment with a witness where the defense attorney was the only one that could impeach the witness if his prior inconsistent statement was denied. In so holding, the court stated that despite the general rule against a lawyer testifying in a case in which he is an advocate, "he may do so where unanticipated circumstances arise and when it is necessary to prevent a miscarriage of justice," and that, when an attorney is needed to protect his client's interests, such testimony "is not only proper but mandatory." 472 So. 2d at 1352; see also, Schwartz v. Wenger, 124 N.W.2d 489 (Minn. 1963) (in civil case, attorney permitted to testify for his client in order to impeach unexpected testimony).

The rules of professional responsibility similarly do not present an absolute bar to a prosecutor testifying. The Model Code of Professional Responsibility "does not render an advocate incompetent as a witness, but merely vests the trial court with discretion to determine whether counsel may appear as a witness

without withdrawing from the case." United States v. Morris, 714 F.2d 669, 671 (7th Cir. 1983), citing Johnston. Florida Bar rules similarly permit an attorney to testify for his client and continue representation where "disqualification of the lawyer would work substantial hardship on the client." R. Regulating Fla. Bar 4-3.7.

Occhicone's case, Holloway, does not compel a contrary result. In fact, Holloway acknowledges that dual prosecutor/witness roles may be necessary in "exceptional circumstances," but such circumstances were not present in that case. Because the prosecutor in this case had unique, relevant information that was not available from any other source and the need for his testimony did not become apparent until shortly before Occhicone rested his case, Holloway is not applicable on these facts.

Of course, in order to prevail on an alleged due process violation premised on prosecutorial misconduct, Occhicone must also demonstrate that he was prejudiced by the actions below. Smith v. Phillips, 455 U.S. 209, 220 (1982) (touchstone of due process analysis is fairness of trial, not culpability of prosecutor); Greer v. Miller, 483 U.S. 756 (1987); Farina v. State, 680 So. 2d 392, 395-6 (Fla. 1996); Shargaa; United States v. Calderon, 127 F.3d 1314, 1335 (11th Cir. 1997), cert. denied, 118 S.Ct. 1328 (1998). He has not even attempted to allege prejudice in this case. He does not identify a postconviction claim which could have been improperly denied based on the prosecutor's testimony.

Therefore, he has not established that due process requires a new hearing in this case.

Since Occhicone has failed to demonstrate any abuse of discretion in the evidentiary rulings excluding his mitigation witnesses and permitted prosecutor Halkitis to testify, he is not entitled to a new evidentiary hearing.

ISSUE III

WHETHER THE TRIAL COURT ERRED IN SUMMARILY DENYING POSTCONVICTION CLAIMS.

Occhicone also disputes the trial court's rulings as to a number of other claims which were summarily denied. Each of Occhicone's particular allegations will be addressed in turn; however, the record clearly supports the trial court's rulings denying these claims without an evidentiary hearing.

A. Presentation of false evidence/withholding of exculpatory evidence

Occhicone first alleges a violation of Brady v. Maryland, 373 U.S. 83 (1963). He claims that the State withheld the names of material witnesses, withheld evidence of Occhicone's intoxication on the night of the offense, pressured witnesses to testify untruthfully, and failed to disclose a deal with a key prosecution witness. The trial court extensively reviewed each of these allegations:

> Under Claim I, all of the allegations of *Brady* violations are denied because each fails the diligence element under *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). To prevail on a *Brady* claim, a defendant must show four elements: 1) the state possessed evidence favorable to the defendant, 2) the defendant did not possess the evidence, nor could he obtain it with any reasonable diligence, 3) the prosecution suppressed the evidence, and 4) had the evidence been disclosed, a reasonable probability exists that the outcome of the proceedings would have been different. *Mendyk*

v. State, 592 So. 2d 1076 (Fla. 1992). Defendant claims that interview notes obtained from the State Attorney's office reveal witnesses who saw Defendant 24 hours prior to the murder and whose testimony would have refuted that of a witness for the State, Debra Newell ("Newell"). Defendant alleges that Newell testified at trial that when she saw Defendant at Shooters during the same period he ordered two drinks, did not appear to have been drinking, did not appear to be intoxicated, and that she had not seen Defendant there prior to 1:30 a.m.

First, the record indicates that Newell never testified that she did not see Defendant prior to 1:30 a.m. as Defendant alleges. Second, the State Attorney notes attached by Defendant appear to be the prosecutor's trial preparation notes as the comments therein of "need as a witness" or "don't need as a witness" indicate. The notes do not contain signatures or approvals by the witnesses of the statements to whom they were attributed. As such, this type of material is generally not subject to discovery or disclosure, and is therefore not evidence of prosecutorial misconduct. *See, e.g., Williamson v. Dugger,* 651 So. 2d 84 (Fla. 1994).

In the alternative, the Court agrees with the State's argument that this claim should be denied because Defendant has failed to set forth a prima facie case under *Brady*, as he has not alleged that such information could not have been discovered upon a diligent investigation. The witnesses named by Defendant and revealed by said notes who allegedly saw Defendant in the 24 hours preceding the murders are, David Hoffman, a bartender at Shooters bar in New Port Richey who had known Defendant for approximately four months; Barbara Talbert, an employee at Shooters who had known Defendant for approximately six months; and Kimberly Schuh (now "Connell"), who had met Defendant three days before the murders and spent time with Defendant off and on throughout that period. As Defendant has failed to allege otherwise, the Court can assume that Defendant knew that

he drank prior to the murders and spent time at Shooters, and was therefore aware of those who witnessed this. *See, e.g., Roberts v. State*, 568 So. 2d 1255 (Fla. 1990). Defendant fails to allege that he does not recall or was not aware that these people saw him in the 24 hours prior to the murders, to satisfy the second element of *Brady*. *See, Mendyk*, 592 So. 2d at 1079. Even had Defendant alleged such, it was common knowledge that Defendant visited Shooters frequently as evidenced by pre-trial deposition testimony (*see, Anderson, Lawson, and Newell deposition excerpts attached*). Therefore, this claim fails to satisfy the second element of *Brady* because a diligent investigation by defense counsel as to Defendant's presence there the days prior to the murders would have revealed these witnesses' identities. Accordingly, these allegations are denied.

Defendant also alleges that the same State Attorney notes reveal comments by the victims' daughter, Anita, that on the night of the murders just prior to the shootings, he had "some difficulty walking and staggered", and that this information would have been critical in cross-examining her at trial especially since she tried to back off her deposition testimony regarding this. Anita was impeached at trial and eventually admitted similar but more damaging deposition testimony in that she smelled alcohol on Defendant's breath and saw him stagger because of the effects of alcohol (*see* R313-18 *attached*). This deposition testimony, containing the same information but even more exculpatory than that in the witness notes, was revealed at trial. Therefore, this allegation is denied as it clearly fails to show a reasonable probability that the outcome of the proceedings would have been different had the information in the witness notes been revealed to the defense, as is required to satisfy the fourth element of *Brady*.

In the remaining allegations under claim I, Defendant alleges two instances of false testimony by State witnesses. To prove the State "knowingly" procured false testimony a

defendant must show that 1) the testimony must have been "the basis for the conviction", 2) the State must have knowingly employed the perjured testimony, and 3) the fact that the testimony was perjured must have been unknown to the defendant at the time of trial and unascertainable through diligent investigation and preparation. *See, DeHaven v. State*, 618 So. 2d 337 (Fla. 2d DCA 1993). State trial witness, Lily Lawson ("Lawson"), by sworn affidavit attached to Defendant's motion, states that "[t]here was tremendous pressure put on me by the police pretrial; they made things very difficult for me, and they put words in my mouth. They wanted me to testify a certain way, and they made sure I did so". These were the only statements in Lawson's affidavit regarding this issue and she fails to actually recant any of her testimony.

Her most damaging trial testimony not mentioned in her affidavit, was that a couple of weeks prior to the murders, Defendant told her that he felt like murdering Anita's parents and making Anita watch (*see* R446 *attached*). This evidence of premeditation was not the only such evidence and was therefore not the basis for the conviction, failing the first prong under *DeHaven*. It was undisputed that Defendant shot the victims, and at least two other trial witnesses testified to similar premeditation statements made by Defendant, as well (*see*, R466, 509 *attached*). Furthermore Lawson has not gone so far as to sufficiently allege that she lied, committed perjury, or testified falsely as to any particular statement she made at trial, and testified to the exact same premeditation statements in her deposition taken prior to the trial on October 21, 1986 (*see, Lawson deposition excerpt attached*). Accordingly, Defendant's claim of knowingly perjured testimony by State witness Lawson is <u>denied</u>.

Finally, under claim I, Defendant alleges one other instance of false testimony by a State witness, Phil Baker ("Baker"), a jailhouse snitch. Defendant claims that the State "permitted" Baker to testify untruthfully at trial by stating that he and

the State did not have any deal worked out regarding Baker's case in exchange for his testimony against Defendant, except that he was to receive a favorable recommendation to the parole board. This type of allegation that the State failed to correct false testimony by one of its witnesses is commonly referred to as a *Giglio* violation. *Giglio v. United States*, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972). In order to prevail in such a claim, the defendant must prove 1) the testimony was false, 2) the prosecutor knew that it was false, and 3) the statement was material. *Phillips v. State*, 608 So. 2d 778 (Fla. 1992). Regarding the alleged deal, Baker testified at Defendant's trial that his score carried probation, community control or 12 to 30 months incarceration and that he had hoped for probation, which he did receive (*see* R572 *attached*). With premeditation being a direct issue in Defendant's case, Baker's most damaging trial testimony was that while sharing a cell with Defendant, Defendant told him that the only mistake he made was killing them and not Anita (*see* R563-64 *attached*).

Defendant submits the affidavit of Kathleen Standley, the victim of Baker's crime, who asserts that a particular assistant state attorney told her in advance that Baker was only going to get probation but they would see to it that he was ordered to make restitution. The State responds that Defendant has not sufficiently proven that any deal was made and that Baker's sentence to five years of probation for the grand theft charge was within the recommended guidelines range. Notwithstanding that the hearsay statements in the Stanley affidavit do not prove any deal was made, this Court's review of the public record in the Baker case, 86-2769CFAWS, indicates that on July 30, 1987, Baker received a downward departure sentence to probation instead of two and one-half to three and one-half years' incarceration, as was recommended under the guidelines, solely because of his agreement with the State to testify in Defendant's trial. Based on this evidence, the Court concedes a deal was made.

> Nevertheless, Baker's testimony that no deal was made is not material or crucial as Defendant argues, but merely collateral to Defendant's case because it relates to Baker's credibility only. If the defense believes that it was material, they could have corrected it by the time of trial, *Phillips*, 608 So. 2d at 781, because Baker gave the same testimony in his May 27, 1987 deposition regarding the statements made by Defendant to him in their cell, and in addition that he was told his score would carry 12 to 30 months' incarceration, or community control or probation, and that if he testified truthfully in Defendant's case, it would be recommended that he get probation on the recent charge and that he not be returned to prison on the parole violation (*see Baker deposition excerpts attached*). Furthermore, as Defendant admits, Baker's credibility at Defendant's trial was already questionable since he testified that he was expecting a favorable recommendation to the parole board, and it was revealed that he had prior convictions for other crimes involving dishonesty, besides the recent grand theft charge (*see* R569-71, 581-83 *attached*). Lastly, there were several more damaging statements of premeditation made by Defendant to other witnesses who testified at trial (*see* R446, 466, 509 *attached*). Therefore, because the Court finds there is no reasonable probability that this false testimony affected the jury's judgment, *id.*, this allegation under claim I is denied. Accordingly, all allegations under claim I are without merit and denied.

(PC-R. V2/222-226).

A thorough review of Occhicone's allegations clearly demonstrates that the trial court's reasoning was correct, the Brady claim was without merit and properly summarily denied. As to the lay witnesses that allegedly could have supported his intoxication defense, Occhicone has failed to show or even allege

that he was not aware of this potential evidence or could not have obtained it himself with due diligence. This is one of the elements required for relief on a Brady claim. Mendyk v. State, 592 So. 2d 1076, 1079 (Fla. 1992). To the contrary, Occhicone claims these witnesses had information because they were *with him* in the time leading up to the murders.

In addition, the requirement that withheld materials must have been both exculpatory and material in order to establish a due process violation under Brady has clearly not been met. The most glaring impediment to Occhicone's plea for relief on this basis is the fact that there was no information available from these witnesses which was not already known to the defense. Occhicone's 3.850 motion identified five potential defense witnesses -- Lily Lawson, David Hoffman, Debra Newell, Barbara Talbert, and Kimberly Connell Schuh. Two of these five actually testified at trial - Lily Lawson (DA-R. 444-63) and Debra Newell (DA-R. 489-507). The remaining three witnesses, according to their affidavits, would have testified that Occhicone was distraught and upset about the difficulties in his relationship with Anita, and that Occhicone was drinking heavily in the time leading up to June 10, 1986. However, this evidence was already before the jury, and was forcefully argued by defense counsel in closing (DA-R. 745, 751-753, 759-762). In addition, the defense had another witness, Joanna Carrico, that was identified at trial as a barmaid with similar information about

Occhicone's emotional state and drinking habits; this witness was not used by the defense (DA-R. 636, 654). Thus, it is readily apparent that, even if the State had formally disclosed the names of people Occhicone had been with prior to the crime, they would not have been used at trial.

Evidence is only "material" for Brady purposes "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." United States v. Bagley, 473 U.S. 667, 682 (1985); Haliburton v. State, 691 So. 2d 466, 470 (Fla. 1997). This "reasonable probability" must be sufficient to undermine confidence in the outcome. Id. The mere possibility that information "might have" helped the defense or affected the outcome of the case does not establish materiality, and the proper test is whether the suppressed information creates a reasonable doubt of guilt that does not otherwise exist. United States v. Agurs, 427 U.S. 97 (1976). Therefore, even if Occhicone were able to establish that these witnesses should have been disclosed and were not, any such failure to disclose could not possibly meet the standard for materiality required for relief.

As part of this claim, Occhicone suggests that Anita Gerrety's statement that Occhicone had difficulty walking and was staggering around the house at the time of the shooting, as reflected in notes from the State Attorney's Office, should have been disclosed to the

defense. Any Brady implications concerning this statement are clearly refuted by the record, however, since Anita admitted on cross examination that she had seen Occhicone stagger, and she was questioned extensively about whether or not Occhicone was staggering and whether she had previously indicated such (DA-R. 314, 317). In closing, defense counsel had reminded the jury of Anita's deposition, where she had stated that Occhicone was staggering, mumbling, and unable to walk straight at the time of the offense (DA-R. 753).

Similarly, the claim that the State's "deal" with witness Phil Baker was not disclosed cannot warrant relief under Brady. In fact, the "deal" as described in the 3.850 motion is not in any way inconsistent with Baker's testimony at trial. Baker was extensively cross examined on this point during trial, indicating that, although he hoped for a better sentence on his grand theft charge as a result of his willingness to testify, he had no specific understanding for such with the State (DA-R. 572). Of course, Baker had received his sentence of probation *prior* to Occhicone's trial (DA-R. 571). Baker also stated that he understood that he would be getting a favorable recommendation from the State regarding his violation of parole, which was still pending at the time of trial, in exchange for his testimony (DA-R. 572).

Since the record reflects that the details of Baker's sentence

were explored by defense counsel and argued as a basis for disregarding Baker's testimony to Occhicone's jury, the facts pled in Occhicone's 3.850 motion did not suggest that any due process violation took place with regard to Baker's testimony.

When reviewed in light of the trial record, Occhicone's motion fails to identify any exculpatory evidence which was not known to the defense or which would have affected the outcome of his trial. Therefore, his Brady claim was properly summarily denied.

B. Pretrial competency

Occhicone next challenges the trial court's summary denial of his claim of incompetence at the time of trial. In this subissue, Occhicone alleges that his counsel "failed to adequately investigate his mental health, failed to provide the expert with relevant and necessary background data, failed to properly present this information to the court, and failed to request an evidentiary hearing on competency" (Appellant's Initial Brief, p. 82). There are no specific facts offered to support these conclusory allegations.

This claim which did not contain sufficient specific facts to warrant an evidentiary hearing. Fla.R.Crim.P. 3.850(c)(6) expressly requires the recitation of the facts relied upon in support of a postconviction motion. The failure to allege any such facts herein clearly mandated summary denial of this claim. See,

Jackson v. Dugger, 633 So. 2d 1051, 1054 (Fla. 1993) ("Conclusory allegations are not sufficient to require an evidentiary hearing"); Kennedy v. State, 547 So. 2d 912, 913 (Fla. 1989).

Furthermore, the conclusory facts offered in support of this claim were clearly refuted by the record. Specifically, Occhicone asserts that no adequate psychological evaluation on the issue of competency was conducted; that he was incompetent to stand trial; that defense counsel allegedly "noticed something was seriously wrong with Mr. Occhicone's comprehension of his situation" and that counsel unreasonably failed to seek a competency hearing (Appellant's Initial Brief, p. 82). However, the record reflects that two mental health experts were appointed to examine Occhicone as to the issue of sanity, and another was appointed to assist the attorneys in their preparation of Occhicone's defense (DA-R. 1440-1445). All three experts ultimately testified at the penalty phase of the trial, and all indicated that competency evaluations were included as part of their examinations (DA-R. 958, 962, 973, 1173, 1179, 1264, 1267, 1294-1295). In fact, Dr. DelBeato testified that there was "no question" in his mind that Occhicone was competent to stand trial (DA-R. 974). Given Occhicone's failure to even allege that he could present expert testimony indicating that he was not competent at the time of trial, his claim of incompetence was clearly insufficient and properly summarily denied. See, Engle v. Dugger, 576 So. 2d 696, 700, 702 (Fla. 1991) (claim legally

insufficient where nothing showed evidence that could have been discovered).

In addition, in light of the testimony as to Occhicone's competence in the record, this claim is procedurally barred. In Johnston v. Dugger, 583 So. 2d 657, 660 (Fla. 1991), this Court reviewed the denial of a 3.850 motion and expressly recognized "Johnston's claim that he was not competent to stand trial in 1984 is procedurally barred because he did not challenge the competency finding on direct appeal." Similarly, Occhicone did not challenge any aspect of the testimony deeming him to be competent in his direct appeal. Occhicone's reliance on Hill v. State, 473 So. 2d 1253 (Fla. 1985), to suggest otherwise is not persuasive, since the factual circumstances in that case "were not presented in the initial court proceedings." 473 So. 2d at 1254. Thus, this claim warranted summary rejection in the instant case.

C. Vague jury instructions

Occhicone also challenges the summary denial of his claim that his penalty phase jury recommendation was tainted by vague and confusing jury instructions. The trial court's finding of a procedural bar against such a claim in postconviction proceedings is well supported by case law from this Court. It has long been the law that claims which could have or should have been raised on direct appeal are not cognizable in a Rule 3.850 motion to vacate.

Torres-Arboleda v. Dugger, 636 So. 2d 1321, 1323 (Fla. 1994); Meeks v. State, 382 So. 2d 673 (Fla. 1980). The purpose of Rule 3.850 is to provide a means of addressing alleged constitutional errors in a judgment or sentence, not to review errors which are cognizable on direct appeal. McCrae v. State, 437 So. 2d 1388 (Fla. 1983). Jury instruction issues are classic appellate issues, since they are obviously reflected in the transcript of the trial, and therefore must be challenged on direct appeal. Gorham v. State, 521 So. 2d 1067 (Fla. 1988). Therefore, the trial court correctly denied this claim as procedurally barred.

D. Invalid prior conviction

Occhicone next summarily alleges that his prior violent felony conviction was obtained unconstitutionally, and therefore reliance on that conviction as an aggravating factor vitiated the validity of his death sentence. It must be noted initially that Occhicone must collaterally challenge his prior conviction *before* bringing the instant postconviction claim; there is no allegation that he has done so in this case. Buenoano v. State, 708 So. 2d 941, 951-2 (Fla. 1998); Eutzy v. State, 541 So. 2d 1143, 1146 (Fla. 1989). Additionally, this aggravating factor could have been applied due to the contemporaneous murder conviction obtained in this case.

However, this claim was also properly denied as factually insufficient. Other than the conclusory allegation that

Occhicone's conviction for resisting arrest with violence "was obtained in violation of his rights under the Sixth, Eighth, and Fourteenth amendments," Occhicone has not offered any facts in support of this claim. The failure to allege any specific facts herein clearly mandated summary denial of this claim. Jackson, 633 So. 2d at 1054; Kennedy, 547 So. 2d at 913.

E. Cumulative judicial error

Occhicone's assertion of cumulative judicial error fails to add a cognizable independent claim, since it relies on finding a number of constitutional violations; Occhicone merely alleges that numerous errors contaminated his trial. This claim is barred, since the effect of any cumulative error based on the issues raised in his direct appeal must have been considered at that time. To the extent Occhicone is asserting cumulative error based on the current postconviction issues, he is clearly not entitled to relief since none of the allegations which he has presented demonstrate any error that could have affected the fundamental fairness of his trial. See, Mendyk, 592 So. 2d at 1081.

F. Ineffective assistance of counsel, guilt phase

Occhicone next addresses a number of grounds raised in his initial claim of ineffective assistance of guilt phase counsel which were denied summarily prior to the evidentiary hearing.

These include the failure to present evidence of cocaine use; the failure to supply experts with sufficient background material; the failure to question potential jurors about a possible taint; and the failure to object to testimony about the defendant's refusal to take an atomic absorption test. The trial court carefully delineated its reasons for denying a hearing on these allegations:

> One such allegation is that Joanne Carrico Parmenter ("Parmenter") who testified for the defense during the penalty phase, could have and would have given additional evidence of Defendant's intoxication during the guilt phase had she been asked to do so, specifically by testifying to Defendant's cocaine problem and that she had to drive him home several times. Defendant has provided a sworn affidavit by Parmenter verifying her proposed testimony. Parmenter testified at trial that she had known Defendant for about two years, from serving him while she was a bartender at the Liquor Lodge and subsequently, while bartending at Shooters. This allegation fails to satisfy the performance prong of *Strickland* because the record indicates that Parmenter was specifically asked by defense counsel during the penalty phase whether the Defendant used any other substances that affected him besides alcohol, tranquilizers, and marijuana, but responded only that he used blood pressure pills (*see* R940-41 *attached*). Parmenter has not admitted or given any reason for this inconsistency and there is no indication that she would have answered differently had she been asked the same question during the guilt phase. As for Parmenter's sworn statement that several times she had to take the Defendant home because he was too drunk to drive, when asked on cross-examination during the penalty phase how many times she gave him a ride or called him a cab when she saw that he was intoxicated, she responded "none" (*see* R945-46 *attached*), and Parmenter has not

admitted or given any reason for this inconsistency. This allegation fails the prejudice prong of *Strickland*, as there is no indication that she would have answered differently had she been asked the same question by defense counsel during the guilt phase. Accordingly, these allegations regarding Parmenter are denied.

Defendant also contends that competent counsel would have presented a qualified expert to testify during the guilt phase about the effects of the alcohol and drugs and proffers Dr. Caddy, who allegedly opines that the defense experts at trial gave inadequate evaluations due to not being supplied sufficient background materials. No affidavit or report from Dr. Caddy was submitted with Defendant's postconviction motion. Dr. Caddy would allegedly testify that at the time of the murders, Defendant "was functioning in an altered mental state in which his capacity to premeditate, to plan a course of action, and to make judgments was significantly diminished because of his intoxicated state". An evidentiary hearing allowing Dr. Caddy to testify is not necessary because Defendant already had competent experts, such as Dr. Fireman, testify during the penalty phase that, among other things, Defendant had organic brain damage from years of heavy drinking (*see* R1061 *attached*), that he did not have the capacity to premeditate and was not of sound mind the night of the murders nor could he appreciate the consequences of his actions (*see* R1043 *attached*), that he was psychotic, irrational, and bereft of reason the night of the murders (*see* R1062, 1072 *attached*), and that although he had some appreciation of right from wrong, he could not appreciate the consequences of his actions (*see* R1072-74 *attached*). Also, Dr. Delbeato testified that he did not think that the murders were premeditated (*see* R1008 *attached*) and Dr. Szabo testified that the night of the murders, Defendant was under extreme emotional disturbance and his capacity to appreciate the criminality of his conduct was substantially impaired (*see* R1178 *attached*). However,

> because no defense expert testified during the guilt phase an evidentiary hearing is warranted only to determine whether counsel acted reasonably in not presenting any experts during the guilt phase, but the allegations with regard to the need for Dr. Caddy are refuted by the record and are therefore denied.
>
> ...
>
> The State contends that two allegations should be denied: One allegation under claim 2 contending inaction by counsel regarding the alleged tainting of the jury by a spectator was already denied in this Court's prior order because refuted by the record, and thereby failing the performance prong of *Strickland*. Second, Defendant's ineffective assistance claim regarding counsel's failure to object to the testimony about Defendant's refusal to take the atomic absorption test as evidence that he was sober, is without merit. As the State points out, the admissibility of such testimony was challenged and rejected on appeal because, unlike *Herring v. State*, 501 So. 2d 19 (Fla. 3d DCA 1986), the prosecutor's comments in closing arguments about Defendant's refusal were used to refute Defendant's claim of diminished capacity, rather than as convincing proof of his guilt. *See, Occhicone v. State*, 570 So. 2d 902 (Fla. 1990). Therefore, even if counsel was deficient by failing to object to the testimony, such would be harmless, failing the prejudice prong of *Strickland*, as the Florida Supreme Court did not find the testimony inadmissible for the purpose for which it was used. *See, e.g., Henderson v. Singletary*, 617 So. 2d 313 (Fla. 1993).

(PC-R. V2/227-28, 226-27).

These allegations were clearly refuted by the record and therefore did not support Occhicone's plea for relief. The allegation that Carrico could have testified to Occhicone's cocaine use was refuted by the transcript of the penalty phase, since

Carrico was specifically asked about his drug use (DA-R. 940-1). This transcript also refutes Occhicone's claim that his attorneys failed to present sufficient background information to his experts, since the experts discussed what had been provided in their testimony (DA-R. 976-78, 998, 1000, 1038, 1202-3). In addition, as to the alleged failure to question jurors, counsel *did* specifically ask the jury venire about the spectator's comments after the matter was brought to the court's attention (DA-R. 163, 182).[3] Finally, any deficiency in counsel's failure to object to testimony about the refused atomic absorption test could not possibly have prejudiced Occhicone, since this Court examined and rejected the merits of his argument as to the admissibility of this testimony as part of his direct appeal. Occhicone, 570 So. 2d at 905.

The trial court expressly identified where and how these allegations are refuted by the record, and attached the relevant portions of the trial record to its Order denying relief. Therefore, an evidentiary hearing was not needed on these aspects of Occhicone's ineffective assistance of counsel claim, and the trial court's summary denial must be affirmed.

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[3]This Court's opinion notes that the judge invited counsel to ask whether the prospective jurors had overheard any comments, "but counsel did not so inquire during voir dire." 570 So. 2d at 904. This appears to be a misstatement, given counsel's clear question to the panel at R. 182.

G. Ineffective assistance of counsel, penalty phase

Occhicone next asserts that the trial court's summary denial of several aspects of his penalty phase ineffective counsel claim was error. He specifically challenges the denial of additional allegations that counsel failed to provide their experts with sufficient background information; failed to present evidence of Occhicone's personal hardships; failed to present evidence of his cocaine problem; and failed to request a special jury instruction adequately defining the aggravating circumstances. Once again, the trial court scrutinized and extensively reviewed these allegations:

> Defendant proclaims that although he was evaluated by several mental health experts, they had no background information and were therefore more vulnerable to cross-examination. Defendant proffers Dr. Caddy, without any affidavit or report, who allegedly opines that at the time of the murders, Defendant was suffering from organic brain damage, major depression, chronic substance abuse and related disorders. This is not a sufficient basis for postconviction relief, as Defendant already had such testimony by his experts during the penalty phase. *See, Provenzano v. Dugger*, 561 So. 2d 541 (Fla. 1990). Also, as the State points out, Defendant fails to allege, as required, that there were serious inadequacies on the part of the experts who did examine him, such as clear indications of brain damage which were ignored. *Rose v. State*, 617 So. 2d 291 (Fla. 1993).
>
> As previously stated, Dr. Fireman testified during the penalty phase to these same problems, and more in that Defendant was an alcoholic (*see* R1040 *attached*) and was suffering from post-traumatic stress after learning that Anita had aborted their baby (*see* R1041 *attached*). *Also, see claim 2,*

supra. Additionally, Dr. Delbeato testified that Defendant was alcohol dependent (*see* R963, 1000 *attached*), was emotionally unstable with alcohol exaggerating his emotional disturbances (*see* R964-69 *attached*), was chronically depressed and suicidal (*see* R991-94 *attached*), and passive-aggressive (*see* R995, 1013 *attached*), while Dr. Szabo testified that Defendant was a heavy drinker and an alcoholic (*see* R1200, 1208, 1212 *attached*). *Also, see claim 2, supra*.

Notwithstanding the insufficiency of Defendant's claim of inadequate mental evaluations, the claim that defense experts had nothing to rely on other than Defendant's self-report is refuted by the record. Each defense expert testified that they relied on various depositions and statements to assist them in preparation for testifying for Defendant. Dr. Delbeato testified that he used only his test results and interview notes to formulate a requested competency report for the Court (*see* R962, 976-978 *attached*), but that he had reviewed a box of materials, including but not limited to depositions and informal witness statements prior to trial (*see* R998-1001 *attached*), Dr. Fireman testified that he spoke with Defendant's sister prior to interviewing Defendant, and had since read articles on Defendant's case (*see* R1049-50 *attached*), as well as depositions (*see* R1059-61, 1079, 1082-85 *attached*). Lastly, defense expert, Dr. Szabo testified that he read depositions before interviewing Defendant (*see* R1202-03 *attached*). Accordingly, Defendant's ineffective assistance allegations regarding the experts under claim 3 is without merit, failing the performance prong of *Strickland* and therefore denied.

Defendant also maintains that counsel should have presented evidence to the effect that although he had long-standing mental and substance abuse problems, due to the marital difficulties with his former wife, the death of his former wife, the death of his mother, and the difficulties with Anita, those problems became worse, causing Defendant to be

> a different person in the time surrounding the murders. Counsel did in fact present such evidence by defense expert, Dr. Fireman (*see* R1060-61 *attached*). Because this allegation is conclusively refuted by the record, it is denied.
>
> Defendant, again raises the same allegations regarding Parmenter and Moore and their knowledge of his alleged substance abuse problems with cocaine. *See, claim 2, infra.* As previously stated, Parmenter's affidavit regarding cocaine fails the performance prong of *Strickland* because defense counsel did give her the opportunity to speak up about Defendant's alleged cocaine problem. Accordingly, these allegations regarding Parmenter are also denied under claim 3.
>
> ...
>
> Finally, Defendant argues under claim 3 that counsel was ineffective for failing to request a special jury instruction adequately defining the aggravating circumstances, although counsel did argue a limiting construction of those aggravating factors in light of such construction by the Florida Supreme Court. *See, Occhicone v. Singletary*, 618 So. 2d 730 (Fla. 1993) (denial of Defendant's petition for habeas corpus). Defendant cites no authority for this allegation other than the opinion denying his petition for writ. Defense counsel cannot be ineffective for failing to object to a proper instruction or request a special jury instruction when the instructions used by the Court had been previously held valid by the Florida Supreme Court. *See, Harvey v. Dugger*, 656 So. 2d 1253 (Fla. 1995); *Mendyk*, 592 So. 2d at 1080. Therefore, this claim fails both prongs of *Strickland*.

(PC-R. V2/230-233). The court did include, as within the scope of the evidentiary hearing, whether defense attorneys were ineffective in failing to present Diane Moore and Susan Clark to testify as to Occhicone's cocaine use around the time of the murders for

mitigation purposes; however, these witnesses did not testify at the hearing (PC-R. V2/232).

Once again, the trial court applied the proper law and carefully analyzed the facts, reaching the well supported conclusion that all of these allegations were insufficient, refuted by the record, or both. The trial court carefully cited to the record and attached all pertinent excerpts, as directed by this Court. Occhicone again has failed to find any fault with the order, and does not even mention the trial court's conclusions in his argument on these issues.

Because Occhicone has failed to demonstrate any error in the summary denial of these claims, he is not entitled to any relief in this issue.

CONCLUSION

Based on the foregoing arguments and authorities, the trial court's orders denying postconviction relief must be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Regular Mail to Harry P. Brody and John P. Abatecola, Capital Collateral Regional Counsel - Middle, 3801 Corporex Park, Suite 210, Tampa, Florida, 33619, this _____ day of June, 1999.

COUNSEL FOR APPELLEE