IN THE SUPREME COURT OF FLORIDA

CASE NO.: SC05-1617

PAUL H. EVANS

APPELLANT

VS.

STATE OF FLORIDA

APPELLEE

ON APPEAL FROM THE CIRCUIT COURT OF THE NINETEENTH JUDICIAL CIRCUIT, IN AND FOR INDIAN RIVER COUNTY, FLORIDA, (CRIMINAL DIVISION)

ANSWER BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

Appellant, Paul H. Evans, Defendant below, will be referred to as "Evans" and Appellee, State of Florida, will be referred to as "State". Record references are:

Trial record: "TR";
Postconviction record: "PC-R";
Postconviction transcripts: "PC-T"
Supplemental records: "S" before the record supplemented;
Initial Brief: IB.

References will be followed by volume and page number(s).

STATEMENT OF THE CASE AND FACTS

On August 6, 1997, Defendants, Evans and Connie Evers Pfeiffer, were indicted for the March 23, 1991 first-degree murder of Alan F. Pfeiffer. (TR.1 13-14). Their trials were severed with Evans proceeding first. His first trial started October 26, 1998, but on November 4, 1998, ended in a mistrial. (TR.7 229, TR.18 1796-1800). On January 11, 1999, the second trial commenced, but the next day, ended in a mistrial due to improper information being disclosed by a potential juror during voir dire (TR.20 1837-38; R.22 2112-20). The third trial began on February 1, 1999, with a guilty verdict being rendered on February 11, 1999. (TR.3 411; TR.24 2162; TR.38 4283-84). The penalty phase was held the following day with the jury recommending death by a nine to three vote (TR.3 412; TR.39 4291, 4459-62). On March 8, 1999, the court conducted a hearing

under Spencer v. State, 615 So.2d 688, 691 (Fla. 1993) (TR.40 4469-4501), and on June 16, 1999, sentenced Evans to death. (TR.3 501-12; TR.40 4511-24).

This Court affirmed the conviction and sentence. Evans v. State, 808 So.2d 92, 100, 109-10 (Fla. 2001). Certiorari review was denied on October 15, 2002. Evans v. Florida, 537 U.S. 951 (2002). On October 3, 2003, Evans moved for postconviction relief (PC-R.1 1-99). Following the Case Management Conference, evidentiary hearing held November 8, 9, and 22, 2004, and the parties' written closing arguments, the court denied postconviction relief. (PC-R.4 697-698; PC-R.5 767-1095; PC-R.6 1105-28). This appeal followed along with a Petition for Writ of Habeas Corpus case number SC07-494.

This Court outlined the facts in part as follows:

> ...This is a murder-for-hire case involving four coconspirators: Evans, who was nineteen at the time of the crime; Sarah Thomas, Evans' girlfriend; Donna Waddell, Evans' and Thomas's roommate; and Connie Pfeiffer, the wife of the victim. At trial, the sequence of events regarding the murder, and Evans' role in the murder, were provided predominantly by Thomas and Waddell, who both testified on behalf of the State. FN1 Waddell signed a deal with the State in which she agreed to plead guilty to second-degree murder in exchange for giving a sworn statement explaining her involvement in the murder and agreeing to testify in any proceeding. Thomas was never charged with any crime. The evidence at trial demonstrated that the victim and Connie had a "rocky" marriage, and that each were (sic) dating other people while they were married. A few weeks before the murder, Connie approached several individuals about killing her husband, but each person refused. Connie then asked

Waddell if she knew anyone who would be willing to kill her husband, and Waddell suggested that Evans might be willing to commit the murder. Thomas testified at trial that Evans told her that he would kill Alan in exchange for a camcorder, a stereo, and some insurance money.

Waddell stated at trial that she, Evans, Connie, and Thomas all collaborated to come up with the plan to kill the victim. Testimony also established that Evans initiated the plan to commit murder and that he was the “mastermind” behind the plot. Pursuant to the agreement, on Saturday morning, March 23, 1991, Waddell, Connie, and Evans all participated in arranging the Pfeiffers' trailer to make it look like a robbery had taken place. Waddell testified that it was Evans' idea to stage the robbery. They stacked electronic equipment near the back door. During the staging of the robbery, Evans wore gloves.

...Waddell and Evans went to her parents' house to steal Waddell's father's gun. Evans broke into the house through a window to steal the gun and also stole a jar of quarters from Waddell's father's bedroom. Waddell and Evans disposed of the jar, keeping the quarters....

Waddell testified that after [test] firing the gun, she, Evans, and Thomas went back to the trailer to go over the alibi with Connie, and Evans told the other three what to say. Waddell stated that Evans explained that he was going to hide behind furniture and shoot Alan when he entered the trailer.

Waddell testified that she, Evans, and Thomas were at the fair that evening but left the fair and arrived at the trailer at dusk. They went in the front door. Evans had a bag containing the gun and dark clothing. Waddell and Thomas left Evans in the trailer, locked the door, and went back to the fair. FN2 They paid for the fair with the quarters stolen from Waddell's parents' house.

Thomas testified that she and Waddell paid with quarters to avoid having their hands stamped, so it would not look like they left the fair and later returned. Thomas also testified that she and Waddell

stayed at the fair for approximately one to two hours before returning to the trailer. According to Thomas, it was Evans who told them to wait at the fair before returning to the trailer.

Between 7 p.m. and 7:15 p.m. that evening, Alan's girlfriend, Linda Tustin, met Alan at the store where he worked. She observed that Alan was agitated and talking on the phone to Connie. When Alan got off of the phone, he told Tustin that “his wife and her biker friends were going to clean him out.” He left work to drive back to the trailer at approximately 7:30 p.m. Alan worked thirty minutes away from the trailer.

Although there is some dispute between the testimony of Waddell and Thomas as to the following sequence of events,FN3 both witnesses agreed that they returned to the pickup site, where Evans got into the back of the car and said, “It's done.” Waddell stated that Evans told her that he turned the stereo up loud so that nobody would hear the gunshots, then hid behind some furniture and shot Alan when he came into the trailer. Leo Cordary, one of the Pfeiffers' neighbors, testified that he heard gunshots between 8 p.m. and 8:30 p.m., but did not recall anyone running from the trailer.

Waddell also testified that Evans did not want to tell her or Thomas too much about the murder so that they would not be able to tell the authorities.... Evans told Waddell, “Just stick to the story that we were at the fair and just we were all together all night at the fair.” Thomas and Waddell both testified that they disposed of the gun in a canal near Yeehaw Junction.FN4 They then went back to the fair to meet up with Connie.

Although there is a dispute in the testimony of Waddell and Thomas as to the timing and specific circumstances, both women stated that Evans tried to burn his pants in the bathtub following the murder.FN5 Thomas testified that shortly after the murder, Evans took the camcorder apart and threw the pieces in a dumpster because he was afraid this could implicate him. Moreover, Waddell testified that she, Thomas, and Evans smashed the television and that Thomas and Evans disposed of the pieces.

In the early morning on March 23, 1991, the Vero Beach Police Department was summoned to the trailer that the victim shared with Connie, due to a complaint of loud music. The police found the south door of the trailer ajar and, upon entering, discovered the victim's body on the living room floor. ... Moreover, the police discovered that the dining area paddle fan light had been disabled. There were no signs of a forced entry or a struggle within the trailer, but the trailer was in a state of disarray, with electronic equipment and other items stacked near the south door. The victim was wearing two gold chains and had $48 in his pocket when the police found him. Moreover, the police found the victim's life insurance policies which were worth approximately $120,000 lying on the table. Each policy listed Connie as the beneficiary.

...A television, camcorder, and VCR were reported missing from the trailer and never recovered. These items were rented from Alan's place of work.

Three bullets were recovered from the victim, one from his spine, and two from his head. The testimony at trial identified the bullets as .38 special Nyclad bullets that were fired from the same gun, and that the shots likely occurred from a distance of more than two feet away. Moreover, spent casings found in Waddell's father's home were consistent with those which would have held the Nyclad bullets.

The police did not speak with Connie until she arrived at the station the following afternoon. Detective Elliot testified at trial that Connie was uncooperative throughout the investigation. Connie told Detective Elliot that she was at the fair with Evans, Waddell, and Thomas on the evening of the murder. Waddell stated that they stayed at the fair “long enough to be seen.” Waddell, Thomas, and Evans each confirmed this alibi.

... Evans told [Thomas] that he did not actually kill Alan, but that he had three African-American men do it. Moreover, Evans called Thomas some time after the murder and told her to “stick to the story.”

...Although Waddell testified that she never received

anything for the death of Alan, Waddell acquired a taxi company some time after the murder. About three years after the murder, Waddell met with Evans. Evans told Waddell that she better keep quiet or his “old family members [were] going to kill” her. Evans also told Waddell that the person who killed Alan was dead. Evans told Waddell that he went and got the gun, took it apart, and took a bus to the woods in Ocala to dispose of the pieces. At the end of the conversation, Evans threatened to kill Waddell and her son if she talked to the police.

Ultimately, the case grew cold and was closed. However, in 1997, the Vero Beach Police Department reopened the case and Detective Daniel Cook focused his investigation upon Evans, Connie, Waddell, and Thomas. Thomas was the first suspect the police interviewed. Thomas explained the events surrounding the homicide and agreed to wear a wire and contact Waddell. At the meeting between Thomas and Waddell, Thomas stated: “We helped.” Waddell responded: “I know. I think about it every day.” The police arrested Waddell and, after the police showed Waddell the statement that she gave to Thomas, Waddell agreed to cooperate with the police and provide a statement. Based on Thomas and Waddell's cooperation, Connie and Evans were arrested for their alleged involvement in the murder.

Although Evans did not testify at trial,FN6 the State presented the statement Evans made to Sergeant Daniel Brumley on March 28, 1991, in which he stated that he was at the fair the entire night of March 23. With regard to Alan's death, Evans told Sergeant Brumley: “I know it was none of us. I don't care what nobody says. We were all together. One thing, Connie couldn't do a thing (sic) like that. Just the nature of her, how she is.”

The jury found Evans guilty of first-degree murder and the case proceeded to the penalty phase. The defense presented testimony establishing that Evans was a hyperactive child and was placed on Ritalin when he was six years old. His parents divorced at that time, and between 1978 and 1984, his father saw Evans only once because Evans' father was in the military. In late 1983, Evans' mother asked

Evans' father to take custody of both Evans and his younger brother, Matthew, because of the children's behavioral problems. Shortly thereafter, Evans' father received news that Evans had accidentally shot Matthew while they were playing. Evans' parents testified at the penalty phase that Evans went through a “very emotional traumatic time” after the shooting. Although there was testimony from family members regarding the effect that the shooting incident had on Evans and the treatment he subsequently received, there was no expert testimony regarding any specific mental illness or impairment from which Evans may have suffered.

Dr. Gregory Landrum, a clinical and forensic psychologist, testified that Evans' intelligence was in the high average to superior range. Moreover, Dr. Laurence Levine, a psychologist who performed a number of psychological and neuropsychological tests on Evans, stated that Evans had above average intelligence and was an avid reader. Finally, Evans' mother and Dr. Levine both testified to Evans' artistic ability, with Dr. Levine stating that Evans was a “stupendous” artist.

Drs. Landrum and Levine both testified that Evans would respond well to a structured environment and would adapt well to prison. However, Dr. Levine stated on cross-examination that Evans' record at all of the institutions he attended was replete with disciplinary problems. Deputies Carl Lewis and Gregory George, who were corrections officers at the Indian River County Jail, testified that Evans had been a good prisoner and had not exhibited any disciplinary problems. Finally, Paul George, a Jehovah's Witness who conducted bible study in prison with Evans, stated that Evans has a sincere belief in God.

Following the penalty-phase proceedings, the jury recommended the imposition of the death penalty by a vote of nine to three. The trial court found the following in aggravation: (1) Evans had committed the crime for pecuniary gain (great weight); and (2) the murder was committed in a cold, calculated, and premeditated manner without any pretense of legal or moral justification (“CCP”) (great weight). The trial court found only one statutory mitigator: Evans' age of nineteen when he committed the murder (little

weight).FN7

In addition, the trial court found and gave weight to the following nonstatutory mitigators: (1) Evans' good conduct while in jail (little weight); (2) Evans' good attitude and conduct while awaiting trial (little weight); (3) Evans had a difficult childhood (little weight); (4) Evans was raised without a father (little weight); (5) Evans was the product of a broken home (little weight); (6) Evans suffered great trauma during childhood (moderate weight); (7) Evans suffered from hyperactivity and had a prior psychiatric history and a history of hospitalization for mental illness (moderate weight); (8) Evans was the father of two young girls (very little weight); (9) Evans believes in God (very little weight); (10) Evans will adjust well to life in prison and is unlikely to be a danger to others while serving a life sentence (very little weight); (11) Evans loves his family and Evans' family loves him (very little weight). The trial court found that Evans failed to establish that he was immature, and therefore gave this proposed mitigator no weight. Moreover, the court refused to recognize Evans' artistic ability as a mitigating circumstance and therefore gave this no weight. Concluding that the aggravation outweighed the mitigation, the trial court imposed the death penalty.

FN1 ... Connie was ultimately convicted of first-degree murder, the jury recommended a life sentence, and the trial court imposed a life sentence.

FN2 Although Waddell did not remember whether she went back to the fair after dropping Evans off at the trailer, Thomas testified that they did go back to the fair after dropping Evans off at the trailer.

FN3 Thomas testified that when she and Waddell originally went to the pickup spot for Evans, he was not there. Thomas stated that they proceeded to drive around and parked at a gravel parking lot. She testified that they did not see Evans, so they went back to the fair and waited another 30 to 45 minutes before leaving again to meet Evans at the pickup spot.

FN4 Thomas stated that she and Evans disposed of the gun a few days after the murder in a canal so that

> fingerprints would be hard to find. By contrast, Waddell testified that the three of them disposed of the gun in a canal that night after shooting off the rest of the bullets. Moreover, according to Waddell, after they disposed of the gun, they went to a dirt road where Evans changed clothes and discarded the dark colored shirt and his shoes. He kept the dark colored pants.
>
> FN5 Waddell testified that this occurred the next day, and that they used pool chemicals. They also tried to burn the gun carrying case. According to Waddell, she, Evans, and Thomas were present when they tried to burn the pants. However, according to Thomas, she and Evans tried to burn Evans' pants after they got home from Denny's.
>
> FN6. In fact, the defense presented no witnesses during the guilt phase.
>
> FN7. The defense waived the following statutory mitigators: (1) lack of significant prior criminal history; (2) the defendant acted under the influence of another; (3) the defendant acted under any strong emotional duress; (4) impaired capacity of the defendant to appreciate the criminality of his conduct or conform his conduct to the requirements of the law; and (5) the victim's participation in or consent to the defendant's conduct.

Evans, 808 So.2d 95-100.

Fourteen claims[1] were raised by Evans on direct appeal and

[1] As provided by this Court:

Evans claims that: (1) the trial court erred in denying Evans' motion to quash the indictment or dismiss the charge; (2) reversal is required under Anderson v. State, 574 So.2d 87 (Fla. 1991), because the State's testimony at trial contradicted the case it presented to the grand jury; (3) the trial court erred in excluding the testimony concerning cannabanoids in the victim's blood; (4) the trial court erred in limiting the cross-examination of Detective Brumley to exclude hearsay; (5) the trial court erred in closing individual voir dire to Evans' family; (6) the trial court erred in denying Evans' motion for a

rejected by this Court. On February 12, 2002, Evans' rehearing was denied and Mandate issued. Certiorari was denied on October 15, 2002.[2] Evans v. Florida, 537 U.S. 951 (2002).

On October 3, 2003, Evans filed his Florida Rule of Criminal Procedure 3.851 Motion for Postconviction Relief (PC-R.1 1-99). Following the State's response (PC-R.1 100-691), the Case Management Hearing was held on February 10, 2004 and the court granted an evidentiary hearing.[3] (PC-R.4 697-98). As a

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statement of particulars and in allowing the State to argue in the alternative that Evans was the shooter or a principal; (7) the State's closing argument comments during the guilt phase were reversible error; (8) the State's voir dire examination of the jury regarding the testimony of coconspirators or codefendants constituted fundamental error; (9) Evans' death sentence is disproportionate; (10) Evans' death sentence is either disproportionate or unconstitutional because the State presented the jury with the alternative theories that Evans was either the shooter or a principal; (11) the State's closing argument comments during the penalty phase were fundamental error; (12) the trial court erred in giving no weight to valid mitigation; (13) the trial court erred in imposing the death penalty when the jury made no unanimous findings of fact as to death eligibility; (14) the trial court erred in finding that the murder was both cold, calculated, and premeditated and that the murder was committed for pecuniary gain (improper doubling).

Evans v. State, 808 So.2d 92, 100 (Fla. 2001). This Court *sua sponte* found sufficient evidence. Id. at 100.

[2] 1 - Excluding petitioner's parents and the public from portions of voir dire was unconstitutional; 2 – It was unconstitutional for the State to argue alterative theories that Evans either shot the decedent or acted as an accessory who was not present at the time of the murder and that the jurors could be divided as to which theory was proven; 3 – Florida's capital sentencing was unconstitutional under Apprendi v. New Jersey.

[3] Claim I (ineffective assistance of guilt phase counsel), Claim II (ineffective assistance of penalty phase counsel except for

result of Evans' motion to disqualify the trial court, a new judge was assigned. (PC-R.4 729-40, 743-44) The evidentiary hearing was held on November 8, 9, and 22, 2004 after having to be reset due to the 2004 hurricanes.

At the evidentiary hearing, Evans called Chief Assistant Public Defender Mark Harllee ("Harllee"), Public Defender Diamond Litty ("Litty"), Rosa Hightower, Jesus Cruz, Christopher Evers, Mindy McCormick, Anthony Kovaleski, Patricia Dennis, Sandra Kipp, Dr. Silverman, and Dr. Harvey. In rebuttal, the State called Assistant State Attorneys Nikki Robinson and Christopher Taylor. Harllee was the lead defense counsel and he tried the case with Litty. Harllee made the guilt phase decisions. While he consulted and advised in the penalty phase, Litty made the penalty phase decisions. By the time of Evans' trial, Harllee had been practicing since 1984 and had been doing capital defense work for ten years. He had conducted eight capital cases before Evans case came to trial. Further, he had attended every Life Over Death seminar offered since 1992, served on the Death Penalty Steering Committee, and presented certain sections at the Life Over Death Seminars. Harllee attended 20 seminars where jury selection was a topic. (PC-T.10

"that part of Defendant's Claim II wherein he alleges failure to object to serious misstatements of the law in the standard jury instructions...."; and Claim III (ineffectiveness of counsel during voir dire). Claims IV - VI were found not to require a hearing. (PC-R.4 697-98).

211-17, EHT.11 325). He was the defense counsel during Evans' first trial in 1998 through Evans sentencing following his conviction of first-degree murder. (PC-T.11 325-26; 355-57).

Litty, like Harllee, attended Life Over Death seminars. At the time of the evidentiary hearing, she had been the elected Public Defense for 12 years. Prior to Evans' case coming to trial, she had defended two capital cases, both Thomas Wyatt cases, as well as capital/non-death penalty cases. She was involved from the beginning of the case and while Harllee was the "captain of the ship", they worked together closely, with Litty doing some guilt phase investigation and handling the penalty phase. (PC-T.10 212-13; PC-T.11 354-58, 370).

Available to Harllee and Litty were two investigators, one dedicated to each trial phase. Brandon Perron was involved in conducting the time trials for Harllee, locating, and interviewing guilt phase witnesses. (PC-T.10 217-23, 227-29). After investigating the case and evaluating the impact evidence would have on the jury, and considering the advantage of having the final closing argument, Harllee developed the guilt phase defense strategy in consultation with counsel and Evans. Sandy Warner ("Warner") was the "in-house" investigator, who assisted with penalty phase issues. Warner worked closely with the attorneys in compiling the standard mitigation information. (PC-T.10 217, 274-75; PC-T.11 341-43, 370). The defense hired three

mental health experts, gave them background information on Evans, and requested evaluations of him. After the evaluations were provided, the defense determined the experts would be used in a limited fashion and the family members would offer evidence of mental health issues. Other mitigation was offered by a jail guard and a minister. (PC-T.11 341-43, 370-75, 377, 382-88).

Upon the evidence presented and trial record, the court concluded Evans' failed to carry his burden to obtain postconviction relief. (PC-R.6 1105-28). Following the denial of postconviction relief, Evans appealed and with the filing of his initial brief in this case, he filed a petition for writ of habeas corpus in case number SC07-494. The State's answer to the postconviction appeal follows and the response to the habeas corpus petition is filed under separate cover.

SUMMARY OF THE ARGUMENT

Issue I – Evans is not entitled to attorney work product materials, exempt for public records disclosure which was used by the State in preparing its witnesses for the hearing.

Issue II - The court's post-evidentiary hearing conclusion that guilt phase counsel rendered effective assistance is supported by the evidence and comports with Strickland.

Issue III – The court properly determined there was no Brady v. Maryland, 373 U.S. 83 (1963) violation.

ISSUE IV – Evans received effective assistance from his penalty phase counsel. The court's findings are supported by competent, substantial evidence and law set out in Strickland.

Issue V – Counsel was not ineffective during *voir dire*.

Issue VI – The was no cumulative error as the issues were either legally insufficient, procedurally barred, or meritless.

Issue VII – Ineffectiveness of collateral counsel is not a cognizable claim and there is no constitutional violation in denying interviews absent a prima facie showing of misconduct.

Issue VIII – Ring does not impact Florida's capital sentencing as death eligibility occurs at time of conviction.

ARGUMENT

ISSUE I

THE COURT PROPERLY FOUND THE STATE'S LETTER TO BE WORK PRODUCT AND EXEMPT FROM PUBLIC RECORDS DISCLOSURE

It is Evans' position that a letter sent to trial defense counsel, Harllee and Litty, as preparation of them for their evidentiary hearing testimony should have been disclosed as a public record. The State disagrees. The letter, as the court found, was done in preparation for the collateral litigation and was work-product exempt from public records disclosure.

This Court applies an abuse of discretion standard when reviewing public records rulings. "A circuit court's ruling on a

public records request filed pursuant to a rule 3.850 motion will be sustained ... absent an abuse of discretion." State v. Coney, 845 So.2d 120 (Fla. 2003). See Pietri v. State, 885 So.2d 245 (Fla. 2004); Mills v. State, 786 So.2d 547 (Fla. 2001); Glock v. Moore, 776 So.2d 243 (Fla. 2001).

During Harllee's evidentiary hearing testimony, he was asked what items he had with him. In response, Harllee stated: "I have a portion of the transcript. I have your Motion to Vacate, and I have my subpoena, and I have some work product of the state attorney who prepared some responses to things he anticipated would be asked of me." It is to this last comment that Evans points to support his claim that the document prepared by Assistant State Attorney, Lawrence Mirman, in anticipation of postconviction litigation was a public record, not subject to the work product exemption. (IB 13, 17) That does not comport with the prosecutor's representation of what the letter contained. As the prosecutor explained: "The letter is of the nature of a pre-hearing letter advising the witnesses of the date of the hearing, the issues likely to be litigated, *and the mental impressions of the undersigned as they relate to the issues litigated*." (PC-R.6 1102)(emphasis in original).

During the public records hearing, the prosecutor stated:

> The defense argued here ... Ms. Litty and Mr. Harllee, are defense witnesses, which the State takes issue with. The significance of these witnesses in

this case is they are attorneys whose conduct is being attacked, not by the State, but by the defense. And the State and any witnesses have a mutual interest in the case; that is, a witness seeks to defend their reputation or their conduct in the case, and the State seeks to protect the conviction in the case.

So the significance of that is the law that [postconviction counsel] referred to, Reaves, the case – there is actually another case – Smith and Gore,[4] which the court is familiar with, also stands for the proposition that the State or any party can send out a letter to in (sic) those cases the expert which clearly can be work product. And the type of letter sent by the State in this case, a letter saying here are the issues at trial, here are some excerpts of transcripts of prior proceedings, and that those communications reveal the mental impressions of the attorneys for purposes of preparing the witness for litigation.

...

So I, as an advocate for the State, prepare the witness, send them a letter. The letter in this particular case specifically spelled out, and I have the letter here for the court to review in camera, that the communication is work product, which many lawyers communicate to the witness (inaudible) fact and another communications. This communication is work product and ask the witness to keep it confidential. The witness to who (sic) is holding it is an attorney who is familiar with that privilege, and is expected to, in this case and many others, to respect that privilege.

(PC-T.13 653-55)

In rejecting this claim the trial court reasoned:

On August 12, 2005, the Court conducted a hearing on the Defendant's demand. After conducting an in camera inspection of the correspondence, the Court

[4] Reaves v. State, 639 So.2d 1 (Fla. 1994); Smith v. State, 873 So.2d 585 (Fla. 3d DCA 2004); Gore v. State, 614 So.2d 1111 (Fla. 4th DCA 1992).

> finds the correspondence exempt from disclosure as a public record because the correspondence was prepared by an agency attorney, the correspondence reflects the mental impression of the attorney, and the correspondence was prepared exclusively for the postconviction proceeding. Fla. Stat., §119.07(6)(1). Therefore, the Defendant is not entitled to the opinion work product of the agency attorney until the conclusion of the litigation.

(PC-R.6 1143-44). The court did not abuse its discretion in this matter and this Court should affirm.

The letter is exempt from disclosure under §119.071(1)(d)1, Fla. State (2006)[5] which provides: for the exemption of records prepared in anticipation of litigation; i.e., work-product materials. Harllee and Litty, the subjects of this collateral litigation, were listed as witnesses for both parties (PC-R.4 703, 708). The adversarial relationship between Evans and his counsel commenced with the filing of the postconviction motion.

In State v. Kokal, 562 So.2d 324 (Fla. 1990), this Court acknowledged that a letter, such as provided to Harllee and

[5] A public record that was prepared by an agency attorney ... that reflects a mental impression, conclusion, litigation strategy, or legal theory of the attorney or the agency, and that was prepared exclusively for civil or criminal litigation or for adversarial administrative proceedings, or that was prepared in anticipation of imminent civil or criminal litigation or imminent adversarial administrative proceedings, is exempt from s. 119.07(1) and s. 24(a), Art. I of the State Constitution until the conclusion of the litigation.... For purposes of capital collateral litigation as set forth in s. 27.7001, the Attorney General's office is entitled to claim this exemption for those public records prepared for direct appeal as well as for all capital collateral litigation after direct appeal until execution or commutation to a life sentence.

Litty, was not a public record stating: "of course, the state attorney was not required to disclose his current file relating to the motion for postconviction relief because there is ongoing litigation with respect to those documents." See State v. Rabin, 495 So.2d 257 (3d DCA 1986) (holding opinion work product nearly absolutely privileged, not subject to disclosure). This Court has upheld the opinion work product privilege for letters sent by the prosecutor to witnesses. Reaves v. State, 639 So.2d 1, 6 (Fla. 1994) (finding no error in determination letters between prosecutor and expert "that contained work product were privileged and not subject to discovery"). See Fla.R.Crim.P 3.220(g)(1) ("*Work Product*. Disclosure shall not be required of legal research or of records, correspondence, reports, or memoranda to the extent that they contain the opinions, theories, or conclusions of the prosecuting or defense attorney or members of their legal staffs").

The work product privilege has been recognized for a letter from counsel to a potential witness which contained counsel's theory of the case. The appellate court stated:

> One of the documents is a 22-page summary of testimony that the defendant gave in a co-defendant's case. The other document is a 5-page summary of events, entitled "David Gore Chronology."
>
> Discovery in criminal cases is governed generally by the Florida Rules of Criminal Procedure. ...
>
> At the same time, rule 3.220(d)(2)(ii) requires

> the defendant to disclose any "[r]eports or statements of experts made in connection with the particular case, including results of physical or mental examinations and of scientific tests, experiments or comparisons."
>
> We think that the defendant here has made a substantial showing of the former, i.e., "work product" of counsel, rather than the latter, i.e., reports or statements of experts. The two documents originated from his lawyer, not from his expert witness, and thus clearly fit within the terms, "records, correspondence, reports or memoranda", used in the work product rule. The remaining requirement is whether such correspondence contains the "opinions, theories or conclusions" of the lawyer.
>
> We do not see how they can avoid doing so. The first document, the 22-page summary of defendant's deposition in his co-defendant's case, is probably the model of an attorney's thoughts. A summary of testimony necessarily incorporates the summarizer's thoughts and ideas of what to include and what to exclude, what is important and what is inconsequential, what to emphasize and what to ignore, what is real and what is fanciful. To another lawyer knowledgeable of the case and its issues, this kind of summary declares the workings of the lawyer's mind who prepared it. It could easily be a roadmap of the trial strategy of the lawyer.
>
> So too with the 5-page chronology. The selection of what events to relate to the witness may tell the opposing lawyer more about what the trial lawyer intends to elicit and emphasize than any discovery deposition ever could. The nature of the facts selected, and the peculiar phrasing used in their articulation, open up the trial lawyer's thought processes and mental impressions to his adversary. Indeed, the prosecutor's zeal to obtain the documents betrays more than anything we can say about the importance of them.

Gore v. State, 614 So.2d 1111, 1113 (Fla. 4th DCA 1992). See Smith v. State, 873 So.2d 585 (Fla. 3d DCA 2004). There was no

abuse of discretion in denying production of the prosecutor's letter to Harllee and Litty.

This Court should reject Evans' use of State v. Rabin, 495 So.2d 257 (Fla. 3d DCA 1986) and Wealton v. Marshall, 631 So.2d 323 (Fla. 4th DCA 1994) as the cases are distinguishable from this matter. Here, the letter was communicating the prosecutor's thoughts on the case in preparation for capital litigation.

In Rabin, a distinction was made between on going and concluded litigation before the court even considered differences between fact and opinion work product. Here, the letter was prepared for the collateral litigation, and is exempt from disclosure while the litigation is ongoing. The litigation is on going through the state and federal proceedings, and remains so until execution of the sentence or its commutation to life imprisonment. See Fla. Stat. §119.071 (1)(d)1.[6] Even under Rabin, where the materials contained attorney impressions of the

[6] Clearly, if the Attorney General's Office is exempt from disclosing such documents until after execution, then the State Attorney's Office, as co-counsel in the litigation, is likewise exempt until the defendant is executed or has been re-sentenced to life imprisonment. It would defeat the purposes of the statute to find the same document in the Attorney General's files is not a public record, but in the hands of the State Attorney is a public record. With certain exceptions/exemptions records in the State Attorney's files before the conviction and sentence is final become public records, while those generated during collateral litigation in state and federal court are not public record as the litigation is ongoing, until the execution is carried out. All materials generated during this period by the State, i.e., attorneys for the Offices of the State Attorney and Attorney General, are exempt from public records disclosure.

case combined with factual issues, they remain privileged work product. Rabin, 495 So.2d at 264 (finding counsel "need not respond to questions concerning his half of the conversation, or his conclusions, opinions, or theories drawn therefrom").

The State's letter was from the prosecutor to defense counsel and includes the prosecutor's impressions of the case given the facts and issues to be litigated. The letter was the State's method of preparing the defense counsel witnesses in this capital collateral case who have been challenged by their client as rendering ineffective assistance. As noted above, "The letter is of the nature of a pre-hearing letter advising the witnesses of the date of the hearing, the issues likely to be litigated, *and the mental impressions of the undersigned as they relate to the issues litigated*." (PC-R.6 1102).

Neither Whealton, nor Holland v. State, 503 So.2d 1250 (Fla. 1987), further Evans' position. In Wealton, the party seeking the fact work product portion of a document was required to show need/hardship. That cannot be shown here as the prosecutor represented he merely identified the issues to be litigated and offered his mental impressions of same. Such is pure opinion work product with no fact work product to be extracted. Moreover, Evans' suggestion, based upon Holland, that without viewing the letter, he was somehow denied a fair evidentiary hearing because he may have been able to show the

State influenced the testimony of Harllee and Litty (IB 18) does not establish the need/hardship requirement. In fact, Evans' argument is without merit as collateral counsel knew of the letter written to Harllee; Harllee spoke of it during the first few moments of his examination by postconviction defense counsel (PC-T.10 210). At that time, counsel could have asked Harllee what impact the letter had on his testimony. Having failed to ask any follow-up questions, Evans did not use due diligence to uncover any alleged influence the State exerted which he now insinuates may have gone to the witness' credibility, nor that he has a need/hardship for the letter.

The letter was based upon the claims raised in Evans' postconviction motion and how those might be litigated given the record and postconviction evidence. Evans cannot show hardship/need to view the letter which merely contains the prosecutor's understanding of the issues and how such would be litigated. Evans verified his postconviction motion, had the evidence collateral counsel would offer, and the appellate record. The letter contained nothing more than the State's impressions of these materials/issues. To insinuate there may be some impropriety is an unfair and unprofessional charge. The judge reviewed the letter and determined it was mere witness preparation including counsel's mental impressions, thus, amounting to exempt work product. This Court should affirm.

ISSUE II

EVANS FAILED TO SHOW GUILT PHASE COUNSEL WAS INEFFECTIVE UNDER STRICKLAND

Evans complains the court erred in finding Harllee's representation during the guilt phase constitutional. He asserts Harllee was ineffective for failing to: (1) present alibi witnesses: Jesus Cruz, Jose Mejia, William Lynch, Rosa Hightower, Tony Kovleski, Christopher Evers and Mindy McCormick to contradict State's timeline and/or pecuniary gain aggravator (IB 23-40); (2) object to Juror Taylor's participation in the trial (IB 44-46); (3) request a Richardson hearing in a timely manner for Charles Cannon's testimony (IB 46-49); (4) object to prosecutor's comments as to the age and pregnancy of Evans' girlfriend, Sarah Thomas (IB 50-51); (5) object to the curative instruction formulated after Donna Waddell noted Evans was gang member (IB 51-52); (6) object to State's reference to killing as "execution style" (IB 52-53); (7) object to bolstering of Waddell and Thomas via Detective Cook (IB 53-58); (8) object to the State's closing argument regarding whether there had to be unanimity on Evans' status as shooter or principal (IB 58-61). It is Evans' position counsel unreasonably failed to investigate and the court failed to take into consideration the evidentiary hearing testimony as a whole and in conjunction with the trial record. Evans is mistaken. The proper analysis under Strickland

v. Washington, 466 U.S. 688 (1984) was conducted and substantial, competent evidence supports the factual findings and the proper law was applied. Relief must be denied.

The standard of review for ineffectiveness claims[7] following an evidentiary hearing is *de novo*, with deference given the court's factual findings. "For ineffective assistance of counsel claims raised in postconviction proceedings, the appellate court affords deference to findings of fact based on competent, substantial evidence, and independently reviews deficiency and prejudice as mixed questions of law and fact." Freeman v. State, 858 So.2d 319, 323 (Fla. 2003).

> ... we review the deficiency and prejudice prongs as mixed questions of law and fact subject to a *de novo* review standard but ... the trial court's factual findings are to be given deference. So long as the [trial court's] decisions are supported by competent, substantial evidence, this Court will not substitute its judgment for that of the trial court on questions of fact and, likewise, on the credibility of the witnesses and the weight to be given to the evidence.

Arbelaez v. State, 889 So.2d 25, 32 (Fla. 2005)[8]

To prevail on an ineffectiveness claim, the defendant must prove (1) counsel's representation fell below an objective standard of reasonableness, and (2) but for the deficiency, there is a reasonable probability the result of the proceeding

[7] The State relies on this standard of review Issues II, IV, V, and VII.

[8] Reed v. State, 875 So.2d 415 (Fla. 2004); Davis v. State, 875 So.2d 359, 365 (Fla. 2003); State v. Riechmann, 777 So. 2d 342 (Fla. 2000); Sims v. State, 754 So. 2d 657, 670 (Fla. 2000).

would have been different. Strickland, 466 U.S. 688-89.

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

Valle v. State, 778 So.2d 960, 965 (Fla. 2001). At all times, the defendant bears the burden of proving counsel's representation fell below an objective standard of reasonableness, was not the result of a strategic decision, and that actual, substantial prejudice resulted from the deficiency. See Strickland; Gamble v. State, 877 So.2d 706, 711 (Fla. 2004).

In Davis v. State, 875 So.2d 359, 365 (Fla. 2003), this Court reiterated that the deficiency prong of Strickland requires the defendant establish counsel's conduct was "outside the broad range of competent performance under prevailing professional standards." (citing Kennedy v. State, 547 So.2d 912, 913 (Fla. 1989). With respect to performance, "judicial scrutiny must be highly deferential;" "every effort" must "be made to eliminate the distorting effects of hindsight," "reconstruct the circumstances of counsel's challenged conduct," and "evaluate the conduct from counsel's perspective at the

time." Strickland, 466 U.S. at 689; Davis, 875 So.2d at 365. In assessing the claim, the Court must start from a "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Strickland, 466 U.S. at 688-89. The ability to create a more favorable strategy years later does not prove deficiency. See Patton v. State, 784 So.2d 380 (Fla. 2000); Cherry v. State, 659 So.2d 1069 (Fla. 1995). "A court considering a claim of ineffectiveness of counsel need not make a specific ruling on the performance component of the test when it is clear that the prejudice component is not satisfied." Maxwell v. Wainwright, 490 So.2d 927 (Fla. 1986).

Expounding upon Strickland, the Supreme Court cautioned in Wiggins v. Smith, 539 U.S. 510, 533 (2003):

> In finding that [the] investigation did not meet *Strickland*'s performance standards, we emphasize that *Strickland* does not require counsel to investigate every conceivable line of mitigating evidence no matter how unlikely the effort would be to assist the defendant at sentencing. Nor does *Strickland* require defense counsel to present mitigating evidence at sentencing in every case. Both conclusions would interfere with the "constitutionally protected independence of counsel" at the heart of *Strickland*.... We base our conclusion on the much more limited principle that "strategic choices made after less than complete investigation are reasonable" only to the extent that "reasonable professional judgments support the limitations on investigation." ... A decision not to investigate thus "must be directly assessed for reasonableness in all the circumstances."

Wiggins, 539 U.S. at 533. From Williams v. Taylor, 529 U.S. 362 (2000), it is clear the focus is on **what** efforts were undertaken

and **why** a strategy was chosen over another. Investigation (even non-exhaustive, preliminary) is not required for counsel reasonably to decline to investigate a line of defense thoroughly. See Strickland, 466 U.S. at 690-91 ("[s]trategic choices made after less than complete investigation are reasonable precisely to the extent the reasonable professional judgments support the limitations on investigation.").

(1) alibi witnesses, Jesus Cruz ("Cruz"), Jose Mejia ("Magia"), William Lynch ("Lynch"), Rosa Hightower ("Hightower"), Tony Kovleski ("Kovleski"), Christopher Evers ("Evers") and Mindy McCormick ("McCormick") (Claim I(6) below PC-R.4 1116-20) - Rejecting this claim, the court reasoned:

> Timing of gunshots
>
> Evans claims that counsel was ineffective for failing to present witnesses to refute the State's timing of gunshots heard by the State's witness Leo Cordary between 8:00 and 8:30 p.m. Evans contends that Jesus Cruz, Jose Magia, and William Lynch would have testified to hearing the gunshots between 9:30 and 10:30 p.m.
>
> At the evidentiary hearing, no evidence was admitted concerning witnesses Magia and Lynch. Cruz testified through an interpreter. The Court makes the following finding of fact with respect to Cruz. At the hearing Cruz was able to understand, and began to respond to some of the questions, prior to translation by the interpreter. Cruz was extremely drunk the night of the murder. Cruz's report of gunshots between 9:30 and 10:00 was only an estimate because Cruz did not look at a watch. Cruz sustained memory loss from a neck injury two years before trial. Cruz could not recall a contact with Assistant State Attorney Christopher Taylor at the time of trial where

Cruz told Taylor that he was drunk the night of the murder and did not remember anything. Taylor memorialized the contact in a memo dated February 10, 1999. (State's Exhibit 6.) The Court finds that Taylor did have contact with Cruz as memorialized in the memo dated February 10, 1999.

Harllee testified that he made a strategic decision not to call Cruz at trial because Cruz admitted to being drunk on the night of the murder and was not credible. The Court finds Harllee's strategy reasonable with respect to Cruz. Thus, absent testimony of Magia and Lynch, Evans fails to demonstrate deficient performance of counsel as to these gunshot witnesses.

Alibi witnesses

Evans claims that counsel was ineffective for failing to present alibi witnesses Rosa Hightower, Anthony Kovaleski, and Christopher Evers. Evans contends that these witnesses would show that he was at the Firefighters' Fair and did not have the opportunity to commit the murder between 8:00 and 8:30 p.m. at the victim's trailer twenty minutes away.

At the evidentiary hearing, Harllee testified that he made a strategic decision not to call two of these alibi witnesses because the witnesses could not give Evans a complete alibi and one of the witnesses was not credible. Harllee stated that he did not want to give up the rebuttal closing argument because the incomplete alibi did not put Evans at the Fair at the time of the shooting and would not rebut evidence that Evans had manufactured and implemented the alibi in planning the homicide. Further, Harllee testified that he was unaware of the third witness.

The Court makes the following findings of fact with respect to Rosa Hightower. The court file contains no report or deposition describing Hightower's contact with Evans at the Firefighters' Fair. However, prior to trial Hightower reported to defense investigator that she was with Evans at the Firefighters' Fair sometime between 6:00 and 7:00 p.m. but that she did not remember seeing Evans again that night. (Defense Exhibit 4) During trial, Hightower

told the prosecutor that she saw Evans when she arrived at the Fair but never saw him again the rest of the night. (State's Exhibit 5) At the evidentiary hearing, Hightower testified differently stating that she was with Evans for about twenty minutes when she arrived at the Fair between 6:00 and 7:00 p.m., and that she saw Evans a second time sometime between 8:15 and 8:45 p.m. before she left the Fair.

Harllee based his strategic decision not to call Hightower on her pre-trial statement of incomplete alibi made to the defense investigator. Absent evidence that the investigator's report was inaccurate, or absent other proof Harllee knew or should have known that Hightower saw Evans a second time between 8:15 and 8:45 p.m., the Court finds no deficiency in the defense investigation and finds Harllee's trial strategy reasonable.

The Court makes the following findings of fact with respect to Anthony Kovaleski. Prior to trial Kovaleski reported to the defense investigator that he was with Evans at the Firefighters' Fair for about an hour starting at dusk. [sunset was at 6:43 p.m.] (Defense Exhibits 1 and 2) At the evidentiary hearing, Kovaleski testified differently stating that he was with Evans for 1½ to 2 hours starting at around 6:00 p.m. Kovaleski's evidentiary hearing testimony was uncorroborated by Rosa Hightower who reported seeing Evans at the Fair during the same period but was not questioned about seeing Kovaleski with Evans.

Harllee testified that he made a strategic decision not to call Kovaleski because the pre-trial alibi testimony was incomplete for the time of the homicide and Kovaleski was not a credible witness. In light of Kovaleski's convictions on crimes of dishonesty and absent corroboration of Kovaleski's evidentiary hearing testimony, the Court finds no deficiency in the defense investigation and finds Harllee's trial strategy reasonable.

The Court makes the following findings of fact with respect to Christopher Evers. Evers was 12 years old at the time of the murder. Evers saw Evans at Firefighters' Fair sometime around dark. Evans was at the Fair when Evers left some time around 7:00 to 8:00

> p.m. Harllee does not recall considering Evers as a potential alibi witness.
>
> Evans' claim as to Evers is legally insufficient because there was no showing that Evers' testimony would have changed the outcome of the proceeding. This, Evans fails to satisfy the second prong of the *Strickland* standard.
>
> Contradiction evidence
>
> Evans claims that counsel was ineffective for failing to call Mindy McCormick to contradict evidence of pecuniary gain and to contradict evidence that Evans was the shooter.
>
> The Court makes the following of finding of fact with respect Mindy McCormick's evidentiary hearing testimony. McCormick would have testified that she met Connie Pfeiffer two weeks after the homicide, that McCormick saw electronic items in Pfeiffer's storage shed similar to the types of items allegedly received by Evans as pecuniary gain, that McCormick observed Pfeiffer a package containing unidentified contents from an unidentified man who was not Evans, and that McCormick saw Pfeiffer throw the package in the river and heard Pfeiffer comment that the package contained "old memories."
>
> The Court concluded that Evans has not met his burden of showing how failure to present McCormick's testimony prejudiced the outcome of the trial. Evans offered no evidence to identify the electronic items with any specificity or to connect the electronic items to the homicide. Further, Evans did not offer any evidence to demonstrate that the unidentified man and the unidentified contents of the package had any relevance to the homicide. Thus, Evans fails to satisfy the second prong of the *Strickland* standard.

(PC-R.4 1116-20) These factual findings and legal conclusions are supported by the record and case law.

The record shows Harllee conducted an investigation, utilized an investigator, met with the witnesses, and determined

their value in relationship to the evidence in existence and the desire to have the final closing argument. Based upon his investigation and discussion with the witnesses and after consultation with Evans, Harllee determined he would not present Magia, Cruz, Hightower, Kovaleski, or McCormick. Further Harllee could not locate Lynch, thus, he was used as a basis for the motion to dismiss and was accordingly not put on at trial.

Harllee had his investigator try to find Cruz and Magia because they had reported hearing firecracker noises near 10:30 p.m. on the night in question. (PC-T.10 222-29). Harllee met with either Magia or Cruz along with an interpreter. At that time, the story changed; there was a memory lapse, the time could not be recalled, and the witness stated there had been drinking and they were very drunk.[9] Harllee "felt like even a poor cross-examination would totally destroy their (Cruz and Magia) credibility, and I made the strategic decision not to call them as witnesses" (PC-T.10 224-26). Such is a valid basis for not calling a witness. Reed v. State 875 So.2d 415 (Fla. 2004) (noting "counsel made a tactical and ethical decision to not attempt to establish an alibi defense because the available testimony provided, at best, an incomplete alibi"); State v. Bolender, 503 So.2d 1247 (Fla. 1987) ("strategic decisions do

[9] When the prosecutor, Chris Taylor, spoke to Cruz during the last trial, Cruz confirmed he and Magia were drunk on the night in question and could not recall anything (PC-T.12 602-04).

not constitute ineffective assistance if alternative courses of action have been considered and rejected").

When Cruz testified in the evidentiary hearing, he reported having suffered a head injury in 1997. The 1991 crime was tried in 1999. As a result of his 1997 head injury, Cruz has memory lapses and cannot recall many things. Moreover, on the night in question, he was very drunk and he does not remember everything (PC-T.11 414). Given his lack of memory and drunkenness, neither Strickland deficiency nor prejudice has been shown.[10]

According to Harllee, Hightower was investigated in relation to the alibi defense. In speaking with her, Harllee learned she saw Evans at the fair near 6:00 or 6:30 p.m., but was not with him the entire time. The report on this witness did not show her seeing Evans at 9:00 p.m. and Harllee has no recollection of Hightower stating she saw Evans at the fair later that evening. Based upon this, Harllee determined Hightower did not provide a complete alibi for Evans, thus, he made the strategic decision not to call her because if she could not give a good alibi,[11] then it was not worth losing final

[10] Neither Magia nor Lynch testified at the evidentiary hearing (Magia because he was not presented and Lynch due to his death), thus, Evans has not proven his claim. Given the lack of admissible evidence regarding these witnesses, the court correctly did not consider them.

[11] Harllee's recollection of what Hightower was reporting at the time of trial is supported by the prosecutor, Chris Taylor, who

closing argument (PC-T.10 229-33; PC-T.11 335). Because Harllee spoke with Hightower, and assessed the value of her testimony before rejecting it, deficiency has not been shown. "Counsel cannot be deemed ineffective merely because current counsel disagrees with trial counsel's strategic decisions. Moreover, strategic decisions do not constitute ineffective assistance of counsel if alternative courses have been considered and rejected and counsel's decision was reasonable under the norms of professional conduct." Occhicone v. State, 768 So.2d 1037, 1048 (Fla. 2000); Bolender, 503 So.2d at 1250. See Reed, 875 So.2d at 429-30 (“counsel made a tactical and ethical decision to not attempt to establish an alibi defense because the available testimony provided, at best, an incomplete alibi”);.

Considering McCormick, Harllee testified he did not use her at trial because her testimony would not contradict that of Sarah Thomas and Donna Waddell and McCormick was not specific enough in her description of the electronic equipment to undermine either the murder for hire aspect of the case or pecuniary gain. McCormick did not offer a firm time frame for visiting Connie Pfeiffer’s (“Connie”) storage area which would negate the State’s proof (PC-T.10 238-39). Negating the proof that Evans received a television or camcorder would not have

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testified Hightower reported seeing Evans near dusk, but did not see him again that night (PC-T.12 601-03).

undermined the pecuniary gain aggravator because the equipment had been taken for a period of time after the murder. In Harllee's estimation, it would not have contradicted completely Waddell and Thomas because no brand names were supplied (PC-T. 10 240-41; PC-T.11 348-49). While it was significant to the parties that Connie had electronic equipment given her husband's business, the State did not have strong proof of what equipment had been given in payment. This lack of strong proof was used by the defense to argue against the "hit man" prosecution theory (PC-T.11 334-35). Harllee's decision not to use McCormick fell under the wide range of professional conduct. Reed, 875 So.2d at 429-30; Occhicone, 768 So.2d at 1048.

With respect to Lynch, Harllee averred he could not recall asking the investigators to look into what this witness had to say,[12] yet, he used the fact Lynch could not be found as a basis for seeking dismissal of the case due to the passage of time (PC-T.10 253-58; TR.19 1808-21).[13]

It is apparent Harllee took professional steps to locate

[12] "An ambiguous or silent record is not sufficient to disprove the strong and continuing presumption. Therefore, 'where the record is incomplete or unclear about [counsel]'s actions, we will presume that he did what he should have done, and that he exercised reasonable professional judgment.'" Chandler v. U.S., 218 F.3d 1305, 1314, n.15 (11th Cir. 2000) (quoting, Williams v. Head, 185 F.3d 1223 (11th Cir. 1999).

[13] This issues was rejected on appeal. Evans, 808 So.2d at 101. See Rivera v. State, 717 So.2d 477 (Fla. 1998) (rejecting due process challenge of pre-indictment delay as defendant did not show complete alibi).

Lynch, but without success. Evans did not develop evidence at the postconviction hearing to show counsel failed to competently seek Lynch. Deficient performance has not been shown. Similarly, given the fact that this Court concluded Evans could not show prejudice arising from the defense being unable to locate Lynch, then prejudice under Strickland has not been met. It cannot be said that absent counsel's failure to locate Lynch, the result of the trial would have been different. Cf. White v. State, 559 So.2d 1097, 1099-1100 (Fla. 1990) (rejecting ineffectiveness claim regarding counsel's failure to preserve issues for appeal based upon earlier appellate finding that unpreserved claim was not fundamental error).

Harllee testified he was aware of Kovaleski and his potential as an alibi witness, but Kovaleski's statement was not inconsistent with the State's proof. Further, after meeting Kovaleski, a convicted felon, and assessing his testimony, Harllee determined it would be very damaging for the jury to hear Evans had performed sex acts upon Kovaleski's wife in Kovaleski's presence (PC.T-10 261-62; PC-T.11 333-34). Although Harllee was aware Kovaleski reported to the defense investigator that he had seen Evans at the fair at either 6:00 or 8:00 p.m., he did not present Kovaleski because he believed Kovaleski "would have been a terrible witness with absolutely no credibility at all, just from his demeanor, the way he came off,

and then throw in the prior felony convictions, that he's in jail at the time, I didn't think he was going to be of any assistance at all." Assessing a witness' value is the duty of counsel. Harllee performed his duty professionally and no prejudice was shown from the decision not to call Kovaleski. Occhicone, 768 So.2d at 1048 (noting counsel is not ineffective merely because collateral counsel disagrees with former counsel's strategy; strategic decisions do not constitute ineffectiveness if other courses were considered/rejected and counsel's decision was reasonable under professional norms.

While Harllee did not recall speaking to Evers, Connie's son, and did not see Evers' name on the investigators bill. Harllee recalled Evers was at the fair with his mother that night. Evers testified he was 12 year-old at the time of the crime and that Waddell had driven him and his mother and brother to the fair. It was Evers' recollect he saw a man at the fair, **whom he has just come to realize** was Evans. While they were at the fair, he and his nine-year-old brother went on a lot of rides. He believes they got to the fair in the afternoon and stayed for hours. However, Evers admitted he had no reason to be noting the time, until his mother said Alan Pfeiffer wanted her home. He recalled his mother trying to reach Pfeiffer, and that he met Evans when it "started to get dark." The sun set at 6:34 p.m. (PC-T.10 232; PC-T.11 324-25; PC-T.12 428-33).

Evers' alleged alibi would have been compared to the account of Greg Hill ("Hill"). At trial, Hill averred that at 6:30 p.m. on 3/23/91, he met Connie, her children, two women, and a man at the fair. Hill and Connie remained together until 9:30 p.m. except for a period between 7:10 and 7:30, when she may have left to make a call. At 9:30 they met Connie's friends and she left to take her children home, but agreed to meet Hill afterwards. When she returned at 10:30 p.m., she was noticeably shaken stating she feared going home and planned to go to a hotel. Connie left Hill at 11:30 p.m. that night (TR 3656-61). There is nothing in conflict with the trial testimony nor to assist Evans. No prejudice arose due to Harllee's failure to interview or call Evers. It cannot be said, that but for counsel's failure to present Evers, the trial would have been different. The court's ruling should be affirmed.

(2) Juror Taylor's participation in the trial (IB 44-46) (Claim I(1) below; PC-R.4 1108-09) – The court held:

> During examination of Officer Kevin Martin, Juror Taylor answered a question posed to the officer concerning an intersection traffic light. Although Juror Taylor's comment is not a part of the record, the record does include the trial court's admonishment of Juror Taylor not to participate in the trial. Evans claims that counsel was ineffective for failing to object to Juror Taylor's comment, and for failing to object to the trial court's admonishment in front of the other jurors, thereby drawing more attention to the comment. Evans contends that counsel's deficiencies "could negatively influence the plausibility of the defense case or improperly bolster

the credibility of the prosecutor's theory."

> At the evidentiary hearing, Harllee testified that he had not heard Juror Taylor's comment at trial and that he had no independent recollection of the comment. However, Harllee stated that he did not have alternate Juror Taylor, venire panel #13 removed from the jury because she was a good defense juror. Harllee explained that process that he uses for taking notes for jury selection. For questions asked to jurors he places a plus for each response positive to the defense and a minus for each response negative to the defense. I addition, Harllee asks jurors to rank themselves on a death penalty scale of one to ten – ten being a death recommendation on every first degree murder conviction and one being practically no death recommendations. (EHT Vol.I 76-78, Vol. II 136)
>
> Harllee reasoned that Juror Taylor was a good defense juror because her brother was incarcerated for attempted murder or armed burglary, she had three pluses and only one minus for her responses during voir dire, and she ranked herself a five on the death penalty scale. (EHT Vol. I 88-91, Vol. II 135-136 & State's Exhibit 1.) In addition, Harllee stated that the trial court's instruction was sufficient to cure Juror Taylor's comment, and Harllee would not have wanted to embarrass a good defense juror by objecting to the trial court's admonishment.
>
> The Court finds Harllee's trial strategy reasonable. Further, the Court finds Evans fails to show how this single juror comment prejudiced the outcome of the trial in light of the other evidence presented. Thus, Evans fails to satisfy both prongs of the ***Strickland*** standard.

(PC-R.4 1108-09).

The court properly rejected this claim given the trial and evidentiary hearing testimony which revealed Harllee's his rationale for keeping Taylor, and Evans has not shown prejudice. According to Harllee, he had not heard the juror's comment, but

had reason to retain her because her brother had a criminal history including murder and burglary convictions; Taylor had views on capital punishment favorable to the defense; and given this, he would not want to embarrass Taylor[14] (PC-T.10 279-82; PC-T 326-28). Such are reasoned and valid decisions. The retention and choice not to embarrass a juror felt to be defense oriented are competent, reasonable grounds that do not fall below the standard of professional representation. Harvey v. Dugger, 656 So. 2d 1253, 1256 (Fla. 1995) (strategic decision to retain juror because she was receptive to arguments for one phase more another was reasonable, competent strategy); Salmon v. State, 755 So.2d 148, 150 (Fla. 3d DCA 2000) (juror's criminal history could indicate sympathy toward defendant). Because deficiency has not been shown, Evans has not met his burden under Strickland.

Moreover, he has not shown how the failure to object prejudiced him. The single comment regarding one traffic light

[14] Taylor's brother was incarcerated for murder and burglary, thus, in Harllee's estimation, she would make a good defense juror. Harllee did not request an interview or seek an instruction that the jury disregard Taylor's comment because the court had instructed the jurors properly (PC-T.10 279-82; PC-T 326-28). In Harllee's questioning of Taylor, she gave three defense oriented answers and no negative answers. On how she rated herself on the death penalty, Taylor gave herself a five on a scale of one to ten, putting her in the middle, and the combination of the guilt and penalty phase questions, made her a good defense juror. Harllee did not comment further on Taylor's "blurting" of an answer during a witness' testimony because he did not want to embarrass her and wanted her retained.

and the fact the juror was admonished in front of the jury was not of such significance that had counsel objected, the result of the trial would have been different. The evidence from Waddell and Thomas was overwhelming and supported the forensic evidence collected. See Evans, 808 So.2d at 95-99.[15] Such a minor point as a juror blurting out a response regarding local traffic equipment, and once admonished did not "re-offend," does not establish prejudice as defined in Strickland.

(3) **Richardson hearing for Charles Cannon's testimony** (IB 46-49) (Claim I(2) below PC-R.4 1109-11) – Evans has failed to show that the court erred in its rejection of this claim. Counsel brought the change in Cannon's testimony to the trial judge's attention, moved for a mistrial and Richardson hearing.[16]

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[15] The evidence established Evans as the person who agreed to do the contract killing of Alan Pfeiffer, developed the plan for how such should be accomplished to make it look like a robbery, while giving the participants an alibi. Further, Waddell and Thomas identified Evans as the shooter, and testified about his destruction of the clothing he wore that night and the electronic equipment he received for the contract killing. (TR.31 3136-37, 3219, 3258-59; TR.32 3317-21, 3388, 3404, 3414-17, 3445-48, 3474-83; TR.33 3486-91, 3497-3502, 3549-57, 3571; TR.34 3616-17, 3656-61, 3674-81, 3692-3703; TR.35 3797-3810, 3815-19; TR.36 3826-55, 3862-64; TR.37 4019-22, 4047).

[16] During cross-examination of Cannon, Harllee complained that Cannon's testimony was different from the testimony given in the first trial. The fact that Cannon spoke to the State between the first and third trials and how he came to change his testimony was proffered to the court. The defense requested a mistrial on two grounds: (1) Cannon told the jury there was a "last trial" and (2) his change in testimony required further investigation by seeking who in the prosecutor's office spoke to

The court **did not deny** the hearing on the basis it was untimely, but because Cannon's testimony did not qualify under Florida Rule of Criminal Procedure 3.220(b)(1)(B), and that Cannon never "pinpointed exactly what he saw that night, and I think he's been kind of wrestling with the dilemma from the first statement

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Cannon, the number of contacts, and why his testimony changed. (TR.33 3505-3533). The court denied the motions noting:

I think he (Cannon) told you why he changed his testimony.

...

I think he's testified to that fact (contacts with the State). I don't know what more you can do. He's having problems remembering exactly when he was contacted, but he did give you the number of times, three times by the State Attorney's Office. He has explained what they told him.

And as I stated, the only thing that really hasn't come out in front of the Jury is the fact that it was self-inflicted (self-inflicted pressure to tell the truth), and I don't know that you want to go there.

(TR.33 3523, 3530-31). When the afternoon session commenced, counsel moved for a Richardson hearing. (TR.34 3580-87). The State offered that there was no discovery violation because the statement was not in writing and there was no change from the prior deposition/trial testimony. The court considered the matter, and found no discovery violation, thus, denying the Richardson hearing. (TR.34 3587).

In the evidentiary hearing, Harllee, was questioned why he did not seek a Richardson hearing immediately. In response, he reasoned one was not requested because there was no discovery violation as Cannon's statements were not in writing. However, Harllee moved for a hearing based on what he termed a significant change in Cannon's testimony. It was Harllee's opinion the matter was preserved for appeal. (PC-T.10 282-89). Further, he believed he thoroughly examined Cannon on his change in testimony. (PC-T.11 328-29).

forward through today's testimony." The State's representation of the conversations had with Cannon before trial was accepted by the trial court. (TR.34 3587). When read in context, both the proffer of testimony, Cannon's cross-examination, and the request for a Richardson hearing, it is clear that the matter was fully considered and the defense was not hampered in its trial preparation. Based upon this, the court concluded the matter was preserved for appeal as Harllee had objected, and the denial of the Richardson hearing was done on the merits, not on the timeliness of the motion.[17] Evans has failed to show error.

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[17] The court determined:

...At the trial in October 1998, Cannon testified that he did not see the TransAm parked at victim's home. In February 1999, at the third trial, Cannon testified that he could not remember whether or not he saw the car. During cross examination followed by proffer, Cannon explained that between trials he had inquired of the State whether he should testify to what he remembered, or to what he had said in prior statements. Without inquiring into the content of the testimony, Assistant State Attorney Nikki Robinson advised Cannon that if he did not remember he should answer accordingly. (ROA Vol. 37, 3505-3533)

The defense did not become aware of the change in testimony until Cannon testified at the third trial. Consequently, the defense requested a mistrial on two grounds: (1) Cannon told the jury that there was a "last trial" and (2) Cannon's change in testimony regarding the sighting of the TransAm. In addition, the defense requested additional time to investigate. The trial court denied both requests. (ROA Vol. 37, 3505-3533) Later, defense counsel in fact did move for a Richardson hearing based on Cannon's significant change in testimony. . . . The trial court considered the argument, found no discovery violation, and denied the request for a Richardson hearing. (ROA Vols. 37 & 38, 3580-3587)

Moreover, because the matter was considered, but resolved against Evans, as the court found no discovery violation, Evans is unable to show prejudice. Clearly, the conversations the State had with Cannon did not require disclosure as Cannon's statements were not in writing. Further, the refinement in the testimony was used to its utmost to impeach Cannon before the jury, showing the defense was not hampered in its presentation. It has not been shown that but for a different timing of the Richardson request, the trial result would have been different.[18]

...Further, the record shows that the Richardson hearing was denied on the basis that there was no discovery violation and not on the basis that the motion was untimely. (ROA Vol. 38, 3587) Thus, defense counsel could do no more in that the trial court found no discovery violation. Therefore, absent other evidence of a discovery violation and prejudice in trial preparation, the Court finds Evans fails to demonstrate deficient performance of counsel or prejudice to the proceedings required to satisfy both prongs of the Strickland standard.

(PC-R.4 1109-11)

[18] Pursuant to Richardson v. State, 246 So.2d 771 (Fla. 1971):

[W]hen the State violates a discovery rule, the trial court has discretion to determine whether the violation resulted in harm or prejudice to the defendant, but this discretion can be properly exercised only after adequate inquiry into all the surrounding circumstances. In making such an inquiry, the trial judge must first determine whether a discovery violation occurred. If a violation is found, the court must assess whether the State's discovery violation was inadvertent or willful, whether the violation was trivial or substantial, and most importantly, what affect [sic] it had on the defendant's ability to prepare for trial.

Here, the court determined there was no discovery violation (TR.34 3587), thus, there was no basis to conduct further

(4) **Evans' girlfriend's age and pregnancy** (IB 50-51) – The matter, Claim I(3) below, was rejected:

> (a) Evans claims that counsel was ineffective for failing to object to trial testimony that Sarah Thomas was 16 or 17 years of age in 1991 when she was living with Evans and was pregnant with his child, and in failing to object to testimony regarding Evans' limited contact with the child. Evans contends that this testimony was irrelevant and served only to show Evans' prior bad acts and bad character.
>
> At the evidentiary hearing, Harllee testified that he did not object because he had evaluated the impact of the testimony and determined that the jury could determine Thomas' age by watching her testify or the State could just ask her birthday. Further, Harllee reasoned that teen pregnancy did not carry the stigma that it once had thus Harllee did not see it as a bad act. In addition, Harllee explained that the testimony concerning the child and the custody battle were to the defense's advantage because these factors gave Thomas a motivation to lie about Evans' role in the murder. (EHT Vol. I 102-106)
>
> The Court finds Harllee's trial strategy reasonable. Therefore, Evans fails to demonstrate deficient performance of counsel required to satisfy the first prong of the *Strickland* standard.

(PC-R.4 1111)

Evans has failed to show where the court erred with regard to the facts or law. In spite of the claim that counsel did not cross-examine Thomas on her motivation to lie, Harllee did make it clear that he evaluated the impact of the testimony that Thomas was 16 or 17 years old in 1991 when she was living with

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inquiry. Alternately, given the proffered testimony and argument, in effect, Evans had a Richardson hearing, but was unable to show a violation and prejudice.

Evans and was pregnant with his child. Harllee noted the jury would be able to assess Thomas' age or the prosecutor could have asked for her birthday. Further, he noted that teen pregnancy does not carry the stigma it once did in society. Given this, Harllee did not see the age as an issue, and determined he would use the fact Thomas had a child with Evans and that they were in a custody battle to Evans' advantage. Harllee argued these factors gave Thomas motivation to lie (PC-T.10 292-96).

Assessment of evidence, its impact on the jury, and value to the defense are issues counsel considers. Harllee explained he assessed the impact of such testimony upon the jury and offered a valid basis for allowing such to be presented without objection. The presentation allowed Harllee to offer a basis for the jury to question Thomas' motivation to testify against Evans. It cannot be said that this was deficient performance as it turned what could be a negative factor into a positive one for Evans. Provenzano v. Singletary, 148 F.3d 1327, 1332 (11th Cir. 1998) (counsel's conduct is unreasonable only if petitioner shows "no competent counsel would have made such a choice"). "A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." Strickland, 466 U.S. at 689. Harllee's strategy

does not constitute ineffectiveness. Stewart v. State, 801 So.2d 59, 65 (Fla. 2001) ("[c]laims expressing mere disagreement with trial counsel's strategy are insufficient."); Occhicone, 768 So.2d at 1048 ("[c]ounsel cannot be deemed ineffective merely because current counsel disagrees with trial counsel's strategic decisions. Moreover, strategic decisions do not constitute ineffective assistance of counsel if alternative courses have been considered and rejected and counsel's decision was reasonable under the norms of professional conduct."); Rose v. State, 675 So.2d 567 (Fla. 1996) (holding disagreement with counsel's strategy is not ineffectiveness); Cherry v. State, 659 So.2d 1069 (Fla. 1995) (standard is not how current counsel would have proceeded in hindsight).

The result of the trial would not have been different had the jury not heard of Thomas' age and her pregnancy with Evans' child, especially given the evidence against Evans as reported by Waddell, Thomas, and other witnesses in this contract killing.[19] Prejudice under Strickland has not been met.

(5) curative for Waddell's comment Evans was part of gang (IB 51-52) – Evans raised a related claim in his habeas

[19] Evans planned and executed the murder, created an alibi, made the homicide look like a robbery gone bad, secured the murder weapon, received payment for the killing, and discarded the incriminating evidence. (TR.31 3136-37, 3219, 3258-59; TR.32 3317-21, 3388, 3404, 3414-17, 3445-48, 3474-83; TR.33 3486-91, 3497-3502, 3549-57, 3571; TR.34 3616-17, 3656-61; TR.35 3797-3810, 3815-19; TR.36 3826-55, 3862-64; TR.37 4019-22, 4047).

petition. There he claimed appellate counsel should have argued the court erred in not *sua sponte* holding a Richardson hearing. Here, he complains counsel should not have agreed to the curative on the "gang" comment as it waived the issue on appeal and that counsel had no sound strategy for not objecting. Neither has merit as reasoned by the court:

> Evans claims that counsel was ineffective for failing to object to Donna Waddell's testimony that Evans belonged to a gang. On proffer at trial, Waddell stated that she was not aware of Evans being in a gang but thought a threat made to her by Evans meant that he was in a gang. (ROA Vol 40 3855-3862) Evans contends that defense counsel was deficient in failing to move for a *Richardson* hearing and in waiving a motion for mistrial by accepting a curative instruction.
>
> It is clear from the record that the State was unaware of, and surprised by, Waddell's speculation regarding Evans' gang membership. (ROA Vol 40 3856) Further, Waddell admitted in her proffer that she was making an assumption as to Evans' involvement in a gang. Thus, the Court finds no deficient performance in failing to move for a *Richardson* hearing or prejudice to the outcome of the trial in the lack of a *Richardson* hearing.
>
> Lastly, counsel moved for a mistrial which the trial court denied preserving the issue for appeal. *Kearse v. State*, 770 So.2d 1119, 1129 (Fla. 2000) (ROA Vol 40 3858) Further, the curative instruction directed the jury to disregard Waddell's gang statement and informed the jury that there was no gang connection. Because the issue was preserved for appeal and the jury is presumed to follow the court's instructions in the absence of contrary evidence, this Court finds no prejudice. *Sutton v. State*, 718 So.2d 215, 216 n.1 (Fla. 1st DCA 1998). Thus, Evans fails to satisfy both prongs of the *Strickland* standard.

(PC-R.4 1112). Such is supported by the record and case law.

When Waddell testified Evans threatened her to remain quiet and speculated he was in a gang, counsel moved for a mistrial, which was denied, but a curative offered. From the discussion which followed, it was clear the State was unaware of Waddell's speculation on gang membership. Given the State's surprise, it had no knowledge of Waddell's speculation, which she admitted to in her proffer, and thus, there was no discovery violation. In fact, the prosecutor noted that the last time Waddell testified she said "an old family member" and the prosecutor did not "know where [Waddell] got the gang." The State was willing to clarify that Waddell was referring to an old family member (TR.36 3855-62). The State's lack of foreknowledge explanation negated any need for a Richardson hearing as the prosecutor was unaware of Waddell's intent to speculate as to gang membership. It cannot be said that the lack of a Richardson hearing was either deficient performance or that had one been requested the result of the trial would have been different.

Because counsel's request for a mistrial was denied, he did all he could do to protect Evans' claim for appeal, as was professionally competent under Strickland. See Card v. State, 803 So.2d 613, 620 (Fla. 2001) (issue preserved for review where counsel moved for mistrial and sought curative); Kearse, v. State, 770 So.2d 1119 (Fla. 2000) (contemporaneous motion for mistrial or request for curative sufficient to preserve issue

for appeal); James v. State, 695 So.2d 1229, 1234 (Fla. 1997). Also, the curative informed the jurors there was no gang connection and they should disregard Waddell's statement in its entirety. The jury is presumed to follow the court's instructions,[20] thus, no deficiency or prejudice under Strickland was shown arising from counsel's agreement to the curative.

(6) "Execution style" killing (IB 52-53) **-** At trial the evidence established that after lying in wait for Alan Pfeiffer to return home, Evans shot him in the back and twice in the head. Evans admitted he hid behind furniture then emerged to shoot Pfeiffer. Dr. Bell reported that the shots were fired from more than two feet away, and Pfeiffer could not have been sitting with his back to the sofa when shot in the back. The bullet which entered the top of Pfeiffer's head traveled down through his brain, lodging in his tongue and the one to the back of his ear was inflicted while he was prone (TR.31 3219-61, 3299, 3830-39) At the evidentiary hearing, Harllee agreed two bullets to the head would be considered execution style. See Pearce v. State, 880 So.2d 561 (Fla. 2004) (describing shots to head as execution style killing); Parker v. State, 873 So.2d 270 (Fla. 2004); Looney v. State, 803 So.2d 656 (Fla. 2001).

[20] U.S. v. Olano, 507 U.S. 725 (1993) (finding presumption jurors follow instructions absent facts to the contrary); Sutton v. State, 718 So.2d 215, 216 n. 1 (Fla. 1st DCA 1998).

Because the killing was execution style (two close range gun shots to the head) and the defense was that Evans did not commit the crime, no deficiency is shown by failing to object to an accurate description of the murder. Also, the result of the trial would not have been different had counsel objected. The jury had all the information to draw its own conclusion that the killing was execution style; the argument was a fair characterization of the killing. As the court found in denying relief, the dictates of Strickland were not met.[21]

Evans' complaint that the court did not address the impact the "execution style" comment may have had on the penalty phase is not well taken. First, the court found that such a characterization was accurate, thus, any impact it had on the sentence was not error. Second, the sentencing court termed the killing "execution style" when discussing the CCP aggravator. Again, given that Evans hid in the trailer while waiting for Pfeiffer to return, and then shot him in the back, then twice in the head, with one head shot inflicted while Pfeiffer was prone, clearly indicates, an execution style killing. Such is irrefutable, thus, neither deficient performance nor prejudice

[21] The court concluded: "Evans' claim is legally insufficient. The Court finds no deficient performance where the theory of defense was that Evans did not commit the crime and where the description of the crime was fair comment on the evidence – describing two shots to the head as an execution style killing. *Parker v. State*, 873 So.2d 270, 289 (Fla. 2004). Thus, Evans fails to satisfy the first prong of *Strickland*." (PC-R.4 1112).

under Strickland have been shown. Relief must be denied.

(7) bolstering of Waddell and Thomas via Detective Cook ("Cook") and State's argument to believe witnesses (IB 53-58) – Evans has failed to show where the court's findings are improper. Based upon the following, relief should be denied.

The court addressed this matter under Claim I(4) finding:

> (a) Evans claims that counsel was ineffective for failing to object to Detective Cook's improper bolstering of Sarah Thomas' and Donna Waddell's credibility when the detective answered questions concerning whether Thomas thought she would be arrested and whether Thomas was promised anything in exchange for her cooperation, when the detective testified he refused to let Thomas make an unmonitored telephone call so that he could "ensure the integrity of the operation," and when the detective stated that he thought the Grand Jury made the final decision on Thomas' arrest. (ROA Vol 38 3604-3611) Evans contends that counsel failed to adequately object to the State's line of questioning despite sustained objections to speculation and hearsay, and a denied motion for mistrial on grounds of improper bolstering.
>
> The Court disagrees and finds no deficient performance or prejudice during this line of questioning. IT was defense strategy to challenge Thomas' credibility by focusing on Thomas' lack of charges beginning in opening statement. (EHT Vol 2 138-140). This line of questioning by the State was proper examination to show how Thomas and Waddell became State witnesses and to solicit information concerning promises, threats, or coercion that may have been exerted by law enforcement in obtaining Thomas' statement. Further, the detective's explanation of monitoring telephone calls in the context of describing the use of the body bug merely reports how the detective avoided contaminating the investigation by preventing Thomas from alerting her accomplices. (ROA Vol 38 3604-3611) Thus, the Court finds the detective's testimony resulted in no prejudice to Evans because the testimony is

> distinguishable from the examples of improper vouching cited by Evans.FN2 The detective was presenting facts concerning the investigation and not testifying as to whether Thomas was telling the truth or whether the jury should believe her.
>
> In addition, in light of defense counsel's sustained objections and denied motion for mistrial, the Court finds Evans' claim merely disagreement with trial strategy, and thus not deficient performance of counsel. Occhicone v. State, 768 So.2d 1037, 1048 (Fla. 2000). Therefore, Evans fails to satisfy both prongs of the Strickland standard.
>
> (b) Evans claims that counsel was ineffective for failing to object to the State's closing argument related to believing Thomas and Waddell. Evans contends that it was improper bolstering for the State to refer to Waddell's plea to second degree murder, and to Thomas' and Waddell's inculpatory testimony. (ROA Vol 42 4201-05). The Court disagrees finding the State's arguments legitimate and logical inferences from the evidence. *Breedlove v. State*, 413 So.2d 1, 8 (Fla. 1982); *Spencer v. State*, 133 So.2d 729, 731 (Fla. 1961), *cert. denied*, 372 U.S. 904 (1963). Thus, Evans fails to demonstrate deficient performance of counsel or prejudice to the proceeding required to satisfy both prongs of the *Strickland* standard.
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> _____
>
> FN2 Cases cited by Mr. Evans – *Weatherford v. State*, 561 So.2d 629, 634 (Fla. 1st DCA 1990); *Capehart v. State*, 583 So.2d 1009 (Fla. 1991); *Tringle v. State*, 536 So.2d 202 (Fla. 1988); and *Norris v. State*, 525 So.2d 998 (Fla. 5th DCA 1988).

(PC-R.4 1113-15). A review of the evidentiary hearing and trial records support the denial of relief.

Harllee testified he saw nothing improper with the question about lack of promises in exchange for cooperation in this case, but he did object, on the valid ground of "speculation" when Thomas was asked about whether she thought she would be

arrested. The court sustained the objection. (TR.34 3604; PC-T.10 300-05). Given the fact that one objection was sustained, postconviction counsel is merely disagreeing with counsel's choice of objections. This does not amount to ineffective assistance. Stewart v. State, 801 So.2d 59, 65 (Fla. 2001) ("[c]laims expressing mere disagreement with trial counsel's strategy are insufficient"). Further, because counsel was successful, no prejudice has been shown. Clearly, the result of the proceeding would not have been different had a different objection been raised and similarly sustained.

Harllee's failure to object to the questions as to whether Cook promised Thomas she would not be arrested does not show ineffectiveness nor improper bolstering. Cook's contact with Thomas was relevant given the defense opening statement and strategy in the first trial of challenging Thomas' credibility. Cook reported his contact and addressed whether he coerced or promised Thomas anything. Such was in response to the suggestions made by Harllee when he asked the jury to focus on Thomas' lack of charges (PC-T.11 329-30). It is common practice for counsel to question law enforcement officers regarding any promises, threats, or coercion they may have exerted in obtaining a statement from a witness or suspect. Given this, there is no showing of a valid objection which was not raised. Counsel may not be deemed deficient.

Any failure to object to questions about Cook's refusal to allow Thomas to make unmonitored calls does not show deficiency, or improper bolstering. Cook merely reported how he avoided undermining the investigation by denying Thomas the opportunity to alert her accomplices. When read in context, the police were looking for unadulterated responses from the accomplices,[22] not necessarily that what was said was the truth. Also, Cook's comment: "we wanted the truth," was neither improper bolstering nor an invasion of the jury's province. More important, even had that single phrase raised an objection, the result of the proceeding would not have been different as it was clear the police were looking for answers untainted with the knowledge a criminal investigation had been opened. Moreover, Waddell and Thomas testified about their contact with the police and the overwhelming evidence against Evans.[23] The Strickland standard

[22] Cook testified Thomas was not permitted to leave the police department or make unmonitored telephone calls so that the integrity of the operation was preserved which Cook defined as precluding the accomplices talking and creating "stories." The police wanted unadulterated responses from Waddell. This was accomplished by not letting Thomas alert her and to keep the accomplices in sight. (TR.34 3607-08).

[23] Evans was the person who agreed to do the contract killing of Alan Pfeiffer, developed the plan how such should be accomplished to make it look like a robbery, while giving the participants an alibi. Further, Waddell and Thomas identified Evans as the shooter, where he obtained the gun, and about his destruction of the clothing he wore that night and the electronic equipment he received as payment. (TR.31 3136-37, 3219, 3258-59; TR.32 3317-21, 3388, 3404, 3414-17, 3445-48, 3474-83; TR.33 3486-3502, 3549-57, 3571; TR.34 3616-17, 3656-61,

requiring deficiency and prejudice has not been met.

Also, Cook's response regarding what transpired between Thomas and Waddell during their taped conversation was sustained as eliciting hearsay. The State, as Harllee agreed, was anticipating properly a previously offered defense argument. Such was not bolstering, but an appropriate area of examination (TR.34 3610-11). Moreover, both Waddell and Thomas testified, thus, the jury was not exposed to anything improper. Not objecting on the grounds of improper bolstering when such would not have been meritorious does not establish deficiency. The failure to raise a non-meritorious issue is not ineffectiveness. King v. Dugger, 555 So.2d 355, 357-58 (Fla. 1990)

Similarly, there was no deficiency in Harllee's examination of Cook in which Cook reported Thomas was not charged upon the Grand Jury's decision. The testimony was in anticipation and response to the defense claim Thomas was not credible because she had not been charged. In Harllee's estimation it was good rebuttal (PC-T.11 329-31),[24] thus clearly, he considered the

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3674-81, 3692-3703; TR.35 3797-3810, 3815-19; TR.36 3826-55, 3862-64; TR.37 4019-22, 4047).

[24] Evans' cases for improper vouching, Weatherford v. State, 561 So.2d 629 (Fla. 1st DCA 1990); Caphart v. State, 583 So.2d 1009 (Fla. 1991); Tingle v. State, 536 So.2d 202 (Fla. 1988); Norris v. State, 525 So.2d 998 (Fla. 5th DCA 1988), are distinguishable as Cook was not speaking directly to whether the witnesses were telling the truth or whether the jury should believe them. The State was presenting facts surrounding the investigation and how it came to be that these accomplices became State witnesses.

argument and decided not to pursue an objection. "Counsel cannot be deemed ineffective merely because current counsel disagrees with trial counsel's strategic decisions. Moreover, strategic decisions do not constitute ineffective assistance of counsel if alternative courses have been considered and rejected and counsel's decision was reasonable under the norms of professional conduct." Occhicone, 768 So.2d at 1048. No ineffectiveness under Strickland was proven.

With respect to Evans claim Harllee should have objected to the State's closing,[25] the court correctly recognized that wide latitude is given to counsel to argue his case. See Breedlove v. State, 413 So.2d 1, 8 (Fla. 1982) (recognizing "[w]ide latitude is permitted in arguing to a jury. [c.o.] Logical inferences may be drawn, and counsel is allowed to advance all legitimate

[25] The State argued:

So what are the theories of the Defense? Well, let's take them one by one. One of Connie's biker friends did it? Well, the only problem with that is if somebody else did it other than these four individuals, why is (sic) Donna Waddell and Sarah Thomas admitting to their involvement in a homicide? They believe -- Donna Waddell believes well enough to plea to second degree murder that she helped Paul Evans.

And if that's the case, then why is the Defendant providing an alibi for the rest of them? Why is he saying we were all together when we know that's not the case? Whey is Sarah and Donna implicating themselves in a first degree murder if somebody else, completely unrelated to this, committed the crime? I guess Mr. Harllee is trying to suggest it could have been drug dealers.

(TR.38 4204-05).

arguments"). In arguing to a jury "[l]ogical inferences from the evidence are permissible. Public prosecutors are allowed to advance to the jury all legitimate arguments within the limits of their forensic talents in order to effectuate their enforcement of the criminal laws." Spencer v. State, 133 So.2d 729, (Fla. 1961). Control of prosecutorial argument lies within the court's sound discretion, and will not be disturbed absent an abuse of discretion. See Esty v. State, 642 So.2d 1074, 1079 (Fla. 1994). Clearly, as the court found below, the State's comments were based upon record facts and were "[l]ogical inferences from the evidence." No objection was warranted, but even had the comments been excluded, the result of the trial would have been the same. There was corroboration of the testimony from Waddell and Thomas and the jury knew Waddell had pled to second-degree murder. Further, Evans' police statement and self-serving exculpatory comment he had others kill Pfeiffer supported the events described by Waddell and Thomas.

(8) State's closing regarding unanimity on Evans' status as shooter or principal (IB 58-61) – As was done on direct appeal, Evans complains the State's closing, wherein it argued the applicability of the principal and actual shooter theories as well as being divided as to premeditation or felony murder theories of guilt. Evans asserts this Court made the finding on direct appeal that "where there exists the possibility that the

'jury may be divided as to the elements of the crime' both the State and Federal constitutions are violated. (IB 59-60). A reading of this Court's opinion reveals, Evans misconstrued the Court's comment. The rejection of the appellate issue on procedural grounds establishes that prejudice cannot be shown here. The court's ruling[26] comports with Strickland.

In Evans, 808 So.2d at 106, this Court stated:

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[26] The trial court concluded:

Evans claims that counsel was ineffective for not objecting to the State's closing argument that half the jury could determine that Mr. Evans was the shooter and the other half could believe that he was a principal. (ROA Vol 42 4173-74) This was based on the testimony of Thomas and Waddell, that Evans either killed the victim or had gotten others to kill the victim.

Before trial, defense counsel moved to have the State elect under which theory it would proceed, shooter or principal, and to preclude the State from arguing both theories to the jury. The trial court properly denied the motion as to not obligating the State to disclose a single theory of prosecution. Defense counsel did not object to the dual theory argument during closing and did not request a jury instruction or special verdict form, thus, the claim was not preserved. However, in rebuttal closing argument, defense counsel did argue to the jury that the State could not have it both ways. (EHT Vol 1 139-141)

The Court finds Evans' claim legally insufficient. In light of the denial of counsel's pre-trial motion challenging the dual theories of prosecution, and absent proof that either theory was legally inadequate or that the State failed to make a prima facie showing under either theory, Evans fails to demonstrate how counsel's alleged deficiencies prejudiced the outcome of the proceeding. *Mackerly v. State*, 777 So.2d 969 (Fla. 2001); *Stevenson v. State*, 787 So.2d 165 (Fla. 2d DCA 2001). Thus, the Defendant fails to satisfy the second prong of *Strickland*.

(PC-R.4 1115-16)(footnote omitted).

> On appeal, Evans **raises for the first time that the State's use, in a capital case, of two mutually exclusive factual theories so that the jury may be divided as to the elements of the crime violates both the state and federal constitutions based on the United States Supreme Court's decisions** in *Schad v. Arizona* ... and *Richardson v. United States* .... We conclude that this claim was not preserved.

(emphasis supplied). The highlighted portion merely identified Evans' appellate issue. This Court did not conclude, or suggest the State's trial argument, even potentially, violated the state or federal constitutions. Evans' insinuation otherwise is not well taken. He may not use this Court's restatement of his claim as a basis to call into question the court's rejection of the allegation of ineffectiveness raised on collateral review.

Further, where a challenge to the State's argument is not preserved for appeal, fundamental error must be found for the defense to prevail on appeal. To constitute fundamental error, the improper comments made in closing arguments must be so prejudicial as to taint the jury's verdict. Thomas v. State, 748 So.2d 970, 985 n. 10 (Fla. 1999). This Court's rejection of the direct appeal claim on procedural grounds shows that such argument did not constitute fundamental error, and as such, Evans is unable to show prejudice from counsel's failure to object to the argument on these grounds. White, 559 So.2d at 1099-1100 (rejecting ineffectiveness claim based upon earlier finding by court appeal that unpreserved errors would not

constitute fundamental error); Teffeteller v. Dugger, 734 So. 2d 1009, 1019 (Fla. 1988); Maxwell, 490 So.2d at 932 ("court considering a claim of ineffectiveness of counsel need not make a specific ruling on the performance component of the test when it is clear that the prejudice component is not satisfied").

Harllee was not ineffective because pre-trial he moved to have the State elect under which theory, principal or actual shooter, it would prosecute and to preclude it from arguing both theories to the jury. However, such were denied, thereby, leaving Harllee with no basis to object during closing argument. Yet, he made the best of the situation, by arguing the State could not have the evidence point both ways (PC-T.11 3301-32).

Evans' misplaces his reliance on Schad v. Arizona, 501 U.S. 624 (1991) and Richardson v. U.S., 526 U.S. 813 (1999) to claim counsel was deficient in not objecting [27]. It is well settled the jury need not agree on the method used in the homicide, only that there was a homicide for which the defendant was

[27] Neither supports his attempt to elevate a defendant's method or participation in securing a death to an element of the crime. The elements of first-degree murder are: "(a) the unlawful (b) killing (c) of a human being (d) when perpetrated from a premeditated design to effect the death of the person killed or any human being." State v. Baker, 456 So.2d 419, 422 (Fla. 1984). The shooter's identity is not an element as is evident from the fact a co-assailant may be convicted of first-degree murder even though he was not the actual killer. San Martin v. State, 705 So.2d 1337 (Fla. 1997). The person who hires another to kill is culpable for the murder just as is the person who killed. Barfield v. State, 402 So.2d 377 (Fla. 1981).

responsible. Schad, 501 U.S. at 644-45 (rejecting claim general verdict which does not differentiate between premeditated and felony murder is inadequate; jury need not agree on precise theory of murder). Likewise, Evans' argument that the State claimed it did not have to prove an element of the crime and the jury was confused about the alibi instruction has no record support. The State's theory was that Evans was the actual shooter and only as a minor, secondary point did the State offer the principal theory,[28] i.e., Evans participated in/benefited from the crime, but was not present at its commission. Such is permissible argument and not violative of the constitution.[29]

Staten v. State, 519 So.2d 622, 624 (Fla. 1988) draws the

[28] The thrust of the State's argument and focus of its evidence was that Evans was the shooter. In response to the testimony Evans told Thomas and Waddell, a period of time after the murder, he had gotten others to kill Pfeiffer, and the defense argument/alibi that Connie or Waddell had the opportunity to kill the victim, the State offered the principal theory.

[29] Under section 777.011, Florida Statutes (1991): "Whoever commits any criminal offense … aids, abets, counsels, hires, or otherwise procures such offense to be committed, and such offense is committed … is a principal in the first degree and may be charged, convicted, and punished as such, whether he is or is not ... present at the commission of such offense." "In order to be guilty as a principal for a crime physically committed by another, one must intend that the crime be committed and do some act to assist the other person in actually committing the crime." Staten, 519 So.2d at 624. "One who participates with another in a common criminal scheme is guilty of all crimes committed in furtherance of that scheme regardless of whether he or she physically participates in that crime." Lovette v. State, 636 So.2d 1304 (Fla. 1994).

distinction between "principal" and "accessory after the fact."[30] At no time did the State argue Evans was an accessory after the fact; it asserted he was a principal, either as the shooter or planner/beneficiary. Under Florida law, one may be convicted of first-degree murder as a principal and not be the "shooter."[31] Whether he pulled the trigger or planned the crime and received a benefit, he was a principal. This was proper argument, thus counsel was not deficient in failing to object. King v. Dugger, 555 So.2d 355, 358 (Fla. 1990) (failure to raise nonmeritorious issue is not ineffectiveness). Relief was denied correctly.

ISSUE III

NO EXCULPATORY/IMPEACHMENT EVIDENCE WAS WITHHELD

Evans asserts the State withheld Brady material related to:

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[30] "Although Florida has abolished the common law distinctions between principals, aiders and abettors, and accessories before the fact, accessory after the fact remains as a separate offense. The accessory after the fact is no longer treated as a party to the crime but has come to be recognized as the actor in a separate and independent crime, obstruction of justice. ... culpability of the accessory after the fact is substantially different from that of a principal, reflecting an intent to punish as an accessory after the fact only those persons who have had no part in causing the felony itself..." Staten, 519 So.2d at 626 (citations omitted)

[31] See Barfield, 402 So.2d at 377 (conviction of contract murder middle-man); San Martin v. State, 705 So.2d 1337 (Fla. 1997)(conviction under both premeditated and felony-murder based on evidence both defendant and co-defendant shot into vehicle killing victim); State v. Roby, 246 So.2d 566 (Fla. 1971) (convicted on proof he aided or abetted crime); Fratello v. State, 496 So.2d 903 (Fla. 4th DCA 1986)(affirming instruction which permitted jury to convict defendant as aider and abettor if it did not believe he shot victim as it was supported by evidence in spite of defense someone else shot victim).

(1) Leo Cordary's ("Cordary") release on bond following a violation of probation (IB 62-64); (2) two letters indicating Waddell's psychological instability at the time of the crimes and Evans' trial (IB 64-66); and (3) Mindy McCormick's ("McCormick") statement that Connie discarded a package she received and the description of the man who delivered the package to her (IB 65). The court rendered a detailed ruling rejecting these claims and Evans' fails to offer any argument where the court erred as a matter of fact or law. Relief must be denied.

This matter, Claim I(7) below, was rejected following an evidentiary hearing. The court stated:

> To successfully maintain a *Brady* claim, Evans must establish the following three elements: (1) the evidence at issue is favorable to the accused, either because it is exculpatory, or because it is impeaching; (2) the evidence was suppressed by the State, either willfully or inadvertently; and (3) the State's failure to disclose the evidence was prejudicial. *Spencer v. State*, 842 So.2d 52, 67 (Fla. 2003).
>
> (a) Evans claims that the State committed a *Brady* violation by failing to disclose Donna Waddell's mental health status at the time of the crime and during trial. At the evidentiary hearing, Evans presented two letters referring to Waddell's mental health and psychiatric treatment discovered pursuant to a public records request of Waddell's court file. One letter was undated and the other was dated five months after Evans' trial. (Defense Exhibits 9 and 10)[32] At the evidentiary hearing, no evidence was

[32] While the court noted Evans offered two letters, it recognized that one (Defense 10, Peter Jorganson, Esq. PC-T.10 310-19) was

> admitted showing that the State knew of Waddell's psychiatric treatment prior to the time or at the time of trial. Further, Evans did not demonstrate that the letters would have been admissible at trial. Thus, Evans fails to show that the State willfully or inadvertently suppressed evidence.
>
> (b) Evans claims that the State committed a *Brady* violation by failing to disclose the composite sketch made of an unidentified man seen by Mindy McCormick giving a package with unidentified contents to Connie Pfeiffer. Based on the Court's analysis on Claim (6) supra, Evans fails to show prejudice required to succeed in a *Brady* claim.
>
> (c) Evans claims that the State committed a *Brady* violation by failing to disclose the prosecutor's involvement in Leo Cordary bonding out of jail on his violation of probation. Evans contends that this information could have been used to impeach Cordary, the State's only witness to the timing of the gun shots. No evidence was presented at the evidentiary hearing to show that Cordary was aware of bond discussions between his attorney and the State, or to show that Cordary bonded out prior to testifying at the third trial was inconsistent. Further, no evidence was presented that Cordary's testimony. Further, no evidence was presented that Cordary's testimony at the third trial was inconsistent with Cordary's statements made prior to his violation of probation, including: Cordary's statement to the police, Cordary's deposition, and Cordary's testimony at the first trial. Thus, Evans fails to demonstrate prejudice required in a *Brady* Claim.

(PC-R.4 1120-21). This ruling comports with the facts and law.

In order to establish a Brady violation, Evans must show:[33]

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undated, and that it was not shown that either was admissible. The State will concentrate on Waddell's letter dated July 1999.

[33] In Way, 760 So.2d at 910-11, this Court quoted Strickler and its three components, but noted that in order for evidence to be deemed "suppressed", it is only reasonable for the defendant to prove he neither had the evidence nor was able to discover it through due diligence. In fact, in Way this Court recognized

"[1] The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; [2] that evidence must have been suppressed by the State, either willfully or inadvertently; and [3] prejudice must have ensued." Strickler v. Greene, 119 S.Ct. 1936, 1948 (1999); Occhicone, 768 So.2d at 1042; Way v. State, 760 So.2d 903, 910 (2000). "[F]avorable evidence is material and constitutional error results from its suppression by the government, if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." Kyles v. Whitley, 514 U.S. 419, 435 (1995). "The mere possibility that an item of undisclosed information might have helped the defense, or might have affected the outcome of the trial, does not establish 'materiality' in the constitutional sense." Gorham v. State, 521 So.2d 1067, 1069 (Fla. 1988) (quoting U.S. v. Agurs, 427 U.S. 97, 109-10 (1976)). No Brady violation occurs "where the information is equally accessible to the defense and the prosecution, or where the

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that where the evidence was available equally to the defense and State or that the defense was aware of the evidence and could have obtained it, the evidence had not been suppressed. See Occhicone, 768 So.2d at 1042 (reasoning "[a]lthough the 'due diligence' requirement is absent from the Supreme Court's most recent formulation of the Brady test, it continues to follow that a Brady claim cannot stand if a defendant knew of the evidence allegedly withheld or had possession of it, simply because the evidence cannot then be found to have been withheld from the defendant.").

defense either had the information or could have obtained it through the exercise of reasonable diligence." Freeman v. State, 761 So. 2d 1055, 1061-62 (Fla. 2000); Provenzano v, State, 616 So. 2d 428, 430 (Fla. 1993). Prejudice is shown by the suppression of exculpatory, material evidence, i.e., where "there is a reasonable probability that the result of the trial would have been different if the suppressed documents had been disclosed." Stickler, 119 S.Ct. at 1952. Reasonable probability is "a probability sufficient to undermine confidence in the outcome." Kyles, 514 U.S. at 435.

(1) **Cordary's bond** – It was Harllee's evidentiary hearing testimony that he was not made aware of the State's role in Cordary's bond hearing and that had he known, he would have used it to challenge Cordary's credibility (PC-T.10 244-46). However, the postconviction evidence reveals, as the court found, that there was no evidence Cordary knew of the State's role in the bond matter.[34] Further, the prosecutor, Ms. Robinson, testified

[34] Excerpts from Connie Pfeiffer's appellate record are included in the Appendix. Also, the July 31, 2000 Order from the Fourth District Court of Appeal establishes that the police report, deposition, and Cordary's testimony in Evans' prior trials were made part of Connie Pfeiffer's appellate record PC-R.6 1095. A review of the record in Connie Pfeiffer's trial (Fourth District Court of Appeal case no. 99-2032 - lower tribunal case no. 97-754 CFB) reveals that Charles Shafer represented Cordary for the bond hearing and that the trial court in Connie's case took into consideration Mr. Schafer's testimony, Cordary's testimony in Evans' trial, and the bond hearing tape. (PC-R.5 949, 952; PC-R-6 972). The record in Connie's case establishes that Cordary,

that the bond issue was not agreed to until after Cordary testified in Evans' third trial. Further, she had not entered into any agreement with Cordary for a bond reduction. She also offered that Cordary's testimonies had been consistent throughout (PC-T.12 594-96). Cordary's consistency regarding the timing of the shots[35] he heard on the night of the murder is bourn out by the many statements, depositions, and trial testimonies he gave since he was first contacted by the police on March 27, 1991, just a week after the murder. As a result, Evans has not carried his burden of proving suppression or

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during Evans' trial in February 1999, was not personally aware of any bond discussions conducted by his counsel. In fact, Cordary had no knowledge of the bond hearing and as Judge Hawley found, Cordary was not present during the bond hearing nor did Mr. Schafer have any discussion with him before or after the bond hearing regarding that matter. There was no evidence to establish that Cordary was aware of anything transpiring. (PC-R.5 897, 943-44; PC-R.6 977-78)

[35] Cordary testified in Evans' first and third trials. Cordary, on March 27, 1991, gave a police statement (PC-R.6 985) and on February 5, 1998, Cordary gave a deposition (PC-R.6 1007-50). On October 28, 1998, Cordary testified in Evans' first trial. (PC.R.6 1052-83). Based upon a review of these materials, it is clear Cordary's testimony has been consistent starting with his police statement where is stated he heard shots "sometime between 7:30 and 8:00 p.m.." Thereafter, in the February 28, 1998 deposition, Cordary testified that he heard a "pop, pop, pop" "probably between 10:30, eleven" (PC.R.6 1021-22). He subsequently corrected himself after follow-up questions that refreshed his recollection and testified that the time was approximately 8:00 p.m. (PC-R.6 983). Thereafter, at Evans' October 26, 1998 first trial, Cordary averred that he had heard the gunshots at 8:00 (PC-R.6 1062). Finally, at Connie's trial, he testified that he heard the shots at 8:00 p.m. (PC-R.5 941). The bond hearing took place in February 1999 after Cordary had testified in Evans' final trial. (PC-R.5 947; PC-R.6 1090).

prejudice. First, there was no agreement in exchange for Cordary's testimony, Cordary was unaware of any decision by the State not to oppose a bond on his violation of probation and the agreement was not finalized until after Evans' last trial. As such, there was no favorable evidence suppressed by the State. More important, no reasonable probability exists that the outcome of the proceedings would have been different given the fact that Cordary's testimony did not change from March 27, 1991, the day he was first contacted by the police.

(2) **Waddell's July 1999 letter –** Evans' trial was held in February 1999 and sentencing was conducted on June 16, 1999 (PC-T.10 310-11; TR 4511-24). The letter did not come into existence until July 1999. Because the letter did not come into existence until after Evans' sentencing, there was no suppression of evidence, and thus, no Brady violation.

(3) **McCormick's police sketch and report Connie discarded package** – The State incorporates its analysis presented in Issue II – sub-claim 1 as further support for its position that no Brady violation has been established with respect to the contents of the package Connie received. First, McCormick was relating an event which occurred at least two weeks after the murder (PC-T.12 438-43). Second, while initially claiming no one from the public defender's office spoke to her, she later admitted she gave a deposition to Harllee in which she spoke of

her police statement. Third, McCormick testified she had no idea what was contained in the package Connie received and discarded (PC-T.12 444-49). Unknown contents of a package clearly do not equate to exculpatory evidence. Moreover, even if Connie's actions are considered suspicious, such does not negate the detailed accounts of Evans involvement in committing the murder for hire as testified to by Thomas and Waddell.[36]

Evans has not shown that the sketch or discarding of the package contents received some two weeks after the murder were exculpatory. Even if it is assumed Harllee did not know of the items, McCormick did not testify at trial and the sketch was of some person who gave something to Connie weeks after the murder. There has been no firm connection drawn between the sketch and the murder. It cannot be said that in the face of the testimony of Waddell and Thomas, that Connie's receipt of a package and the sketch of the man who delivered it was of such a nature that there is a reasonable probability for an acquittal.

ISSUE IV

PENALTY PHASE COUNSEL RENDERED EFFECTIVE ASSISTANCE

Evans challenges penalty phase counsel's investigation and decisions related to not presenting physical and mental health

[36] Evans, 808 So.2d at 95-99 and TR.31 3136-37, 3219, 3258-59; TR.32 3317-21, 3388, 3404, 3414-17, 3445-48, 3474-83; TR.33 3486-3502, 3549-57, 3571; TR.34 3616-17, 3656-81, 3692-3703; TR.35 3797-3810, 3815-19; TR.36 3826-64; TR.37 4019-22, 4047.

mitigation evidence. It is Evans position that counsel should have used different experts, Dr. Silverman and Dr. Harvey, to present mitigation of a cognitive impairment and Attention Deficit Hyperactivity Disorder ("ADHD") as well as evidence of Evans' prior inadequate mental health treatment, improper medications, raised in an unstructured family environment, and that he lacked life skills. (IB 87-88). He asserts the court misconstrued the evidentiary hearing facts and should have granted relief. Further he suggests the jury was instructed in an unconstitutional manner. The State disagrees. Contrary to Evans' position, the court resolved disputed facts and applied the law correctly recognizing that: (1) the jury was given instructions upheld repeatedly;[37] (2) the new doctors merely disagreed with the primary diagnoses of numerous other experts and that such disagreement developed years after trial does not

[37] The court concluded:

... The jury instructions in the penalty phase tracked the language of the Standard Jury Instructions Penalty Proceedings – Capital Cases, section 921.141. The Supreme Court of Florida has held that the standard instructions are proper and do not impermissibly shift the burden to the defendant. *Brown v. State*, 721 So.2d 274, 283 (Fla. 1998); *Cooper v. State*, 856 So.2d 969 (Fla. 2003). Thus Evans fails to demonstrate deficient performance and prejudice required to satisfy both prongs of the Strickland standard.

(PC-R.4 1122). Evans has not presented any case law or argument to undermine this Court's case law or the trial court's reliance on same in finding counsel was not deficient in failing to object to the standard penalty phase instructions.

establish ineffective assistance; (3) that counsel's investigation, and strategic decision was professional under Strickland; and (4) that Mindy McCormick's testimony would not have made a difference in the trial.[38] This Court should affirm.

With respect to the main challenge to penalty phase counsel's performance, i.e., his investigation and presentation of additional mental health and family witnesses, the court concluded Litty did not render ineffective assistance reasoning:

> (b) Evans claims that counsel was ineffective during the penalty phase for failing expert testimony of Evans' psychological history and the effects of institutionalization on Evans. Evans contends that experts should have been used to present detailed evidence of Evans' hospitalizations, medical diagnoses and treatments, abandonment by his parents, difficulties in school, circumstances surrounding his brother's death and funeral, and Evans' qualification for disability compensation.
>
> At the evidentiary hearing, defense counsel testified that the limited use of expert witnesses was a matter

[38] The court reasoned: "Evans claims that counsel was ineffective for failing to present evidence to refute the aggravator of pecuniary gain. Evans relies on Mindy McCormick's testimony discussed in Claim I(6). Based on the Court's analysis in Claim I(6) supra, Evans fails to demonstrate prejudice required to satisfy the second prong of the *Strickland* standard." (PC-R.4 1124). The State relies on its analysis of McCormick's testimony presented in Issue II, sub-claim 1 and reminds the Court that her testimony did not offer a firm time frame for visiting Connie's storage area where she allegedly saw electronic equipment, the fact that the victim had access to a lot of such equipment based on his business, and the fact that Evans received electronic equipment in payment for the murder and retained such equipment for a period of time thereafter (PC-T.10 238-39). As such McCormick's testimony would not negate the aggravator, and counsel could not be deemed ineffective for not presenting such witness.

of penalty phase strategy. Diamond Litty, lead counsel at the penalty phase, testified that it was the defense strategy to present Evans as the product of a bad marriage and absentee parents. The objective was to show an emotionally disturbed client who had been in may hospitals and who had experienced significant emotional trauma. After investigating Evans' family, school, and medical history, the defense team determined that the best was to present evidence of Evans' troubled childhood was through Evans' mother and father. Litty reasoned that these lay witnesses could bring in beneficial evidence engendering sympathy from the jury while at the same time limiting the focus of damaging evidence contained in Evans' medical records. Litty explained that defense counsel did not want the jury to know that Evans had no remorse for killing his brother, that he laughed of jail after starting a brush fire, that he was preoccupied with violent thoughts, that his drawings expressed themes of violence, that he bragged about killing his brother, that he stabbed a boy with a butter knife for making fun of him, that he threatened staff with violence, that he was discharged from a facility for being too aggressive, that he beat people up for money, and that he wrote a letter threatening that he was watching and could kill at anytime.

At the evidentiary hearing, Evans presented two mental health experts, Dr. Seth Silverman and Dr. Philip Harvey. Both experts disagreed with the primary diagnosis of conduct disorder made by multiple institutions during Mr. Evans' hospitalizations from age 6 through age 17.

Dr. Silverman diagnosed Evans with idiosyncratic thought processes and personality disorders. During cross-examination, Dr. Silverman admitted that his diagnosis had been made only two days prior to the evidentiary hearing and not included in his report submitted months earlier. Also, Dr. Silverman conceded that there was ample evidence in the record to support the more than 30 diagnoses of conduct disorder made by multiple institutions over ten years of hospitalization and the diagnosis made by defense expert, Dr. Rifkin.

> Dr. Harvey diagnosed Evans with cognitive impairments resulting in poor impulse control likely due to growth deficiency reported at 18 months of age. On cross-examination, Dr. Harvey admitted that there was no medical record evidence of Evans' growth deficiency, merely anecdotal evidence from Evans' parents to support Harvey's diagnosis of cognitive impairments.
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> Both experts testified that it is unlikely that Social Security benefits would have been awarded to Evans at age 17 solely on the basis of conduct disorder. However, no evidence was presented explaining another basis for the award of disability compensation.
>
> The Court finds the testimony of Drs. Silverman and Harvey insufficient to refute the record replete with evidence of multiple diagnoses of conduct disorder throughout Evans' childhood. Thus, there is insufficient evidence to show that trial counsel was ineffective merely on the basis that the more favorable diagnoses from Evans' new doctors conflict with the diagnoses of the original experts. *See Jones v. State*, 855 So.2d 611, 618 (Fla. 2003); *Asay v. State*, 769 So.2d 974, 986 (Fla. 2000).
>
> Also at the evidentiary hearing, Evans presented testimony of his aunt, Patricia Dennis, and his mother, Sandra Kipp. Both witnesses testified to Evans' parents' lack of supervision, neglect, and lack of involvement with Evans. The Court finds this evidence cumulative to the testimony presented during the penalty phase.
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> Based on the foregoing, the Court finds trial counsel's mitigation investigation and penalty phase strategy reasonable. Trial counsel made informed decisions after thoroughly evaluating Evans' history and determined that the information could be more effectively presented through lay witnesses. Thus, Evans fails to demonstrate deficient performance required to satisfy the first prong of the *Strickland* standard.

(PC-R.4 1122-24)

The court's rejection of the new mental health testimony[39] was based on its resolution of credibility, conflicting evidence, and the fact that counsel may not be deemed deficient merely because a more favorable diagnosis is developed years later. This is especially true where it is shown that penalty phase counsel did a professional investigation,[40] hired or

[39] At the evidentiary hearing, Evans offered Dr. Silverman who arrived at a new diagnosis just two days before he testified, but he did not disagree with the prior diagnosis of a conduct disorder and admitted other reports showed Evans showed no remorse fore the shooting of his brother. Dr. Harvey offered that at the age of 15 to 18 months, Evans was diagnosed with a failure to thrive which may cause a conduct disorder and Attention Deficit Hyperactivity Disorder, and has been associated with abnormalities in the frontal and temporal lobes, cognitive impairments, and behavioral abnormalities (PC-T.12 543-44, 553-54, 559-60, 577, 588-89; PC-T.13 622-26 EVH.4 431-35). Not only was there evidence to undermine these conclusions or at least call them into question, but Evans failed to present anything which undermined confidence in the original mental health investigation and reports received by penalty phase counsel and upon which she relied to form her strategy.

[40] The evidentiary and appellate records establish that Evans' counsel investigated and prepared for the penalty phase professionally by hiring mental health experts, gathering background information and records through contacts with family and prior healthcare professionals, and meeting with Evans' recent jailer and religious advisor. From this, defense counsel assessed the risks associated with presenting the evidence gathered and developed sound penalty phase strategies therefrom. (PC-T.10 215-17; PC-T.11 325-25, 345-46, 357-59, 363-64, 367-73, 382-96). Litty worked closely with Harllee and their investigator, Sandy Warner, in compiling the standard mitigation information; Warner followed the office's mitigation check list (PC-T.11 356-58, 370). The defense penalty phase theme was to show Evans was the product of a bad marriage which worsened after his birth, finally ending in divorce. Evans witnessed his parents' fights and was the product of ineffective parenting or absent parents. The parents' absence was credited as a reason for Evans' accidental shooting and killing of his younger

consulted with the appropriate experts where necessary, and after assessing the evidence made decision on who to call as witnesses.[41] Here, the record shows Litty hired three mental

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brother. Also, the defense showed Evans was on medication or therapy for his behavior since the age of six and was hospitalized after the shooting because his mental problems worsened. It was a defense theme that Evans did not get the help he needed. The defense also showed that Evans was the product of a bad marriage which worsened after his birth and eventually ended in divorce. The parents fought in front of their children. The family situation was that the mother was overwhelmed by the situation and the father was absent and neglected his children. Further, the defense intended to show that Evans was on medication and in therapy since the age of six. His mental condition worsened after he shot his brother. Following that incident, Evans was hospitalized. The defense attempted to show Evans could do well in prison, had no disciplinary problems in jail, found religion, and had a close relationship with God. During the evidentiary hearing, Litty admitted that mental health experts were called by the defense for a limited purpose and that the experts did discuss Evans' medications and how they impacted a teenager, his Attention Deficit Hyperactivity Disorder, effect of Matthew Evans' death on Evans. Also, the defense did not present witnesses from the hospitals Evans attended. There was no medical testimony about Evans' "failure to thrive" diagnosis, although his mother spoke about it. The defense did not present testimony about growth hormones (PC-T.11 358-59, 364-67, 370-73).

[41] It was Litty's assessment that the parents offered powerful testimony and were able to present compelling mental health information in layman's terms which is well accepted in Indian River County where the case was tried. Oft times, jurors are critical of defense experts and the alleged "psychobabble" they are offering as though the defense was trying "to pull something over on them." Kipp and Evans, Sr. were very articulate and detailed. They described everything better than an expert and were more emotionally stirring. Also, in Litty's experience and estimation, jurors can assess mental health testimony from laymen using common sense. This was one reason the defense elected to present the mental health information through the parents in stead of experts (PC-T.11 377-78, 389-90)

Another reason for limiting the mental health expert testimony was the risk the defense would run to opening the door

health experts, Drs. Landrum, Livine, and Rifkin. Counsel assessed all the information, including Dr. Rifkin's opinion, before deciding on what mitigation to offer and through which witnesses. The doctors had been provided and reviewed Evans' hospital, school, and medical records, conferred with defense counsel, and spoke with the parents. The strategy was to use the parents to present all of the background history and mental health information and limit Drs. Landrum and Levine to informing the jury Evans was able to be a good prisoner who responds well to structured environments and would do well in prison. The doctors reported Evans was very bright with an above average/superior IQ (PC-T.11 363-69, 382-83, 390-91).

The defense feared, and took steps to limit opening the door to testimony Evans was a dangerous sociopath/psychopath given Evans' mental health records. Likewise, the defense did not want the jury to hear that Evans showed no remorse at his brother's killing, and in fact, had shown prior hostility toward Matthew. Also, the fact that Evans started a brush fire and was not intimidated by the police was not something the defense

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to some very damaging information in Evans' mental health/school records. According to Litty, every time the defense found one good piece of evidence, five bad items would present themselves. One thing would be more damaging than the next. Because of this, the defense decided to present the mental health information through the parents in layman's terms, which gave the information to the jury, but withheld some of the more damaging aspects of Evans' history (PC-T.11 382-83).

wanted explored with the experts. Evans' diagnosis of a conduct disorder based on his violent behavior, as noted in the medical records and as found by defense expert, Dr. Rifkin,[42] was something the defense feared from the full use of mental health experts. The records, which could have been explored more fully with the mental health experts, contained such damaging references as Evans' preoccupation with violence, showing feelings of violence, murder, and torture toward doctors, teachers, students, and staff, bragging that he killed his brother, and that he had stabbed a boy in the back with a butter knife. The defense wanted to keep this from the jury (PC-T.11 384-87).[43] By presenting the mental health background through the parents, Litty believed the defense was able to offer good information about Evans while precluding the State from putting

[42] Dr. Rifkin found Evans to be learning disabled with probably some type of frontal lobe brain injury. He also diagnosed a conduct disorder. These factors were known to the defense, and based upon strategy, Litty did not want to put such damaging information before the jury. Dr. Rifkin would open the door to "far more bad things that any good that would come out of it." (PC-T.11 383-88, 392-93).

[43] For these same reasons, Litty did not call expert witnesses from Evans' hospitalizations. The records were replete with incidents of violence or thoughts of violent/aggressive behavior. While Litty admitted some of Evans' negative mental health history did come out during the State's cross examination, in Litty's estimation, it would have been much more damaging had the mental health experts been used by the defense to present all of Evans' background mental health information. (PC-T.11 387-88, 395-96).

on the most damaging information.[44] The defense wanted to make Evans look as sympathetic as possible without conceding anything which was argued in guilt phase. Maintaining credibility with the jury was considered. Litty offered the best mitigation available the defense (PC-T.11 388, 393-94).

Litty's conclusion was reasonable as evident from the testimony from the new mental health experts who were forced to agree in part with the prior experts and had to admit to many damaging aspects of Evans' history with little benefit to the defense.[45] The new mental health experts Evans offered at the

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[44] For example, by having Kipp speak of her son's artistic ability, the defense prevented the State from having the doctors discuss that those drawings were of satanic/morose images such as skulls, fangs, and knives. The medical records contained notations about the satanic drawings. Similarly, the parents were not open to examination about the medical record notations that Evans would beat-up people for money. Litty explained that given the State's theory of prosecution, a contract murder, notations of willingness to beat-up people up for money would be very damaging. Also, the defense did not want the jury to know Evans had written a note while hospitalized that he was watching and could kill at any time (PC-T.11 388-89).

[45] From Charter Woods, the March 24, 1984 diagnosis was conduct disorder. Dr. Jordan of the Florida United Methodist Children's Home wrote in his report that Evans is "an angry and assaultive child who when provoked can hurt another child. He is a very angry child with a conduct disorder." When seen in 1989 by Dr. Alcolde of Harbor Shore Psychiatric Facility, Evans was diagnosed with a dysthymic disorder, depressive neurosis and two conduct disorders of socialized aggressive and access emergent personality disorder. In the Social Security Insurance evaluation for disability, the doctor concluded Evans "also seems to have a dysthymic disorder, but this condition is not nearly as severe as the conduct disorder. He has antisocial trends." Dr. Silverman agreed that Evans has a conduct disorder. According to Dr. Silverman, a conduct disorder is consistent

hearing were Drs. Silverman[46] and Harvey.[47]

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with someone capable of committing murder and a conduct disorder may account for Evans' academic problems and verbal skill difficulties. Dr. Noradini, from CPC Palm Bay Hospital, noted in 1989 that Evans' aggressive behavior was directed at his mother, her boyfriend, teachers, and authority figures - Evans threatened staff members, damaged furniture, and stabbed a fellow student with a butter knife because the boy teased him. The hospital records noted various actions by Evans which included: (1) showing no remorse for killing brother; (2) setting a fire and showing lack of fear of authority; (3) disregard for social rules and acting out; (4) being highly explosive and destructive; (5) ease of discussing and bragging about killing his brother which neither Evans' mother or staff members could deem the killing purely accidental; (6) in "doll play" therapy, Evans would not only "kill" the doll, but would torture it; (7) drawing of satanic/morose things. Evans IQ was tested at 102 and 127 (PC-T.12 546-49, 553-63, 570-74, 583-84). All of this would have been reveal at trial had the defense experts not been limited.

[46] Dr. Silverman initially opined that his evaluation of Evans and review of the hospitalization records/reports, trial transcript excerpts, and discussion with Evans' mother lead him to conclude that Evans suffers from idiosyncratic thought process and schizoid/schizotypal personality disorder, although he admitted Dr. Silverman admitted that Evans may not meet all of the criteria for schizotypal process disorder and that other doctors diagnosed a conduct disorder. On cross examination, Dr. Silverman was compelled to admit that when he did his initial review and produced a report in for the originally scheduled May, 2004 evidentiary hearing, he did not diagnose a schizoactive personality disorder or schizoid personality disorder. In fact, the instant diagnosis was developed two days before he testified in this case. When questioned about the myriad of notes generated in Evans' hospital records, Dr. Silverman was obliged to concede that the consistent diagnosis of Evans since he was admitted to mental health hospitals was that he had a conduct disorder and there was ample evidence in the record to support the diagnosis. Of the various times the hospital doctors diagnosed Evans, there were three or four references to schizoid, avoidance, and idiosyncratic thought disorders and at least 30 determinations the Evans has a conduct disorder. Dr. Silverman admitted Evans has a conduct disorder and that such a diagnosis by the prior doctors was correct (PC-T.12 514-19, 526-27, 532-35, 543-46, 553, 576-78, 581-89).

As noted in Henry v. State, 862 So.2d 679, 685 (Fla. 2003):

> We have stated that defense counsel's reasonable, strategic decisions do not constitute ineffective assistance if alternative courses have been considered and rejected. *State v. Bolender*, 503 So.2d 1247, 1250 (Fla. 1987). A reasonable, strategic decision is based

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[47] Evans presented two new mental health professions, Drs. Silverman and Harvey. Dr. Silverman agreed that the findings contained in the mental heath hospitalization reports and that of Dr. Rifkin that Evans' suffered from a conduct disorder were supported by the evidence. Dr. Harvey also noted that a conduct disorder could be associated with one diagnosed with a failure to thrive, however, the information about a failure to thrive was developed, not through medical records, but from anecdotal recollection of Evans' parents. Dr. Harvey reported that Evans' parents told him of a diagnosis of "failure to thrive" at the age of 15 to 18 months which led to neuro-developmental impairments, cognitive abnormalities, conduct disorders, and Attention Deficit Hyperactivity Disorder (PC-T.622-23, 629). Such may result in Evans being easily led, using poor judgment, or not evaluating the consequences of his actions carefully would have been influencing Evans at the time of the crime. Dr. Harvey did not opine as to any mitigator he would have offered. The closest he came was to state in his report: "As a consequence of these impairments, [Evans'] behavior at the time of the homicides was directly influenced and his capacity to plan these acts is reduced, as was his capacity to understand the consequences of his actions. These factors created a situation of substantial cognitive disturbance at the time of the instant crime." (Defense EX. 17). Also admitted by Dr. Harvey was the fact that there were no medical records substantiating a diagnosis of failure to thrive; that information was anecdotal for the parents. Further, for the eight to nine years after the murder, and while Evans was collecting Social Security benefits, he was living in the community, and had not been arrested for anything. Dr. Harvey agreed that his diagnosis, as well as that of Dr. Rifkin, did not mesh with the Evans being a "hit man" and that he could not dismiss the trial testimony that it was Evans who developed the alibi which he and the other accomplices gave to the police (PC-T.13 622-23, 629-33). As the appellate record reflects, Evans masterminded the planned killing, developed the alibi utilized, benefited financially, and was the actual shooter (TR.32 3375, 3386, 3411; TR.34 3674-78, 3681, 3690-92, 3694-701; TR.35 3798-800, 3803-17; TR.36 3826-39, 3841-48).

> on informed judgment. *See Wiggins v. Smith*, 539 U.S. 510, ----, 123 S.Ct. 2527, 2538, 156 L.Ed.2d 471 (2003) (finding counsel's decision "to abandon their [mitigation] investigation at an unreasonable juncture ma[de] a fully informed decision with respect to sentencing strategy impossible"). Accordingly, we determine not whether counsel should have presented mental health mitigation but whether counsel's decision not to present such evidence was a reasonably informed, professional judgment. *See id*. at 2536 (where petitioner claimed counsel were constitutionally ineffective for failing to investigate and present mitigating evidence, stating "our principal concern ... is not whether counsel should have presented a mitigation case" but "whether the investigation supporting counsel's decision not to introduce mitigating evidence ... was itself reasonable.").

It is well recognized that shielding the jury from highly damaging mental health testimony is a valid, professional strategy. See Burger v. Kemp, 483 U.S. 638, 792 (1987)(finding counsel's decision not to present defendant or psychologist for fear of very negative evidence on cross-examination was reasonable); Darden v. Wainwright, 477 U.S. 168, 186 (1986); Henry, 862 So.2d at 686 (rejecting claim of ineffective assistance of penalty phase counsel because counsel had a reasonable strategy after full consideration of the alternatives for electing to not put on available and investigated mental health expert testimony as it "was likely to do more harm than good" and instead chose to humanize the defendant); Rutherford v. State, 727 So.2d 216, 223 (Fla. 1998) (affirming denial of postconviction relief where penalty phase counsel knew of the

mental mitigation "but made a strategic decision under the circumstances ... to instead focus on the 'humanization' of Rutherford through lay testimony"); Haliburton v. Singletary, 691 So.2d 466, 471 (Fla. 1997) (finding counsel rendered constitutional assistance based on decision to humanize Haliburton rather than use mental health testimony because the expert would say that the defendant was "dangerous" and likely would kill again); Bryan v. Dugger, 641 So.2d 61, 64 (Fla. 1994) (finding counsel not ineffective for choosing a mitigation strategy of "humanization" and not calling a mental health expert); Ferguson v. State, 593 So.2d 508, 510 (Fla. 1992) (finding counsel's decision to not put on mental health experts to be "reasonable strategy in light of the negative aspects of the expert testimony" where experts had indicated that defendant was malingering, a sociopath, and a very dangerous person); State v. Bolender, 503 So.2d 1247, 1250 (Fla. 1987) (holding "[s]trategic decisions do not constitute ineffective assistance if alternative courses of action have been considered and rejected").[48]

[48] The Eleventh Circuit Court of Appeals likewise recognizes that decisions to forego mental health evidence through experts is appropriate after investigation and analysis of evidence. See Davis v. Singletary, 119 F.3d 1471, 1476 (11th Cir. 1997); Spaziano v. Singletary, 36 F. 3d 1028, 1039 (11th Cir. 1994; Grayson v. Thompson, 257 F.3d 1194, 1227 (11th Cir. 2001); Glock v. Moore, 195 F.3d 625, 638 (11th Cir. 1999); Mills v. Singletary, 63 F.3d 999, 1025 (11th Cir. 1995); Marek v.

Similarly, merely because Evans has now found new mental health experts to opine about different aspects of his mental condition does not call into question the constitutionality of penalty phase counsel's reasoned decisions. See Jones v. State, 855 So.2d 611, 618 (Fla. 2003) (finding no ineffectiveness where defendant's new doctors conflicted with original experts); Asay v. State, 769 So.2d 974, 986 (Fla. 2000) (opining "trial court correctly found that trial counsel conducted a reasonable investigation into mental health mitigation evidence, which is not rendered incompetent merely because the defendant has now secured the testimony of a more favorable mental health expert."); Elledge v. Dugger, 823 F.2d 1439, 1446 (11th Cir.) (opining "[m]erely proving that someone--years later--located an expert who will testify favorably is irrelevant unless the petitioner, the eventual expert, counsel or some other person can establish a reasonable likelihood that a similar expert could have been found at the pertinent time by an ordinarily competent attorney using reasonably diligent effort"), modified on other grounds, 833 F.2d 250 (11th Cir. 1987). This Court must reject the suggestion that experts should have been put before the jury.

Singletary, 62 F.3d 1295, 1300 (11th Cir. 1995); Lambrix v. Singletary, 72 F.3d 1500, 1504 (11th Cir. 1996); Hance v. Zant, 981 F.2d 1180, 1184 (11th Cir. 1993); Card v. Dugger, 911 F.2d 1494, 1511 (11th Cir. 1990).

Here, defense counsel investigated mental health issues, obtained Evans' mental and hospitalization records, contracted with mental health experts, and interviewed family members. After review of the gathered information and assessment as to how the information would be open to attack by the State and received by the jury, counsel determined the best strategy was to limit the testimony form its experts, but to put on the evidence through Evans' parents. See Gaskin v. State, 822 So.2d 1243, 1248 (Fla. 2002) (stating "[t]rial counsel will not be held to be deficient when she makes a reasonable strategic decision to not present mental mitigation testimony during the penalty phase because it could open the door to other damaging testimony."). Counsel's decisions complied with the dictates of Strickland and Wiggins v. Smith, 539 U.S. 510 (2003).

Moreover, even had the experts now offered testified in the penalty phase, their conclusions that Evans' had a conduct disorder would not have altered the result of the penalty phase. Mitigation of his prior psychiatric history was given weight and the new doctors have not opined that any of the statutory mental health mitigators were established. What Dr. Harvey offered was that Evans's behavior at the time of the crime was influenced; his capacity to plan was reduced, as was his capability to understand the consequences of his actions. Such is not the same as opining that there was substantial mental or emotional

disturbance or capacity to understand the criminality of his conduct or conform his conduct to the law was substantially impaired. Dr. Harvey merely says it was reduced. Such is insufficient to show ineffective assistance. See Ventura v. State, 794 So.2d 553, 570 (Fla. 2001) (holding defendant could not establish prejudice where the mitigation presented at evidentiary hearing was cumulative of evidence presented at trial); Haliburton, 691 So.2d at 471 (finding "[i]n light of the substantial, compelling aggravation found by the trial court, there is no reasonable probability that had the mental health expert testified, the outcome would have been different.").

With respect to the lay witnesses, Evans offered his aunt, Patricia Dennis, who spoke of the neglect Evans received from his parents because of difficulties in their marriage, their connection with the military and other jobs causing them to be absent or the family to move often. Also Ms. Dennis spoke of Evans' killing of his brother at age twelve, his resultant hospitalization where he was again neglected by the family, and Ms. Dennis' first hand experience that Evans was too difficult to handle during her six month care of him (PC-T.12 469-75). Evans also presented his mother, Sandra Kipp. She reiterated her penalty phase testimony[49] noting her bad marriage, neglect and

[49] Evans' mother, Sandra Kipp ("Kipp"), testified consistently with Evans, Sr. She too, spoke of a bad marriage, absentee

disappointments by Evans's father, difficulties with Evans due to his behavioral problems, his hospitalizations, some physical injuries, and Evans' killing of his brother (PC-T.12 479-505). Similar, if not the same information was developed through Evans' father, during the penalty phase.[50]

It is well settled that the failure to present cumulative evidence will not support a finding of ineffective assistance of counsel. Rutherford v. State, 727 So.2d 216, 225 (Fla. 1998) (finding denial of collateral relief proper where the new evidence offered was merely cumulative to the penalty phase presentation); Van Poyck v. State, 694 So. 2d 686, 692-94 (Fla. 1997) (finding defendant failed to prove ineffectiveness where

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parents, and the divorce. Kipp discussed Evans' diagnosis of hyperactivity, learning and behavioral problems in school, and prescriptions for Ritalin and Cylert which did not help the problems Evans was experiencing. She described Evans' killing of Matthew and the resulting hospitalizations/counseling which did not improve his situation. Kipp noted Evans was artistic; he made drawings and wrote poetry for his grandmother. The jury was told of Evans' two daughters, and Kipp, begged the jury not to take her son. (PC-T.11 373-82; TR.39 4345-69).

[50] In the penalty phase, Evans' father, Paul Evans, Sr. ("Evans, Sr."), admitted his marriage was bad, which worsened until it ended in divorce. Evans, Sr. testified he and his wife neglected Evans and fought in front of their children. At an early age, Evans was diagnosed with a hyperactivity disorder and was placed on medication. Evans also had a learning disability. According to Evans. Sr., his son was hard to control and there was little of it in Evans' home. Evans' had been caught with a gun in school the week before he shot his younger brother when they were left alone. Following this, Evans was hospitalized, but the hospitalization only made the situation worse; Evan never received the help he needed. Evans, Sr. explained he loved his son and asked the jury not to take a second child from him. (PC-T.11 372-77; TR.39 4317-41 xxx).

life-history account argued for on collateral review, had been, in large measure, presented to jury); Woods v. State, 531 So.2d 79, 82 (Fla. 1988) (reasoning "[t]he jury, however, heard about Woods' [psychological] problems, and the testimony now advanced, while possibly more detailed than that presented at sentencing, is, essentially, just cumulative to the prior testimony. More is not necessarily better."); Card v. State, 497 So.2d 1169, 1176-77 (Fla. 1986) (holding counsel cannot be deemed ineffective for failure to present cumulative evidence). By and large, the information offered by Evans' mother and aunt was presented in the penalty phase and taken into account in sentencing. Hence, there was no deficiency under Strickland as the court found. Likewise, there can be no prejudice as the information was taken into account for sentencing. This Court should agree that the recent evidence of a difficult childhood and neglect by his family would have resulted in a life sentence. Relief must be denied.

ISSUE V

COUNSEL WAS NOT INEFFECTIVE DURING VOIR DIRE

Evans' claims Harllee rendered ineffective assistance by failing to challenge or reassert a prior challenge regarding Jurors Schumann and Combs as unqualified and for failing to object to court limiting counsel's ability to back strike jury members. The court's rejection of these claims is supported buy

the facts and law. Relief must be denied.

In denying relief, the court reasoned (Claim III below):

> Evans claims that counsel was ineffective for failing to challenge Juror Schumann for cause because the juror was biased in favor of the death penalty for homicides not involving self defense. In addition, Evans contends that counsel should have moved for a mistrial during the penalty phase as the result of Juror Schumann's body language when information came out concerning Evans' accidental shooting of his brother. No authority was presented to show that a juror's body language would be grounds for a cause challenge.
>
> Harllee testified that he selected Juror Schumann because she was a good guilt phase juror for the defense. Harllee reasoned that Juror Schumann's brother-in-law had been arrested, the juror was frustrated by a police investigation of an assault in her home, and the juror and her husband had discussed Connie Pfeiffer's receipt of life insurance. Harllee's jury selection notes show five pluses on Juror Schumann's voir dire responses and a self-ranking of nine on Harllee's ten-point death penalty scale. (State's Exhibit 2) Despite Juror Schumann's pro death penalty ranking, Harllee explained that he selected the juror in an effort to win the guilt phase. Further, it is clear from the evidentiary hearing testimony that Harllee knew that backstriking was permitted had Harllee elected to do so. The Court finds Harllee's trial strategy reasonable.
>
> On the issue of moving for a mistrial, Harllee stated that defense counsel requested the trial court to permit inquiry of Juror Schumann to determine whether mid-trial publicity about the accidental shooting was the reason for heated deliberations during the guilt phase and for the juror's body language during the penalty phase. The request was denied. The trial court invited defense counsel to file a motion. No motion was filed because Harllee believed it was mere speculation as to what the body language meant. The Court finds Harllee's trial strategy reasonable.

Claim III(2) Counsel failed to challenge Juror Combs.

> Evans claims that counsel was ineffective for failing to strike Juror Combs because the juror knew some of the lay witnesses from the bar where he worked. Harllee moved to challenge Juror Combs for cause but the challenge was denied. Harllee did not exercise a peremptory challenge but decided to keep Combs as an otherwise good defense juror. Harllee's jury selection note show four pluses on Juror Combs's voir dire responses and a self-ranking of five on Harllee's ten-point death penalty scale. (State's Exhibit 2) Further, it is clear form the evidentiary hearing testimony that Harllee knew that backstriking was permitted had Harllee elected to do so. The Court finds Harllee's trial strategy reasonable.

(PC-R.4 1125-26).

This ruling should be affirmed and there is records support for the court's rejection of the ineffectiveness claim for not objecting to a limitation on back-strikes of jurors. As the court found, backstrikes were permitted, and Harllee knew such were permitted,[51] thus, there was no basis for a defense

[51] After the jury had been selected, Juror Schroeder had a disagreement with the trial court and was excused. This necessitated further selection inquiry. In reviewing the trial court's recognition that if back-strikes were used against the initial eleven jurors, then the process would just continue until "somebody finally accepts a jury and moves on" Harllee agreed that it may have meant the trial judge did not want the parties to exercise back-strikes. However, Harllee knew he was permitted to back-strike, and he did not neglect to back-strike someone merely for the sake of starting the trial (PC-T.11 278-82, 335-51). In fact, the record supports Harllee's understanding and evidentiary hearing testimony. After noting that an additional 20 jurors would be available for questioning that day and another 170 on the following Monday, the trial court clarified that: "...no, **I'm not going to prohibit you from back striking**. So just so that's clear on the record, you know what I said." (TR 3094) (emphasis supplied). Clearly, Evans'

objection. Likewise, because Evans' premise is incorrect, he is unable to show deficiency or prejudice arising from counsel's conduct in selecting the twelfth juror. See Freeman v. State, 761 So. 2d 1055, 1070-71 (Fla. 2000) (noting issues which would have been non-meritorious on direct appeal cannot be basis for ineffectiveness claim).

Moreover, Harllee had valid reasons to retain Juror Schumann (PC-T.10 270-71).[52] and Juror Combs;[53] he believed they

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suggestion that back-strikes were prohibited and that counsel was ineffective in not objecting when the parties were selecting the twelfth juror is refuted from the record and refuted by evidentiary hearing Harllee's testimony.

[52] During voir dire, Schumann noted she believed in/favored the death penalty, but could follow the law. She rated herself a nine on a scale of ten in response to how she would impose the death penalty. However, she would not impose it if self-defense were involved. (TR.25 2295-96; TR.27 2625-29, 2634-35, 2648-49). In spite of these answers and the fact self-defense was not the defense's theory, Harllee did not move to strike her for cause. (TR.27 2661-64). He explained, Schuman's answers on the death penalty were outweighed by her answers regarding: (1) brother-in-law's arrest by Indian River Sheriff; (2) frustration with police because she had been assaulted in her home - police did nothing; and (3) reading article on insurance money Connie received and discussing article with her husband. Harllee recalled Schumann had read the news article about Connie receiving insurance proceeds and had discussed it with her husband. He used Connie's receipt of insurance proceeds against the State to show that Connie received the money, but the State could not show where Evans gained from the crime. Harllee juxtaposed the receipt of insurance money by Connie against the small electronic equipment the State attributed to Evans. Schumann's recollection of the money aspect of the crime, made her a juror he wanted to keep (PC-T.11 335-37). In addition, Harllee expected Schuman was sympathetic with the defense given her brother-in-law's arrest. While she rated herself a nine on Harllee's death penalty scale, she answered well for the defense on five points regarding the guilt phase.

would make good defense jurors and/or his basis for a cause challenge to Combs was negated by the fact he knew only one, maybe two witnesses, and those never testified.[54] He came to these conclusions after considering their *voir dire* responses. It was Harllee's belief that if he could win the guilt phase, Schuman's penalty phase answers would be of no moment. With Combs, Harllee assessed him to be "middle-of-the-road" regarding

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[53] While he initially moved to strike Combs for cause, Comb's answers during voir dire, made him a defense juror and the witnesses he did know, Missy Kovaleski and Molly McIntosh, did not testify. (PC-T.11 276-82, 335-51). Combs rated himself a five (middle-of-the-road) on the defense death penalty scale and had four positive answers during voir dire. Harllee reasoned that he wanted to keep Combs. Deficiency has not been proven because it has not been shown that Combs should have been stricken for cause or was biased. Puiatti v. Dugger, 589 So.2d 231, 235 (Fla. 1991) (noting "fact that a juror knows something about the case or knows individuals who may be witnesses clearly is not grounds per se to excuse the juror for cause.").

[54] With respect to Juror Combs, the record supports the denial of relief as he was not stating that he knew a lot of the witnesses who would be testifying, only that he knew one person, Molly McIntyre and may know Missy Kovaleski merely because her first name was unusual and a "Missy" frequented his bar. Combs answered he knew people from the bar only by their first name and when he heard that McIntyre was a possible witness he stated: "that's the reason I stopped and thought for a few minutes and maybe -- because I only know them by first names, and a lot of first names I recognize for sure." This prompted Combs to "put his hand up on possible knowledge" of the witnesses (TR.25 2294-95). Evans has not shown that but for Harllee's failure to use a peremptory challenge, the result of the trial would have been different. Relief must be denied because Evans has not carried his burden of proving both deficiency and prejudice under Strickland. No prejudice has been shown from counsel's decision to select Combs as neither McIntyre nor Missy Kovaleski testified, thus, Combs was not in the position to know any of the witnesses or to give one more credibility over the other based on external factors.

the death penalty and noted he gave four positive answers during *voir dire*. Such analysis and decision-making is reasonable and well within the Strickland standard for proper representation. Peterka v. State, 890 So.2d 219, 239 (Fla. 2004) (not questioning jurors on guns because those that knew firearms would be sympathetic to the defense in the guilt phase and those that did not would make good penalty phase jurors was reasoned strategy); Occhicone, 768 So.2d at 1048 (“strategic decisions do not constitute ineffective assistance of counsel if alternative courses have been considered and rejected and counsel's decision was reasonable under the norms of professional conduct”); Harvey, 656 So.2d at 1256 (strategic decision to retain juror because she was receptive to arguments in one phase over another was reasonable, competent strategy). Cf. Ventura v. State, 794 So. 2d 553, 568-569 (Fla. 2001) (use of strategy in not excusing juror for cause is effective assistance). "Counsel cannot be deemed ineffective merely because current counsel disagrees with trial counsel's strategic decisions. Moreover, strategic decisions do not constitute ineffective assistance of counsel if alternative courses have been considered and rejected and counsel's decision was reasonable under the norms of professional conduct." Occhicone, 768 So.2d at 1048.

With respect to the undecernable, but "loud voices"[55] heard coming from the **guilt phase** jury room, Evans is unable to link those voices to Schumann's body language noted during counsel's **penalty phase** opening. Evans suggests counsel was deficient in not filing a motion for juror interviews after the penalty phase.[56] However, the record establishes the defense argument was merely speculative as to what Schumann's body language meant (TR.39 4382-83, 4455-59). The best counsel could offer was that Schuman "made a facial expression to one of the other jurors like as if she may have known that information (Evans's killing his brother) prior to today." (TR.39 4383). In further discussions, **counsel retreated from an allegation that the jurors read something** during the trial and offered that maybe "if somebody on the Jury all of a sudden remembers something from a newspaper fifteen years ago" and tells the jurors then there should be an inquiry. Such is the fishing expedition

[55] The content of heated deliberations would inhere in the verdict unless there is some clear indication of impropriety as a verdict may not be impeached by juror conduct which inheres in the verdict. Johnson v. State, 593 So.2d 206, 210 (Fla. 1992).

[56] Evans would have this court find counsel ineffective because counsel did not file written request to interview Schuman based upon her facial expressions/body language. As the trial court found at the time, it would be inappropriate for the parties to speculate on facial expressions/movements or to invade the province of the jury on such mere speculation. Counsel objected to Schumann, and although additional pleadings could have been filed, the decision not to file the documents is within the wide range of professional conduct, especially given the lack of any evidence that there was juror impropriety or that there was communication about non-record facts.

decried in Arbelaez v. State, 775 So.2d 909 (Fla. 2000).

Further, there are no sworn allegations that Schuman read anything improper; there is only speculation as to what a body movement indicated and counsel's unfounded fears voiced on the record that someone may have remembered something she read 15 years before.[57] Such is insufficient to require interviews, thus, Evans' has not shown counsel's deficiency. Under Reaves v. State, 826 So.2d 932, 943 (Fla. 2002), Evans' speculation is insufficient to warrant juror interviews.[58] In fact, Evans, as

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[57] Merely because counsel chose to speculate as to the negative inference to be drawn from Schumann's "look" does equate to evidence of misconduct. The law is clear; the province of the jury may not be invaded unless clear misconduct is alleged. "[J]uror interviews are not permissible unless the moving party has made sworn allegations that, if true, would require the court to order a new trial because the alleged error was so fundamental and prejudicial as to vitiate the entire proceeding. Kearse v. State, 770 So.2d 1119, 1127 (Fla. 2000). While reading news articles about the case does not inhere in the verdict, Baptist Hosp. of Miami, Inc. v. Maler, 579 So.2d 97, 100 (Fla. 1991), the scope of that inquiry is within the court's sound discretion. Resolution of conflicting evidence is a function of the court's fact finding responsibilities which will not be overturned unless unsupported by the evidence. Marshall v. State, 854 So.2d 1235, 1242 (Fla. 2003) (remanding for limited evidentiary hearing to attempt to obtain identity of female juror who spoke to affiant and to interview juror and conduct further inquiries "only if the court determines that there is a reasonable probability of juror misconduct."); United State v. Ramsey, 726 F.2d 601, 604 (10th Cir 1984) (recognizing before juror interview required, there must be finding allegation is not frivolous).

[58] A "jury inquiry is limited to allegations which involve an overt prejudicial act or external influence, such as ... prejudicial nonrecord evidence or an actual, express agreement between two or more jurors to disregard their juror oaths and instructions." Reaves v. State, 826 So.2d 932 (Fla. 2002).

the court determined, has not shown that counsel had anything more than speculation to offer as to what Schumann's actions meant, thus, he had no valid basis to seek interviews; he cannot be faulted for not presenting what did not exist. Likewise, the failure to put the request in writing following the denial of an oral motion is not deficient. The result of the proceedings would not have been different based on the existing evidence. The information the defense "feared", i.e., Schumann knew Evans' killed his brother, was brought out during the penalty phase and utilized by the defense as mitigation. Even had a motion been filed, it would have been based on unfounded fears and speculation and denied as meritless as was done orally.[59] See Arbelaez, 775 So.2d at 916; Kearse, 770 So.2d at 1127-28. As such, no prejudice can be shown under Strickland. Given the overwhelming evidence of Evans' guilt, Evans, 808 So.2d at 95-99, the result of the guilt would not have been different, and

[59] Even if there was some merit to the speculation offered at trial, the degree of misconduct, i.e., remembering something read 15 years ago, there is nothing to support a suggestion such was discussed in deliberations. However, even if it were, the degree of misconduct does not rise to the level of causing prejudice as the death of Evans' brother was before the jury. "[E]ven where there is evidence of some juror misconduct, reversal is not required, *per se*, because ... "[i]n order to authorize the setting aside of a verdict on account of misconduct of the jury, it must appear that such misconduct may have had an influence upon the final result, and caused injury to the complaining party." James v. State, 843 So.2d 933, 936-37 (Fla. 4th DCA 2003); State v. Rodgers, 347 So.2d 610(Fla. 1977).

likewise, because the information came out in the penalty phase, the sentencing recommendation is not undermined.

ISSUE VI

AN ADEQUATE CUMULATIVE ERROR ANALYSIS WAS CONDUCTD

Evans complains the court failed to conduct an adequate cumulative error analysis because, "in a conclusory fashion" the court rejected the claim of cumulative error.[60] (IB 96). The conciseness of the court's rejection of this claim based upon the fact the individual claims were either barred and/or meritless does not undermine confidence in the decision. Where the claims, as here, are legally insufficient, procedurally barred, and/or meritless, there can be no cumulative error. See Wike v. State, 813 So. 2d 12, 22 (Fla. 2002); Rose v. State, 774 So.2d 629, 635 n. 10 (Fla. 2000); Freeman v. State, 761 So.2d 1055 (Fla. 2000); Downs v. State, 740 So.2d 506, 509 (Fla. 1999); Melendez v. State, 718 So.2d 746, 749 (Fla. 1998); Chandler v. Dugger, 634 So.2d 1066 (Fla. 1994); Rivera v. State, 717 So.2d 477, n.1 (Fla. 1998).

ISSUE VII

EVANS' COLLATERAL REVIEW WAS NOT RENDERED UNCONSTITUTIONAL DUE TO DENIAL OF JUROR INTERVIEWS

Evans claims his collateral counsel was rendered

[60] The court reasoned: "Based upon the denial of Claims I through V, *supra*, the Court finds no cumulative procedural or substantive errors affecting the fairness of Evans' trial. *See Freeman v. State*, 761 So.2d 1055 (Fla. 2000)." (PC-R.4 1126-27).

ineffective as a result of the denial of juror interviews and he suggests that Juror Taylor's interjection of herself into the trial required an interview. First, there is no claim of ineffective assistance of collateral counsel. Lambrix v. State, 698 So. 2d 247 (Fla. 1996); Pennsylvania v. Finley, 481 U.S. 551 (1987); Murray v. Giarratano, 492 U.S. 1 (1989) Second, this Court has rejected repeatedly the challenge to the rule prohibiting juror interviews absent a *prima facie* showing of juror misconduct. Marshall v. State, 854 So.2d 1235, 1240-44 (Fla. 2003) (remanding for limited inquiry on juror misconduct upon finding affidavit reporting racial comments by jurors did not inhere in verdict); Arbelaez v. State, 775 So. 2d 909, 920 (Fla. 2000) (affirming denial of juror interviews as such were mere fishing expedition); Mann v. State, 770 So.2d 1158, 1160, n.1 (Fla. 2000) (finding challenge to juror interview issue barred citing to Young v. State, 739 So.2d 553 (Fla. 1999)). Cf. Gilliam v. State, 582 So. 2d 610, 611 (Fla. 1991) (affirming denial of motion to conduct post-verdict interview of jurors where defendant failed to make prima facie showing of misconduct). Further, the Florida Supreme Court has adopted recently Florida Rule of Criminal Procedure 3.575 which provides for juror interviews if the pleading requirements are met.[61]

[61] In adopting the rule, this Court stated: "In response to concerns raised about the effect of the new provision on rule 4-

Third, Juror Taylor's comments were addressed under the claim of ineffectiveness of guilt phase counsel (Issue II, sub-claim 2) below, not on the instant grounds. The matter should be found unpreserved. Steinhorst v. State, 412 So.2d 332, 338 (Fla. 1982) Nonetheless, given that Taylor's comments were on the record from the trial, Evans' is time barred from making his claim, and has failed to satisfy the pleading requirements of rule 3.575 or Marshall. Relief must be denied.

ISSUE VIII

FLORIDA'S CAPITAL SENTENCING IS CONSTITUTIONAL

Evans claims Ring; Apprendi; and Jones v. United State, 526 U.S. 227 (1999) establish the death penalty is unconstitutional. As the court found, a similar claim was raised and rejected on direct appeal, thus rendering this matter barred and meritless (PC-R.4 1127-28). This Court should affirm.

On direct appeal, Evans challenged the constitutionality of his death penalty based upon Apprendi v. New Jersey, 120 S. Ct. 2348 (2000) and Jones v. United State, 526 U.S. 227 (1999). The claim was rejected. Evans, 808 So.2d at 110, n.10. Having raised this challenge earlier, Evans is barred from raising it in collateral review. "Issues which either were or could have

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3.5(d)(4), we have added a commentary . . . explaining that the new procedure is not intended to abrogate the existing rule 4-3.5(d)(4) procedure." Amendments to Florida Rules of Criminal Procedure, 2004 WL 2248209, 2 (Fla. 2004) (footnotes omitted).

been litigated at trial and upon direct appeal are not cognizable through collateral attack." Muhammad v. State, 603 So.2d 488, 489 (Fla. 1992).

This Court has rejected consistently the claims Evans raises. See Parker v. State, 904 So.2d 370 (Fla. 2005); Whitfield v. State, 706 So.2d 1 (Fla. 1997); Hodges v. State, 885 So.2d 338 (Fla. 2004); Porter v. Crosby, 840 So.2d 981, 986 (Fla. 2003); Brown v. Moore, 800 So.2d 223 (Fla. 2001).

CONCLUSION

Based upon the foregoing, the State requests respectfully this Court affirm the denial of postconviction relief.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail to: Suzanne Myers Keffer, Esq. and Christina Spudeas, Esq., Office of the Capital Collateral Regional Counsel-South, 101 N.E. 3rd Ave., Suite 400, Fort Lauderdale, FL 33301 this 15th day of June, 2007.

CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this brief is 12-point Courier New, in compliance with Fla. R. App. P. 9.210(a)(2).

Respectfully submitted,

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