

IN THE SUPREME COURT OF FLORIDA

NORMAN MEARLE GRIM,

Appellant,

v.

CASE NO. SC06-122

STATE of FLORIDA,

Appellee.

_____ /

ON APPEAL FROM THE CIRCUIT COURT
OF THE FIRST JUDICIAL CIRCUIT
IN AND FOR SANTA ROSA COUNTY, FLORIDA

ANSWER BRIEF

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PRELIMINARY STATEMENT

So as to maintain consistency with the Appellant, references in the State's brief will be denominated as follows:

EHT. - Transcript of Evidentiary Hearing from April 14, 2005.

EHT2. - Transcript of Evidentiary Hearing from April 15, 2005.

EHT3. - Transcript of Evidentiary Hearing from September 1, 2005.

PC-R. - Refers to the post-conviction record on appeal.

TT. - Refers to trial transcript in this matter.

STATEMENT OF THE FACTS AND OF THE CASE

_____Norman Grim was charged with the brutal murder of Cynthia Campbell. The facts underlying Grim's crime are more fully discussed in the direct appeal opinion:

On July 27, 1998, at approximately 5:08 a.m., Deputy Sheriff Timothy Lynch responded to a call from Cynthia Campbell, who complained of a disturbance behind her house. Upon Lynch's arrival, Campbell was standing on her front porch with her next-door neighbor Norman Grim, Jr., who was wearing a pair of cut-off jean shorts. All three walked around the porch to the back of Campbell's house where Lynch noticed a broken window and a chrome lug nut in the surrounding bushes. Before returning to his house, Grim invited Campbell over for a cup of coffee after Lynch finished his investigation.

Connie Kelley, Campbell's bookkeeper, arrived at Campbell's house at 7:20 a.m., entered the house, called Campbell's name, but did not receive an answer. Kelley became concerned and called the police. Cynthia Magee, Campbell's paralegal, went to Campbell's house later in the morning, saw her car parked in front of the house, and went inside to check. Deputy Sheriffs Calvin Rutherford and Steven McCauley arrived ten to fifteen minutes after Magee.

Rutherford obtained permission from Grim to look inside his home and noted that Grim had no shirt on and that there was a light pink color on one of his shoulders. n1 Neither deputy saw any signs that there had been a struggle in the house.

Corporal Blevin Davis arrived at 11 a.m. and talked briefly with Grim. Davis observed that Grim was wearing a pair of cut-off blue jean shorts with several small reddish brown stains on them; there was another reddish-brown stain on his shoulder. Grim explained that the stains were primer paint from where he had been working on his car. Grim asked for and obtained permission to get his dogs that were now loose in the neighborhood.

Thomas Rodgers, the manager of the north end of the Pensacola Bay fishing bridge, ran a bait and tackle shop and convenience store at the foot of the fishing bridge, and he testified that sometime early in the afternoon of July 27, 1998, Grim came into his store. On the same day,

Cynthia Wells, a former coworker of Grim, left work around 1 p.m. and was traveling on the Pensacola Bay bridge where she saw Grim walking beside his parked car with both doors and the trunk open. She testified that he was wearing a light-colored shirt and cut-off blue jean shorts.

In the afternoon of July 27, James Andrews and his son were fishing from the Pensacola Bay bridge. Around 3:30 p.m., Andrews hooked a human body that was wrapped in a sheet, a shower curtain, and masking tape. Law enforcement was called to retrieve the body, which the parties stipulated was Cynthia Campbell. After receiving word that Campbell's body had been found, Detective Donnie Wigen went to the convenience store where he talked to Rodgers and retrieved a surveillance videotape showing that Grim had entered the store just after 2 p.m.

Law enforcement officers secured Grim's house. Davis drove to the Pensacola Bay fishing bridge and was present when Campbell's body was brought to shore. Davis testified that her body was wrapped in striped sheets, which the police determined belonged to Grim, and black garbage bags. When the bags and sheets were removed at the autopsy, Davis observed that a piece of green carpet was "wrapped up with everything else." Davis recalled having seen a similar piece of green carpet hanging over the rail of Grim's back porch. Thereafter, the police obtained a search warrant for Grim's home and an arrest warrant.

Crime scene analyst Janice Johnson from the Florida Department of Law Enforcement attended Campbell's autopsy conducted by Dr. Michael Berkland, a forensic pathologist. Johnson testified that under the black garbage bags, the body was wrapped in carpet and sheets. They had to remove "layers of material," including the garbage bags, a floral sheet, a blue striped flat sheet and fitted sheet, a piece of green carpet, masking tape, and rope.

Dr. Berkland testified that Campbell's face was covered with deep abrasions and contusions around both eyes, her forehead, both sides of her chin, and her lips, all of which Dr. Berkland described as blunt force trauma. There was additional blunt force trauma to both shoulders and to the head. These injuries were all consistent with having been inflicted by a hammer. Dr. Berkland testified that Campbell suffered eleven stab wounds to the chest, seven of which penetrated her heart,

and were consistent with having been caused by a single-edged weapon like a knife. Dr. Berkland opined that the blows to the head preceded the stabbings to the chest and that Campbell's death was caused by blunt force trauma to the head and multiple stab wounds to the chest.

After attending the autopsy, Janice Johnson went to the victim's home where she found no signs of any struggle. She then went to Grim's home where she found two damp mops in the kitchen that had suspected blood stains. Although the area appeared to have been cleaned, Johnson discovered small areas of blood on the floor of the kitchen and on the cabinets near the floor. Johnson collected a coffee mug from the kitchen counter and two bloody fingerprints on a trash bag box. Inside the kitchen trash can was a striped pillow case that appeared to have blood on it and that had the same pattern as one of the sheets found wrapped around Campbell's body. In the dining room, Johnson collected additional samples of suspected blood from the window frame and from the floor. In the living room, Johnson seized a pair of athletic shoes and a rope which appeared to be consistent with the rope found on the victim's body. Johnson also collected a pair of blue-jean shorts with bloodstains on them.

On the back porch, Johnson found a piece of green carpet draped over the rail which was consistent with the green carpet wrapped around the victim's body. Johnson also found a cooler in which she found a steak knife, a piece of terry cloth with reddish-brown stains on it, a pair of Hanes underwear, a tampon with reddish-brown stains on it, a pair of prescription eyeglasses, a wristwatch with a broken band, masking tape, a blue and white striped pillowcase, a hammer with suspected blood, some cloth tissue, and a Bud Lite beer carton.

Grim was arrested in Oklahoma on July 31, 1998. Detective Davis flew to Oklahoma to pick him up, to retrieve the clothes he had been wearing, and to arrange for the return of Grim's car.

The prescription glasses found in the cooler matched Campbell's prescription records, and the roll of masking tape in the cooler was fracture-matched to the tape found on Campbell's body. The rope and the green carpet found on Campbell's body were compared to the rope and green carpet found at Grim's home. Although the examiner was unable to fracture-match these pieces, he determined that they were identical in appearance, construction, and fiber type and could have originated from the same

source. Fingerprints on the coffee cup found on Grim's kitchen counter were identified as Cynthia Campbell's, and the bloody fingerprints on the trash bag box were identified as Grim's.

DNA analysis of stains on the cut-off jean shorts Grim was wearing when arrested revealed twelve genetic markers consistent with the DNA of Cynthia Campbell, and the steak knife found in Grim's cooler yielded six genetic markers consistent with the victim. The hammer found in the same cooler also yielded genetic markers consistent with the victim, as did swabbings from the box of trash bags. Likewise, stains on a pair of blue-jean shorts and a pair of shoes found in Grim's living room bore genetic markers consistent with those of the victim.

After the presentation of evidence during the guilt phase, the jury returned a verdict of guilty on the charges of first-degree murder and sexual battery upon a person twelve years of age or older with the use of a deadly weapon. In light of the fact that Grim continued to insist on waiving his right to present mitigating evidence during the penalty phase, and, in fact, ordered his attorneys not to present any mitigation, the trial court conducted a hearing pursuant to *Koon v. Dugger*, 619 So. 2d 246 (Fla. 1993). During the hearing, the trial judge determined that Grim freely, voluntarily, and knowingly entered into his decision to waive mitigation and announced that he would conduct the penalty phase before the jury where Grim still could, if he wished, present mitigating evidence. Afterward, the judge stated that he would conduct a Spencer hearing and order a presentence investigation report and, if necessary, he would also appoint an independent or special counsel to present mitigating evidence to the court outside the presence of the jury.

At the penalty phase, the State introduced certified copies and testimony relative to Grim's prior Florida convictions: (1) unarmed robbery; (2) kidnapping and robbery; (3) armed burglary and aggravated battery; and (4) armed burglary and armed theft. The State's last witness was the victim's mother, Dorothea Campbell, who read a short victim impact statement. Grim did not present any mitigating evidence, and the jury recommended the death penalty by a vote of twelve to zero.

At the sentencing hearing, Grim's attorneys were present before the court, along with Spiro Kypreos, special counsel appointed by the trial court to

investigate and present mitigation. Grim insisted on not presenting any mitigation and so instructed his attorneys. Defense counsel confirmed Grim's waiver of mitigation, and the trial court found that Grim, against the advice of his counsel, freely and voluntarily decided not to present mitigating evidence.

During sentencing, the State presented its sentencing memorandum to the court, along with depositions from the following persons: Grim's mother, stepfather, and sister, a coworker, a supervisor, and psychologist Dr. James Larson. Defense counsel objected to the attachment of Dr. Larson's deposition because it provided mitigation that Grim did not want presented.

Before there was any presentation of mitigating evidence at the sentencing hearing, defense counsel objected to special counsel Kypreos's presentation, particularly to Dr. Larson's interview with Grim. The trial court denied the objection. Thereafter Kypreos offered in mitigation a presentence report and a psychological report from court proceedings occurring in 1982, a 1983 letter from Grim's public defender in those cases, and a written description of intermittent explosive disorder taken from the Diagnostic and Statistical Manual of Mental Disorders (4th ed. 2000). Kypreos also presented testimony from Grim's sister relative to his family life and childhood and two of Grim's work supervisors regarding his work ethic.

In its written order, the trial court found that the State established three aggravating circumstances beyond a reasonable doubt: (1) the murder was committed by a person under sentence of imprisonment; (2) the defendant had prior convictions for violent felonies; and (3) the murder was committed while the defendant was engaged in the commission of a sexual battery. The trial court found the following statutory mitigating circumstances pursuant to *section 921.141 (6) (h), Florida Statutes (1997)*: (1) disruptive home life and child abuse (given significant weight); (2) hard-working employee (given significant weight); and (3) mental health problems that did not reach the level of *section 921.141(6) (b), Florida Statutes (1997)* (given great weight). The trial court also considered seventeen nonstatutory mitigators. Because many were subsumed within the statutory mitigation and thus already considered, the trial court considered the following remaining nonstatutory mitigators: (1) lack of long-term psychiatric care (no weight); (2) marital problems and situational stresses

(great weight); (3) errors of judgment under stress (no additional weight); (4) model prison inmate (some weight); and (5) entered prison at a young age (given little weight). The trial court ordered and adjudicated Grim guilty of first-degree murder and sentenced him to death. The court also found Grim guilty of sexual battery upon a person twelve years of age or older with the use of a deadly weapon and sentenced him to 390.5 months in state prison to run consecutively to the death sentence.

Grim v. State, 841 So. 2d 455, 456-460 (Fla. 2003) (footnotes omitted).

___This Court affirmed Grim's death sentence. Thereafter, Grim brought a post-conviction motion raising several claims of error. Grim argued that: (1) the State had violated *Brady*¹ principles by withholding impeachable evidence regarding a witness; (2) his trial counsel's performance violated *Strickland*;² (3) both of his penalty phase counsels failed to bring forth mitigation evidence; (4) his specially-appointed mitigation counsel had a conflict of interest; (5) his death sentence violated *Ring*;³ and (6) cumulative errors denied him a fair trial.

An evidentiary hearing was convened to address Grim's claims. Following the hearing, the trial court issued an order denying Grim's motion to vacate. Grim now brings this appeal.

EVIDENTIARY HEARING

Dr. James Larson, a licensed psychologist in the State of

¹ *Brady v. Maryland*, 373 U.S. 83 (1963).

² *Strickland v. Washington*, 466 U.S. 668 (1984).

³ *Ring v. Arizona*, 536 U.S. 584 (2002).

Florida, was called to testify (EHT 6). His practice encompassed forensic psychology, which involved evaluating the psychological functioning of individuals (EHT 9); moreover, he evaluated inmates to assess their competency at the time of the commission of their crime (EHT 10). Dr. Larson first became involved in Grim's case when he was contacted by one of Grim's attorneys, Michael Rollo, in March of 2000 (EHT 12). Larson administered psychological tests to Grim in April of 2000 (EHT 13). Larson also reviewed Grim's mental health records (EHT 14). A review of these records indicated that Grim suffered from Intermittent Explosive Disorder (IED) and an Antisocial Personality Disorder (EHT 14-15). Larson testified that Grim had previously sought psychiatric assistance because he was having problems with: his marriage, controlling his anger, and alcohol abuse (EHT 18). Larson noted that according to Grim's medical history, he had been prescribed psychotropic drugs to address his mental issues (EHT 19). Larson's interview and evaluation of Grim revealed that he had been coping with depression prior to the murder (EHT 20). Grim had also detailed his personal background to Dr. Larson (EHT 21). During Larson's interview with Grim, Grim revealed that he had had virtually no contact with his biological father after his parents divorced when he was eleven (EHT 21). Grim also reported that his biological father was an alcoholic (EHT 21), and had rejected Grim's attempts to form a relationship (EHT 22).

Dr. Larson testified that Grim was aware that Larson's responsibility was to assist with the presentation of mitigation evidence (EHT 23). Grim informed Dr. Larson that he did not want any mental mitigation evidence brought forth if the jury returned a verdict of guilty (EHT 24). According to Dr. Larson, Grim's rationale was that he had previously been incarcerated and based on his prior experiences, Grim had no desire to spend the rest of his life in jail (EHT 24). Dr. Larson believed that there was likely more information that could have been gleaned from Grim regarding his childhood history; but, Grim was unwilling to elaborate any further than was necessary (EHT. 24,40). Larson administered the WAIS-III to Grim; he achieved a score of 109 (EHT 25). During the course of Dr. Larson's interview, Grim suggested he had been having trouble with his marriage; and that, according to Grim, the murder of Campbell occurred rather suddenly (EHT 28). Dr. Larson acknowledged that external stressors, such as marital discord, could exacerbate the symptoms of IED (EHT 29). Larson explained that IED is not a psychotic disorder, and that Grim was cognizant of the wrongfulness of his conduct (EHT 32-33). In Larson's conversations with Grim's counsel, there was some discussion of the viability of raising certain defenses; but, these defenses were ultimately rejected because the only defense that Grim wanted to propound was one that would have totally exculpated him (EHT 33).

On cross-examination, Dr. Larson conceded that while IED was

a mental impairment, it does not implicate psychosis (EHT 39). Dr. Larson also provided that Grim was adamant that he did not want any mental mitigation evidence presented; specifically, he did not want any evidence presented relating to an insanity defense, his history of taking of Prozac, nor his mental health (EHT 41). Grim only wanted to pursue a defense that focused on being found not guilty for the murder of Cynthia Campbell (EHT 41). Dr. Larson also believed Grim had been accurately diagnosed with Anti-Social Personality Disorder (EHT 41).

Dr. Joseph Lipman, a certified neuropharmacologist was called to testify. He explained that a neuropharmacologist was an individual who, among other things, develops drugs to treat mental disorders, and studies the psychological effects of abused drugs (EHT 49). Dr. Lipman also examined Grim (EHT 58). Grim detailed to Dr. Lipman his somewhat itinerant childhood (which was due to the fact that Grim's father was in the military) (EHT 59). Grim told Dr. Lipman that his biological father was physically abusive and had problems with alcohol abuse (EHT 59). Lipman also testified regarding Grim's extensive history of substance abuse, and observed that Grim began using marijuana on a regular basis at a very young age; moreover, Grim told Lipman that his problems with substance abuse became progressively worse as he got older (EHT 60). Lipman observed that although Grim enlisted in the Navy, he continued to struggle with substance abuse issues including

excessive consumption of: marijuana, alcohol, and LSD (EHT 61). Grim's problems led to him eventually being discharged from the Navy in 1982 (EHT 61). Dr. Lipman provided that in 1982, Grim was charged with a series of crimes and was sentenced to eight years in prison (EHT 62). Lipman also noted that Grim was again imprisoned in 1990 following his attempt to steal tires from a garage in Texas (EHT 63). Grim served two and a half years for his subsequent crime (EHT 63). Dr. Lipman also testified about Grim's troubled marriage, including the fact that, Grim was arrested in 1997 on Christmas Eve for physically abusing his wife (EHT 64). According to Dr. Lipman, after the Christmas Eve incident, Grim sought treatment for his mental issues (EHT 64). Grim was prescribed Depakote and Prozac (EHT 64). Lipman testified that Grim consumed large quantities of alcohol on a daily basis (EHT 65), and had accordingly developed a significant tolerance (EHT 69). Lipman further testified regarding the effects of prolonged alcohol abuse, including the fact that it impairs the functioning of the brain (EHT 71). Moreover, Dr. Lipman believed Grim's alcohol abuse made him more vulnerable to acting impulsively (EHT 73). Dr. Lipman noted Grim was taking psychotropic medication for his emotional problems; Grim had also run out of money at the time of the offense, and had been unable to afford to renew his prescription (EHT 76). Dr. Lipman believed that because of Grim's alcohol and drug usage, he had not intentionally killed Cynthia Campbell; and,

Dr. Lipman provided, the murder likely occurred somewhat impulsively (EHT 81). Lipman further noted that most of Grim's prior criminal offenses involved alcohol and were impulsive in nature (EHT 82). Lipman also observed that Grim's conduct following the murder of Campbell evidenced that he was remorseful for what he had done (EHT 83).

On cross-examination Dr. Lipman explained that immediately after the crime Grim drove around circuitously until he reached Oklahoma (EHT 84). Lipman testified that Grim's trek occurred after he had dumped Campbell's body over a pier in Pensacola (EHT 85). Lipman stated that neuropsychological tests were not administered to Grim (EHT 87), and conceded that such tests are instructive in determining whether an individual suffers from brain damage (EHT 88). Lipman conceded there was no indication that Grim was intoxicated, when police first encountered him in the early morning hours prior to the murder (EHT 89). Lipman also noted that because Grim was an alcoholic, he might have been particularly adroit at hiding from law enforcement any indications that he had imbibed alcohol in the hours preceding the murder (EHT 90-91).

John Molchan, an assistant state attorney who prosecuted the Grim case was called to testify. Molchan was asked if he was aware of problems Dr. Michael Berkland, a State witness at Grim's trial, had previously encountered regarding his Missouri medical license (EHT 99). Molchan stated that he likely had discussed Dr.

Berkland's issues (EHT 100). Molchan disagreed with any suggestion that Berkland's testimony about whether Campbell was sexually battered was dispositive in Grim's first degree murder conviction (EHT 100). Molchan noted that Grim's jury had also considered whether the murder was premeditated, and given the manner in which the murder was effectuated, Molchan believed premeditated murder had also been established (EHT 101). Molchan could not specifically recall providing Grim's defense lawyers with discovery related to Dr. Berkland's issues in Missouri; however Molchan noted that Grim's original attorney, a public defender named Antonia Stitt, was fully aware Berkland had been disciplined by Missouri authorities - as she had asked Berkland several questions about it during a deposition (EHT 102-3). Molchan provided that he was not entirely sure of the status of Berkland's Missouri medical license at the time Berkland testified at Grim's trial (EHT 105). Molchan also refuted the suggestion that the appointment by Judge Bell of "public interest" mitigation counsel, Spiro Kypreos, was improper; even though Kypreos had previously represented Tracy Coffey - an inmate who sought to testify against Grim (EHT 112-13). Molchan conceded that in hindsight he probably should have disclosed to Judge Bell that a conflict existed (EHT 114-5).

On cross-examination, Molchan noted that Grim's defense team was also aware of Dr. Berkland's medical license problems in Missouri (EHT 120). Further, Molchan agreed that the substance of

Berkland's testimony simply involved describing a laceration that was discovered inside of Campbell's vagina (EHT 121).

On redirect examination, Molchan stated that he did not believe Coffey was a credible witness and therefore did not call him to testify (EHT 123). Molchan also conceded that Grim's co-counsels, Richard Hill and Michael Rollo, did not depose Dr. Berkland; however, Molchan did observe that they *should* have been aware of Berkland's deposition testimony (EHT 124).

Ronald Swanson was next called to testify. Swanson, prior to being appointed to the bench, was formerly an assistant state attorney assigned to the Grim case. Swanson testified that he was aware Dr. Berkland had lost his medical license in Missouri but also noted that this information was brought out during a deposition of Berkland that occurred months prior Grim's trial; therefore Grim's counsel at the time of the deposition, Antonia Stitt, was also cognizant of Berkland's problems (EHT 128-9). Swanson testified that he had only a vague recollection of Dr. Berkland's issues in Missouri (EHT 135). Swanson also agreed that Grim's defense had not been not provided with every parcel of information within the prosecution's possession relating to the fact that Berkland did not possess his Missouri medical license (EHT 136).

On cross-examination, Swanson noted that when Dr. Berkland was deposed by Grim's original attorney, public defender Antonia Stitt,

he (Berkland) had been asked several questions pertaining to his Missouri medical license (EHT 137). Moreover, Swanson noted that Dr. Berkland's license issues were first brought forth by the Public Defender's Office, and not by the State Attorney's Office (EHT 138). Swanson further observed that when the Public Defender's Office withdrew from representing Grim because of a conflict of interest, normal procedures should have called for the Public Defender's Office to transfer the entire Grim case file to his new representatives (EHT 140).

On redirect examination, Swanson conceded that he was not entirely sure if the Public Defender's Office had transferred all of the information in its file to Grim's subsequent representatives - Richard Hill and Michael Rollo (EHT 140).

Richard Hill was called to testify. Hill provided that he was first appointed to the Grim case in December of 1999, and shortly thereafter, he asked Rollo to serve as his co-counsel (EHT 146-7). Hill stated that he had read the depositions taken by the Public Defender's Office (EHT 153-4). Hill stated he had some conversations with the Public Defender's Office regarding Grim's case file (EHT 157-8). During Grim's trial, Hill served as first chair, and Rollo was responsible for handling the penalty phase (EHT 161-2). Hill recalled that Grim did not want to present any mitigation evidence, and did not want to pursue a defense premised on involuntary intoxication (EHT 166). According to Hill, Grim

wanted either to be found not guilty, or he wanted the death penalty (EHT 167, 173). Though Grim did not want any mitigation evidence presented, Hill did not interpret this to mean he (Hill) was totally absolved of his responsibility to investigate potential mitigating evidence (EHT 168). Hill testified that Grim was adamant about not wanting to pursue mitigation and signed waivers prepared by Hill and Rollo to that effect (EHT 171). Hill observed that Grim was knowledgeable about the criminal justice system and realized the prospects he faced, and yet still did not want to pursue a defense that would have constituted an admission of guilt (EHT 175). Hill testified that he was aware: (1) Dr. Larson believed Grim had brain damage; (2) Grim had a history of alcohol abuse; and (3) that Grim had been abused as a child (EHT 176-7). Hill said that his strategy at trial was to establish reasonable doubt, a strategy that was first broached by Grim (EHT 178). Hill stated that voluntary intoxication was not presented as a defense during the guilt phase, nor as mitigation evidence during the penalty phase per Grim's instructions as to how he wanted to proceed (EHT 179). Hill noted that voluntary intoxication defenses were rarely successful; and moreover, Grim insisted he did not want to concede his guilt - as would be required if he presented an insanity defense (EHT 179-80). Hill testified that he did not present any evidence to support a statutory mental mitigator (EHT 184). Hill was aware that he would have a difficult time defending

Grim, particularly because Judge Bell would not allow Hill to propound a defense theory that an unrelated third party was responsible for the death of Cynthia Campbell (EHT 185). Hill testified that he would have challenged Dr. Berkland's testimony more strenuously if he were aware it could have been impeached (EHT 186). Hill conceded that the only testimony at Grim's trial related to the sexual battery aggravator found by the trial court derived from the testimony of Dr. Berkland (EHT 186). Hill admitted that he was somewhat aware of the fact that Dr. Berkland had professional issues in Missouri, but, Hill asserted that he was unaware that Berkland did not have his Missouri license; and had the full scope of this information been made available, Hill testified that he certainly would have used it to impeach Berkland (EHT 187, 193). Hill did not believe the State had established Campbell's murder had been premeditated; he further agreed that if the allegation that Campbell was sexually battered could have been challenged - the related felony murder charge against Grim could have been called into question (EHT 187). Hill also noted that the defense gave no real thought to recusing Judge Bell from the case even though Judge Bell had previously represented Henry Company Homes - the entity Grim sought to implicate in the murder of Campbell (EHT 194). Hill did not believe that Judge Bell's prior representation of Henry Company Homes would impact his ability to rule fairly in Grim's trial (EHT 195). Hill reiterated that it was

Grim who asked that no lesser included offenses be pursued in lieu of the first degree murder charge (EHT 197). Hill provided that the reason he placed Grim's refusal to propound mitigation affirmatively on the record was because Hill was aware that, in post-conviction proceedings, he would certainly be questioned about his trial strategy (EHT 198-9). Hill denied being provided copies of various documents in the possession of the State Attorney's Office related to the fact that Dr. Berkland did not have his Missouri medical license at the time he testified at Grim's trial (EHT 204). Hill stated that the Public Defender's Office had never provided him with any information that would have helped to impeach Dr. Berkland (EHT 204). Hill testified that he did not attempt to challenge the admission of blood evidence inculcating Grim and did not call any witnesses (EHT 207-8); nor did the defense present any evidence (EHT 209). When asked why Hill did not challenge, among other things, the validity of a video purporting to be Grim in a store proximate to the pier where Campbell's body was found, Hill stated that the individual in the video was unquestionably Grim and therefore did not feel the need to contest the video recording (EHT 209 -11). Hill testified that he filed motions to suppress evidence found at the crime scene and certain statements that Grim made to law enforcement (EHT 214). Additionally, Hill filed motions to waive presenting mitigation evidence (EHT 214-5). Hill further provided that he was not entirely responsible for the

presentation of mitigation evidence (EHT 218).

On cross-examination, Hill was asked about the public defender's questioning of Dr. Berkland during an earlier deposition; wherein the public defender had asked Berkland several questions about his performance of autopsies - which had come under scrutiny while he was practicing in Missouri (EHT 221). Hill acknowledged that he was aware of Dr. Berkland's issues in Missouri; however the only defense theory that Grim wanted to pursue was that he had not committed the murder (EHT 221). Hill testified that there was evidence supportive of premeditated murder due to the fact, among other reasons, Campbell had suffered multiple wounds, and that more than one weapon had been used to effectuate her murder (EHT 222 -3). Hill felt that Dr. Berkland's testimony regarding whether Campbell had been sexually battered was not seriously in question, noting that Campbell's injuries were readily obvious (EHT 223). Hill testified that he had secured an expert to scrutinize the State's DNA evidence, and the expert determined that there was no basis for challenging the results (EHT 224). Hill acknowledged that Campbell's DNA was found in Grim's home; and Grim's fingerprint was also found in Campbell's blood (EHT 224). Moreover, Hill agreed that evidence had been presented at trial indicating that Campbell's body had been wrapped in a bed sheet that had belonged to Grim and his ex-wife (EHT 225). Hill agreed that there was a great deal of evidence that had been

presented against Grim (EHT 225). Hill stated that at no time did Grim assert he wanted to change course regarding his defense (EHT 225). Hill became Grim's counsel following the withdrawal of the public defender's office - due to a conflict of interest - and acknowledged he had received the public defender's file, which included depositions and police reports (EHT 228). Upon being transferred the Grim matter, Hill discussed the case with Grim's former attorney, public defender Antonia Stitt; and apparently, Grim had expressed to Stitt (just as he would to Hill and Rollo), that he only wanted to pursue a defense strategy that would not require him to inculcate himself; nor did Grim want any mitigation evidence presented if he was found guilty (EHT 228-9).

On redirect examination, Hill acknowledged he did not attempt to challenge the state's assertion that the murder was premeditated; instead, the defense sought to argue that Grim was not responsible for the murder (EHT 230). Hill believed that Grim was knowledgeable about the defense he wanted to present, and that Grim had the right to pursue the defense of his choosing provided he was aware of the consequences of his decisions (EHT 231). Hill testified that he felt it was possible that Grim could have been found guilty of second degree murder (EHT 232).

Julie Edwards, an assistant state attorney, testified (EHT 241). Her office was responsible for prosecuting Grim, but Edwards did not have direct involvement in the case (EHT 242). Edwards was

asked about a letter an inmate had written that apparently was received by the State Attorney's Office relating to the Grim case (EHT 243). Edwards could not recall ever seeing the letter but stated that the state attorney's office surely would have disclosed the letter to Grim's defense team (EHT 244).

Thereafter Spiro Kypreos testified. Kypreos was an attorney appointed by Judge Bell to represent the "public interest" in the Grim case (EHT2 9). Kypreos stated that his job was to raise potentially mitigating evidence on Grim's behalf, although Grim did not personally wish to challenge his death sentence and refused to cooperate with Kypreos (EHT2 9-10). Kypreos believed that it was his duty to bring forth all possible mitigation evidence that could be used to spare Grim's life (EHT2 11). Kypreos testified that Grim's penalty phase counsel, Michael Rollo, believed that he (Rollo) was required to abide by the wishes of his client, Grim, and therefore did not bring forth mitigation evidence; in turn, the presentation of mitigation became Kypreos' responsibility (EHT2 12). Kypreos stated that he did not recall presenting his findings to a penalty phase jury (EHT2 15). Kypreos did not believe he enjoyed a traditional attorney/client relationship with Grim, but did believe that he was still responsible for representing Grim interests - specifically related to gathering mitigation (EHT2 16). Kypreos believed that because he had represented Grim's mitigation interest at the behest of Judge Bell, he did not think that his

limited role in the Grim matter would expose him to a post-conviction claim for ineffective assistance of counsel (EHT2 17). And although Kypreos did not believe he enjoyed a traditional attorney/client relationship with Grim, he attempted to represent Grim as if he were Kypreos' own client (EHT2 18, 32). Kypreos provided that he attempted to bring forth as much information as he could regarding Grim's mental state at the time of the crime, even though he was not given a tremendous amount of time to pursue mitigation evidence (he believed that he was given approximately a week) (EHT2 19). Kypreos did not consider himself to be a mitigation specialist (EHT2 21). Kypreos stated that he secured information about Grim, from among other sources, a psychologist report given to him by Rollo (EHT2 23, 26). Kypreos did not do any independent investigation regarding Grim's background (EHT2 27). Because Kypreos was given a relatively short amount of time to secure mitigation, he was unable to present as much evidence as he would have been able to do had he been representing Grim from the outset (EHT2 28). Kypreos did not believe his investigation of Grim's background for mitigation purposes would have satisfied Sixth Amendment standards had he been Grim's counsel under traditional circumstances (EHT2 28). Kypreos was also asked about his former representation of Tracy Coffey, an inmate not called at Grim's trial, but who was apparently willing to testify that Grim had made inculpatory remarks about killing Campbell (EHT2 35).

Kypreos was asked whether he believed he had a conflict of interest given that he served as "public interest" counsel to Grim, but had previously represented Coffey (EHT2 37). Kypreos stated that in hindsight, based on appearances, he probably would have disclosed that he had represented Coffey in another matter; however, Kypreos did not believe that the appearance of a conflict automatically required disqualification (EHT2 37). Kypreos testified that he did not contact Grim's family members, though had he been representing Grim in a traditional capital proceeding he would have (EHT2 38). Kypreos stated that he had been placed in a very difficult position given the time constraints that he was working under, his lack of resources, and that he would not be permitted to conduct a full borne investigation (EHT2 39-41).

On cross-examination, Kypreos acknowledged that it difficult to garner mitigation evidence given that Grim was not cooperative (EHT2 42). In fact, Grim refused to talk with Kypreos; and Grim's penalty phase counsel, Michael Rollo, objected when Kypreos sought to present mitigation evidence (EHT2 43). Finally, Kypreos did not believe that his prior representation of Tracy Coffey had affected Kypreos' presentation of mitigation evidence on Grim's behalf (EHT2 43).

On redirect examination, Kypreos testified that he firmly believed that if he was allowed to fully explore Grim's background for potentially mitigating evidence, Grim had a chance to avoid a

death sentence (EHT2 45).

Michael Rollo was called to testify. Rollo provided that he was appointed to represent Grim (EHT2 54). Rollo believed that he was appointed subsequent to the appointment of Grim's guilt phase counsel, Richard Hill (EHT2 54). Rollo stated he had previously tried a capital case with Hill (EHT2 54).⁴

Rollo testified that Hill was responsible for almost the entirety of the guilt phase portion of the proceedings (EHT3 9). Hill and Rollo did not seek to hire an investigator, at the behest of Grim, who had advised his attorneys that he did not want to pursue mitigation evidence (EHT3 9). Rollo noted that Grim had previously been incarcerated in both Florida and Texas, and Rollo believed Grim's decision regarding his refusal to present mitigation was based upon Grim's familiarity with the criminal justice system (EHT3 9). Rollo stated that he attempted to dissuade Grim from refusing to put forth mitigation evidence, but Grim remained adamant (EHT3 11). Rollo testified that he was aware Grim was taking medicine at the time of the crime, which had been prescribed to address his IED (EHT3 12). Rollo acknowledged that Grim's drug use at the time of the crime was discussed as a possible defense (EHT3 13). However, Rollo also noted that an

⁴Following a dispute related to whether Rollo had disclosed the entirety of his records to the Grim's post-conviction counsel, the proceedings were recessed until Rollo provided the full scope of his records.

intoxication defense would likely be difficult to pursue because the evidence seemed to indicate that Grim was aware of what he was doing as the murder took place (EHT3 14-15). Rollo testified that, notwithstanding the fact Grim did not want to present mitigation evidence, based on precedent established by *Koon v. Dugger*, he (Rollo) was required to identify for the trial court the evidence that he *would* have presented had a penalty phase hearing been conducted (EHT3 18-19). Rollo stated that he had contacted some of Grim's family members (EHT3 20). Rollo explained that one of the reasons he may not have pursued evidence pertaining to Grim's behavior while he had previously been incarcerated in Florida and Texas was because Grim did not want to present any mitigation evidence that would have gone towards lessening the likelihood of a death sentence (EHT3 21-22). Rollo further asserted that he did not waive a jury recommendation because the sentencing judge was still required to make an independent review of the underlying evidence (EHT3 27); moreover, because Grim actually wanted the death penalty if found guilty, Rollo believed that it would not have been prudent to allow the judge to be the sole determiner of Grim's fate without input from the jury (EHT3 28).

Rollo was cross-examined. He testified that his role in the Grim case was to serve as mitigation counsel during the penalty phase hearing (EHT3 30). Rollo noted that Grim had been examined by Dr. Larson, who found that Grim had a spate of personality

disorders; as such, presenting evidence of these disorders during the penalty phase would potentially have had a negative impact on any mitigation because his disorders could also have been used to establish that Grim could not control himself (EHT3 31). Rollo testified that he questioned Grim several times as to whether he wished to change his mind regarding mitigation; Grim's answer never wavered (EHT3 32). Rollo insisted that he continued to investigate mitigation evidence despite the fact Grim had affirmatively decided that he did not want mitigation presented (EHT3 33). Rollo testified that Grim did not want any lesser included offenses to be explored, nor any defenses related to either his diminished capacity or voluntary intoxication (EHT3 35). Moreover, Grim did not want any evidence presented suggesting he was unaware of what he was doing at the time of the crime (EHT3 35). Rollo stated that Grim wanted to argue as a defense that another individual had committed the crime; a defense which Rollo believed would be very difficult given that the evidence against Grim was - in Rollo's estimation - "overwhelming" (EHT3 36). Rollo testified that he did not have any discussions with Spiro Kypreos, who was appointed by the court to explore potentially mitigating evidence, because Rollo did not want to discuss privileged conversations that he had had with Grim (EHT3 38). Rollo noted that at the Spencer hearing, Kypreos provided the court with information related to Grim's family background and his psychological history; Grim was

displeased that such information was disclosed at all (EHT3 38). Rollo believed that the amount of physical evidence implicating Grim in the death of Campbell was "overwhelming," and while Hill and Rollo followed Grim's wishes regarding trial strategy (i.e., someone else was responsible for the crime) - Rollo did not feel that this strategy would be successful (EHT3 38-9). Rollo's preferred tact would have been a scenario wherein Grim would have confessed and thereafter an extensive amount of mitigation evidence would have been brought forth; instead, because Grim insisted on going to trial, Hill and Rollo were left to argue, in Rollo's estimation, an "absurd" defense that someone else was responsible for the murder (EHT3 39). Rollo observed that Grim was so adamant that he did not want any mitigation evidence presented, that, during the penalty phase Grim instructed Rollo not to challenge arguments brought forth by the State (EHT3 40).

On redirect examination, Rollo acknowledged that Dr. Larson had diagnosed Grim with anti-social personality disorder, which is considered a mitigator under Florida law (EHT3 40-41). Rollo observed that Grim did not want any reports that had been prepared by Dr. Larson to be presented during the penalty phase (EHT3 43-44).

SUMMARY OF ARGUMENT

___Grim contends that he has been denied a panoply of constitutional rights. However, the record in this case establishes

that Grim's assertions of constitutional error are misplaced. First, Grim asserts that the State withheld negative information regarding the credentials of a medical examiner who testified at his trial. His contention is untrue, as the record in this case evidences that the State never withheld from Grim's attorneys the fact that the medical examiner in question had lost his license in another state; consequently no *Brady* violation obtains.

Secondarily, Grim argues that he was denied effective assistance of counsel at trial. However, most of the "problems" Grim complains of were created by his desire not to put forth any mitigation evidence. As such, Grim's attorneys were slightly hamstrung throughout the proceedings - including the penalty phase; nevertheless the record demonstrates that Grim's attorneys' actions were consistent with the dictates of *Strickland v. Washington*.

Third, Grim suggests that his specially appointed penalty phase counsel failed to properly investigate potential mitigation and therefore such representation cannot withstand constitutional scrutiny. However, the difficulties that the specially appointed counsel encountered in attempting to gather mitigation evidence were brought about by Grim's unwillingness to cooperate or provide assistance. Grim should not be able to now complain about the failings of an attorney whose sole purpose was to better inform the trial, and subsequent reviewing courts, what, if any, mitigation evidence existed.

Lastly, Grim complains that his specially appointed mitigation counsel had a conflict of interest that compromised his ability to adequately represent Grim. Apparently, Grim's specially-appointed mitigation counsel had previously represented an individual who was seeking to testify against Grim. This individual was never called to testify; nevertheless Grim now states that the alleged conflict of interest should have been disclosed to the trial court. As will be shown, it was unnecessary for the conflict to have been disclosed because there is no suggestion that the specially-appointed mitigation counsel was compelled to simultaneously represent both Grim, and, an individual whose interests were fundamentally at odds with Grim's. Therefore no conflict existed.

STANDARD OF REVIEW

This matter comes before this Court following the trial court's denial of Grim's post-conviction claims; accordingly deference is owed to the trial court's findings of fact. *See Walls v. State*, 926 So. 2d 1156, 1165 (Fla. 2006). Similarly, it is well-understood that, provided "the trial court's findings are supported by competent substantial evidence, this Court will not substitute its judgment for that of the trial court on questions of fact, likewise of the credibility of the witnesses as well as the weight to given the evidence by the trial court." *Id.* (quoting *Blanco v. State*, 702 So. 2d 1250, 1252 (Fla. 1997)) (internal quotation marks omitted).

ARGUMENT

I. GRIM WAS NOT DENIED HIS CONSTITUTIONAL RIGHTS AS UNDERSTOOD BY THE FIFTH, SIXTH, EIGHTH, AND/OR FOURTEENTH AMENDMENTS BECAUSE THE STATE NEVER WITHHELD EXCULPATORY EVIDENCE AND GRIM WAS NEVER DENIED EFFECTIVE ASSISTANCE OF COUNSEL

Grim argues that he has been denied a panoply of constitutional rights because he was not granted access to information during discovery which might have enabled him to have more aggressively impeach the credentials of a medical examiner who testified at Grim's trial. Specifically, Dr. Michael Berkland was called at Grim's trial to testify regarding antemortem vaginal injuries suffered by Campbell. Berkland's testified based on a series of autopsy photographs. These photographs outlined the brutal injuries that Campbell endured, and in particular, severe bruises to Campbell's vaginal area. Berkland testified that it appeared from the autopsy photographs that Campbell had been sexually battered before she had been murdered. Berkland opined that, based on his evaluation of the photographs, some type of blunt instrument had been forcefully inserted into Campbell's vagina.

In its order sentencing Grim to death, Judge Bell identified the fact that Campbell had been sexually battered as an aggravating sentencing factor; and in turn, the finding that Campbell was sexually battered was premised almost exclusively on the testimony of Dr. Berkland. Grim now argues that Dr. Berkland's credentials

as a medical expert should be seriously called into question because at the time he testified at Grim's trial, he had lost his license to practice medicine in Missouri due to a series of errors he committed while performing autopsies.

Grim suggests that Berkland's testimony at his trial had a dispositive effect on his sentence. Grim further argues that if his attorneys had been privy to information regarding the fact Berkland had lost his medical license in Missouri -- ostensibly because he had performed faulty autopsies -- Grim could have more vigorously sought to impeach Berkland's testimony and credibility. He argues that information regarding Berkland's background was not made available to his attorneys during discovery even though the State had this information at its disposal. As such, Grim believes the State has contravened the basic tenets of *Brady v. Maryland*, 373 U.S. 83 (1963), because evidence that would have gone towards strongly impeaching the underlying basis of Berkland's expertise was not provided to the defense.⁵

⁵Grim's *Brady* claim, which is premised on the fact that he was not made fully aware that Berkland lacked his Missouri medical license, while novel, is not entirely unprecedented. *Cf. generally Syvertson v. North Dakota*, 699 N.W.2d 128 (N.D. 2005) (dismissing *Brady* claim which was premised on Syvertson's contention that the prosecution had failed to disclose the fact that the physician who had examined Syvertson had himself been disciplined in two States for professional misconduct; North Dakota Supreme Court determined that no *Brady* violation occurred because there had been no determination that the prosecution was in possession of the alleged *Brady* material).

The State respectfully disagrees with Grim's alleged ground of error. His contention gives the false impression that the State attempted to obscure damaging evidence that was harmful to the credibility of an important witness. To the contrary however, evidence of the fact that Dr. Berkland lacked his Missouri medical license was well-established, and was known (or should have been known) by all of his attorneys.

The State may be found liable for a *Brady* violation under those circumstances where: (1) it was in possession of evidence that was favorable to Grim, and the evidence was either exculpatory or impeachable in nature; (2) either intentionally, or through inadvertence, the now-challenged evidence was not disclosed; and (3) prejudice resulted from the State's failure to disclose the evidence in question. See *Davis v. State*, 928 So. 2d 1089, 1113 (Fla. 2005) (citations omitted). This Court has observed that consistent with *Brady*, prejudice exists where the evidence in question was "material," in that there is a strong likelihood that had the suppressed "evidence been disclosed to the defense, the result of the proceeding would have been different.'" *Id.* (quoting *Strickler v. Greene*, 527 U.S. 263, 280 (1999)); see also *Kyles v. Whitley*, 514 U.S. 419, 435 (1995) (recognizing that a determination as to whether alleged *Brady* evidence is material, requires reviewing courts to assess whether "the favorable evidence could reasonably be taken to put the whole case in such a light as to

undermine confidence in the verdict").

This Court's review of *Brady* claims is consistent with the standard applied when reviewing ineffective assistance of counsel claims generally; deference is owed "to the trial court's findings of fact but [this Court will] independently determine whether the facts are sufficient to establish the elements of each claim." *Lamarca v. State*, 931 So. 2d 838, 852 (Fla. 2006).

As noted, Grim's primary contention is that his attorneys were not made fully aware of Berkland's prior medical license problems, which stemmed from the fact Berkland had improperly performed a number of autopsies while practicing in Missouri. During the post-conviction evidentiary hearing, Grim produced several documents, including, among other materials, internal memoranda, letters, and newspaper reports all related to Berkland's lack of a Missouri license. The foregoing documents were in the possession of the State Attorney's Office which had prosecuted Grim, but apparently were not fully disclosed to Grim's attorneys prior to his trial. Grim maintains that the failure to produce these *specific* documents during discovery hampered Grim's ability to impeach Berkland's findings.

The State believes Grim overstates the impact of Berkland's testimony on the proceedings, and concomitantly, de-emphasizes his own awareness of Berkland's problems in Missouri. Similarly, Grim seems to be arguing that but for the testimony of Berkland, there

was a significant likelihood that Grim would not have been convicted of first-degree murder - as there would have been no sexual battery aggravator. In order to reach this conclusion Grim overlooks much of the evidence found in the record; and, he fails to fully explain that the alleged *Brady* material related to Berkland's problems in Missouri was actually known to Grim's attorneys prior to the commencement of his trial.

Grim was originally represented by Antoinette Stitt, a public defender. Stitt eventually withdrew as Grim's attorney because a potential witness at Grim's trial had been represented by her office. Prior to Stitt's withdrawal as Grim's counsel however she deposed Dr. Berkland, and probed him to some degree regarding his previous problems in Missouri. Specifically, Stitt asked Berkland a rather open-ended question regarding his problems in Missouri; Berkland answered forthrightly; and he fully explained that he no longer had a Missouri medical license because he had erroneously performed a series of autopsies:

Antoinette Stitt: Okay. Well, let's get a little bit of unpleasantness out of the way to begin with. Apparently, there's some problems with you as a medical examiner in another state?

* * *

Dr. Berkland: The incoming medical examiner and me ran into some problems. He elected to terminate me for probably a variety of reasons . . . I was sort of causing [the medical examiner] some embarrassment then in the court system. They had found seven teaching brains where the autopsy report had a boilerplate error in it, if you would, that the brain had been serially sectioned. [Berkland continued with a rather involved description of

his problems]

* * *

The next thing I knew I was getting a notice saying I could no longer perform forensic autopsies in the state of Missouri.

* * *

And so as it presently stands, they have revoked my license, and that's under appeal.

(PC-R. 363-366).

As previously referenced, Stitt did not continue as Grim's counsel due to a conflict of interest. She was replaced by Michael Hill. However, the record makes unmistakably clear that Grim's trial and mitigation counsel were aware that Berkland had received a significant administrative sanction while he worked as a medical examiner in Missouri: loss of the right to practice medicine in that state. Similarly the record evidences that Berkland was forthcoming regarding his difficulties in Missouri, and made it quite clear to Stitt that he was not licensed because of problems of his own creation.

The State respectfully takes the position that the deposition testimony provided by Berkland indicates that there was no attempt to obscure the facts regarding his problems in Missouri. Moreover, Grim has not established that the State Attorney Office's conduct implicated *Brady*. As this Court has noted in a somewhat similar context, a defendant does not establish a *Brady* violation simply because discoverable information, that was known to a defendant's

initial attorney (i.e., a public defender), was not fully disclosed to any of the defendant's subsequent attorneys. This is likely because the original and subsequent attorneys are presumed to have coordinated with each other regarding substantive matters, including those germane to putting forth a defense.

In *Provenzano v. State*, 616 So. 2d 428 (Fla. 1993), the accused alleged in a 3.850 motion that the State had violated the tenets of *Brady* because it allegedly failed to disclose: certain psychiatric reports, jail records, and notes from one of the State's expert witnesses. *Id.* at 430. This Court commented that a defendant fails to establish a *Brady* violation when the information at issue was equally obtainable by both sides through reasonably diligent effort. *Id.* Notably, this Court found that the alleged *Brady* material could have been gathered by means other than via the State; for example, shortly after committing his crime, Provenzano's first attorney (who was later replaced) had been granted a motion which had sought that various medical records - including the relevant psychiatric report - be sealed to everyone but Provenzano, his attorney, and any court-appointed medical expert. This Court found that even though Provenzano was later represented by another lawyer, based on his original attorney's prior motion, the psychiatric report Provenzano sought was not unavailable to his new lawyer. Consequently, Provenzano's *Brady* claim was denied since his original attorney clearly knew of the

psychiatric report, and therefore his subsequent attorney was charged with being aware of it as well.

In the instant case, Grim argues that he should have been provided with more information related to Berkland's problems in Missouri. However, the record certainly establishes that Grim's initial attorney, Antoinette Stitt, was aware of Berkland's medical license issues, as evidenced by her deposition questioning of Berkland wherein *she* propounded questions related to his Missouri credentials. *See, e.g., James v. State*, 453 So. 2d 786, 790 (Fla. 1984) (noting that there is no *Brady* violation where the evidence sought was equally accessible to both parties). The deposition took place on March 25, 1999, approximately a year and half before the commencement of Grim's trial. Moreover, during the post-conviction evidentiary hearing, Richard Hill, Grim's trial counsel, acknowledged that he was cognizant of the fact that Berkland had problems related to his medical license. For example, when asked whether Hill had read the relevant depositions which had been taken by the public defender prior to Hill's representation of Grim, Hill stated, "[y]es, I basically looked at what they had - the depositions they had taken. *I read depositions, read what other discovery was in the file*" (EHT 153-4) (emphasis added).

Therefore, the State respectfully argues that Grim has not raised an identifiable *Brady* claim, as the allegedly suppressed evidence was in the possession of Grim's counsel. *See, e.g.,*

United States v. Griggs, 713 F.2d 672, 674 (11th Cir. 1983) (“Where defendants, prior to trial, had within their knowledge the information by which they could have ascertained the alleged *Brady* material, there is no suppression by the Government.”).

Additionally, consistent with *Brady* and its progeny, this Court must also be mindful that the burden is on Grim to establish that had the jury been privy to the additional newspaper accounts, internal memoranda, and court records regarding Berkland’s medical license, a reasonable probability existed that the result of Grim’s trial would have been different. *See, e.g., Strickler*, 527 U.S. at 291. A fair analysis of the record highlights that the evidence inculpatory Grim in the murder of Cynthia Campbell was simply overwhelming. At Grim’s trial, videotape evidence was produced showing Grim at a store near the pier where Campbell body was eventually discovered (eyewitnesses also testified to seeing Grim at the pier), Grim’s fingerprint was discovered in Campbell’s blood, Campbell’s body was discovered wrapped up in a bed sheet and a carpet belonging to Grim, Campbell’s glasses were located in Grim’s cooler, tape that was used to wrap up Campbell’s body was torn from a roll belonging to Grim, and blood evidence found throughout Grim’s house contained Campbell’s genetic markers.

Further, Grim’s first degree murder sentence was not tethered exclusively to the fact that Campbell had been sexually battered, as his brief seems to suggest. The sentencing court enumerated

several aggravating factors, including the fact that Grim had previously been convicted of a violent felony. Grim's prior violent felony conviction has not been disclaimed, nor in anyway been challenged by Grim. Thus, even if this Court were to eliminate the sexual battery aggravator that was found by the trial court, this Court has certainly upheld a death sentence premised only on the prior violent felony aggravator. See, e.g., *Rodgers v. State*, 2006 Fla. LEXIS 2542 at *32-33 (Fla. Oct. 26, 2006).⁶

Therefore, Grim's *Brady* claim should be rejected.

II. GRIM WAS NOT DEPRIVED EFFECTIVE ASSISTANCE OF COUNSEL DURING HIS TRIAL AS HE HAS MADE ABSOLUTELY NO SHOWING THAT HIS COUNSEL FAILED TO INVESTIGATE AND/OR PRESENT EXCULPATORY AND IMPEACHMENT EVIDENCE AND TESTIMONY, OR FAILED TO ADEQUATELY PREPARE FOR AND CHALLENGE THE EVIDENCE PRESENTED BY THE STATE

Grim further asserts that he was denied effective assistance

⁶Moreover, the testimony of Dr. Berkland was highly circumscribed. He only testified regarding autopsy photos showing obvious tearing along Campbell's vaginal area. Berkland testified that a blunt object had been forcefully inserted and removed from Campbell's vagina. This testimony was hardly controversial as Grim's attorneys conceded that the photographs evidenced the injuries. Had the State desired to have a different medical expert, other than Berkland, testify as to Campbell's injuries, the testimony would not have been any different from Berkland's, therefore no *Brady* violation should obtain. See generally *United States v. Garcia*, 13 F.3d 1464, 1472 (11th Cir. 1994) (determining that non-disclosure of the fact that government witness was a suspect in an unrelated murder case was not a *Brady* violation because, among other reasons, the witness/suspect's testimony was not essential to attaining conviction and because his testimony could have easily been replaced by another law enforcement official); see also *United States v. Gale*, 314 F.3d 1, 6, (D.C. Cir. 2003).

of counsel because his trial counsel failed to vigorously challenge evidence brought forth by the State. He maintains that his lawyers' conduct violated the tenets of *Strickland v. Washington*, 466 U.S. 668 (1984). Under *Strickland*, an individual claiming that he has been denied effective assistance of counsel must first "identify particular acts or omissions of the lawyer that are shown to be outside the broad range of reasonably competent performance under prevailing professional standards." *Maxwell v. Wainright*, 490 So. 2d 927, 932 (Fla. 1986). Thereafter, the claimant must establish that his lawyer's allegedly deficient representation "so affected the proceeding that confidence in the outcome is undermined." *Id.* Upon review of an ineffective assistance of counsel claim, this Court presumes that counsel's representation comported with professional norms. See *Strickland*, 466 U.S. at 690. Ineffective assistance of counsel claims are construed as mixed questions of fact and law wherein this Court independently reviews "the trial court's legal conclusions, while giving deference to the factual findings." *Davis v. Florida*, 928 So. 1089, 1105 (Fla. 2005).

Grim raises four subissues: (1) his trial counsel failed to present mental health mitigation; (2) his trial counsel did not seek the recusal of Judge Bell; (3) trial counsel made an allegedly improper comment to the trial court that Grim did not want any lesser included offenses argued; and (4) trial counsel failed to

challenge the state's evidence, and did not bring forth any evidence that would have strengthened Grim's reasonable doubt defense. These arguments will be addressed in turn.

A. MITIGATION EVIDENCE WAS NOT PRESENTED AT GRIM'S BEHEST

Grim claims that his attorneys erroneously failed to present mental mitigation evidence; he specifically contends that his attorneys should have presented evidence relating to Drs. Larson and Lipman's psychological evaluations of Grim. In his brief, Grim avers that his attorneys were aware that, within the timeframe contemporaneous to Cynthia Campbell's murder, Grim had: consumed large quantities of alcohol, was under tremendous stress because of his tumultuous relationship with his estranged wife, had smoked marijuana, and had ingested psychotropic drugs. Appellant's Brief at 50. Grim contends that had his attorneys more vigorously explored his background, a viable defense could have been presented which, perhaps, would have spared him from his death sentence.

For example Grim notes that experts should have looked to -- and ultimately testified -- regarding the degree to which various intoxicants in Grim's system at the time of the murder negated his intent to commit the crime. See Appellant's Brief at 51. According to Grim's reasoning, the failure of his attorneys to present a voluntary intoxication defense constituted ineffective

assistance of counsel under *Strickland*.⁷ Grim takes issue with Hill and Rollo's testimony at the evidentiary hearing wherein both attorneys noted that they did not present any evidence regarding Grim's alcohol and drug consumption around the time of murder because they were acting in accordance with Grim's wishes.

This Court has recognized that a capital defendant has the right not to present mitigation evidence provided his counsel has conducted a sufficient investigation regarding potentially mitigating evidence. See *Lamarca v. State*, 931 So. 2d 838, 850 (Fla. 2006) (citing *Koon v. Dugger*, 619 So. 2d 246, 249-50 (Fla. 1993)). The burden is on Grim to establish his ineffective assistance of counsel claim. See, e.g., *Holland v. State*, 916 So. 2d 750, 757 (Fla. 2005) (quoting *Asay v. State*, 769 So. 2d 974, 985 (Fla. 2000)) ("In evaluating claims that counsel was ineffective for failing to present mitigating evidence, this Court requires that the defendant bear the burden of establishing that counsel's ineffectiveness 'deprived the defendant of a reliable penalty phase proceeding.'").

In accordance with *Koon*, this Court has mandated that a determination as to whether a capital defendant's counsel properly

⁷Given Grim's insistence on asserting his innocence, an ineffective assistance of counsel claim based on failure to pursue an voluntary intoxication defense is not cognizable. *Brown v. State*, 894 So. 2d 137, 146 (Fla. 2004) ("Failure to present intoxication defense cannot constitute an ineffective assistance of counsel when defendant asserts his innocence.").

investigated potential mitigation evidence first requires the defendant's counsel to affirmatively place on the record that the defendant does not wish to have mitigation presented on his behalf; concomitantly, counsel must inform what, if any, mitigation is believed to exist. *Lamarca*, 931 So. 2d at 850.. Thereafter, the trial court must receive assurances from the capital defendant that he has discussed the applicability of mitigation with his attorney and nevertheless still wishes to forego presenting mitigation during the penalty phase. *Id.* at 850-51.

Grim relies on this Court's decision in *Lewis v. State*, 838 So.2d 1102 (Fla. 2002) for the proposition that Rollo and Hill's failure to present mitigation evidence should be deemed invalid; because from Grim's perspective, his attorneys did not conduct a vigorous investigation regarding the existence of potentially mitigating evidence. Appellant's Brief at 53. Accordingly, Grim argues that Hill and Rollo failed to adequately prepare mitigation, which ultimately prejudiced Grim. Appellant's Brief at 54.

The State believes that Grim's arguments are belied by the transcript of his trial. To recall, when Judge Bell learned of the fact that Grim did not intend to present any mitigation evidence he engaged Grim in a formalized inquiry regarding whether Grim was knowingly and voluntarily waiving his rights. The questions asked by Judge Bell were consonant with the principles articulated by

this Court in *Koon*. Additionally, Grim's mitigation counsel, Michael Rollo, was required, in accordance with the requirements of *Koon*, to place on the record the mitigation evidence that he would have been prepared to produce had Grim been willing to allow its presentation. Rollo testified that he was prepared to call Dr. Larson as a witness who would have testified regarding the applicability of two statutory mitigators: (1) that Grim was under extreme emotional disturbance at the time of the crime; and (2) that Grim was unable to conform his conduct to the dictates of the law (TT. V. 841). Moreover, Rollo informed Judge Bell that Dr. Larson would have testified regarding Grim's relationship with his parents including: the abuse Grim suffered at the hands of his biological father, the impact of his parents' divorce, and the subsequent economic difficulties his mother endured raising Grim as a single mother. Dr. Larson would have also discussed the significant external stressors that were likely affecting Grim at the time of the crime including the fact that Grim had recently become estranged from his wife, had filed for bankruptcy, and had also learned that his wife had been unfaithful (TT. V. 845).

Rollo further testified about additional mitigation witnesses that would have been called on Grim's behalf. Rollo was prepared to call Grim's employers at Daws Manufacturing Corporation who would have testified that Grim was a diligent and respected employee (TT. V. 846). Grim's mother, Isabel Flammand, was

prepared to testify that Grim was a well-behaved child. Grim's sister was also willing to testify.

Following Rollo's recitation of the litany of witnesses and evidence he was prepared to present in mitigation, Grim was thereafter asked whether he was still unwilling to present mitigation evidence. Grim affirmed that he was completely satisfied with Rollo as his counsel, but that he still did not want any mitigation evidence to be brought forth.

Grim now opines that he was denied effective assistance of counsel because his attorneys never vigorously pursued a defense involving the fact that Grim was intoxicated at the time of the commission of the crime. Similarly, Grim believes that Hill and Rollo improperly relented to Grim's desire not to present mitigation evidence; and failed to conduct a reasonable investigation as was found by this Court in *Lewis v. State*, 838 So. 2d 1102 (Fla. 2002).

In *Lewis*, this Court confronted whether a capital defendant's lawyers were constitutionally deficient because they failed to marshal substantive mitigation evidence - in reliance on Lewis's instructions to his attorneys that he did not want mitigation presented. In *Lewis*, the accused had asserted that he did not want to present any mitigation evidence that would have, in essence, inculpated him. This Court found that his lawyers had failed to adequately prepare mitigation irrespective of the fact that Lewis

had asserted he did not want any presented. This Court compared the hours that Lewis' lawyers spent in preparation for trial, versus the amount of time that was spent preparing mitigation evidence, and found the relative paucity of hours spent preparing Lewis' mitigation to be telling. In addition, a psychological expert who was to evaluate Lewis had not been retained until after the guilt phase had been completed; and of equal importance, the expert had only a limited time to evaluate Lewis and therefore was unable to render a full diagnosis. Lewis' mitigation counsel was also found to be constitutionally inadequate because he was not prepared to call Lewis' family members as potential mitigation witnesses if, per chance, Lewis changed his mind and decided that he wanted to present mitigation; nor had his counsel looked into Lewis' background records to determine whether substantive mitigation evidence could have been presented.

The circumstances found in *Lewis* are not analogous to those presented in the instant case. The only similarities between *Lewis* and the present case are the fact that both capital defendants insisted that they did not want mitigation evidence to be presented on their behalf. The similarities end there. Rollo, who served as Grim's mitigation counsel, diligently prepared evidence and witnesses who would have testified during the penalty phase had Grim been so willing. As noted, Rollo was prepared call Dr. Larson who would have testified regarding Grim's background. Larson had

evaluated Grim in April of 2000, more than six months before the commencement of Grim's trial. He administered a battery of psychological tests and agreed with previous findings that Grim suffered from Intermittent Explosive Disorder. Moreover, unlike in *Lewis*, Rollo had been in contact with, and was prepared to call Grim's family members -- specifically his mother and his sister -- to testify during the mitigation hearing. Accordingly, it is improper to conflate the circumstances found in *Lewis*, with those found in the instant case.

The circumstances found in Grim's case are more akin to those found relatively recently in *Henry v. State*, 2006 Fla. LEXIS 943 (Fla. May 25, 2006). In *Henry*, the accused had affirmatively stated that he did not want mitigation evidence presented on his behalf. In his subsequent appeals however, Henry argued that his counsel had failed, among other things, to present mitigation evidence during the penalty phase proceedings. This contention was disputed by this Court for several reasons. First, this Court recognized that Henry had presented this identical argument on direct appeal and it had been rejected. *Id.* at *21. This Court also determined that the circumstances presented in Henry's case were not similar to those found in *Lewis* given, for example, in Henry's case a mental evaluation had been conducted well before the commencement of Henry's trial, and Henry's attorneys had also retained mental competency experts. Moreover, unlike *Lewis*,

Henry's attorney had subpoenaed several family members to testify on his behalf in case Henry changed his mind. Thus, given the foregoing, this Court determined - as it had previously held in ruling on Henry's direct appeal - his waiver of mitigation was not constitutionally infirm, and his attorneys' representation was not ineffective. *Id.* at *23-25.

Similarly, this Court should find that Grim's attorney was prepared to present ample mitigation evidence on his behalf, including, *inter alia*, family members, former employers, and medical experts. Grim should not be permitted to have it both ways wherein on one hand he affirmatively disclaimed his right to present mitigation, yet on the other, subsequently challenges his waiver as being uninformed.

Accordingly, this Court should determine that the requirements of *Koon* were fully complied with, and Grim's waiver should be upheld.

B. JUDGE BELL SHOULD NOT HAVE BEEN RECUSED

Grim also contends that his counsel should have moved to recuse Judge Bell from presiding over his criminal trial, averring that he was not impartial, and should not have been permitted to be involved in the case. Grim's averment is premised on his somewhat convoluted theory that a third-party/entity, who had been previously represented by Judge Bell in an unrelated matter, was responsible for the murder of Cynthia Campbell.

Grim sought to argue that an individual affiliated with Henry Company Homes had actually killed Campbell. Henry Company Homes is real estate company that, according to Grim, had an acrimonious litigation history with Campbell. According to Grim, Campbell had allegedly confided to an acquaintance that someone affiliated with Henry Company Homes was going to take her life.

Judge Bell informed the parties that he had previously represented Henry Company Homes while practicing in the private sector. Grim had sought to argue his theory that someone affiliated with Henry Company Homes was actually responsible for Campbell's murder, and attempted to introduce third-party hearsay statements to that effect. Judge Bell denied the introduction of such evidence on the basis that, among other reasons, a predicate foundation had not been established for introduction of the alleged statements. However, during the trial Judge Bell did permit Grim to ask investigators whether they were cognizant of these alleged statements, and whether law enforcement had investigated them.

Grim believes that Judge Bell's prior representation of Henry Company Homes was evidence, or at least gave the appearance of bias. The State in turn believes that nothing in the record substantiates Grim's claim that Judge Bell was biased against him; nor does the record suggest that Grim's attorneys were ineffective for failing to file a motion to recuse Judge Bell. Moreover, Grim's brief does not properly explain the basis for Judge Bell's

ruling wherein he did not allow the admission of third-party hearsay statements purporting to inculcate some unnamed individual.

The basis for an assertion that a judge is biased to such an extent that he must be disqualified, must not derive, or be exclusively based on the judge's particular rulings; see, e.g., *Wiley v. Wainwright*, 793 F.2d 1190, 1193 (11th Cir. 1986); see also *McQueen v. Roye*, 785 So. 2d 512, 514 (Fla. 3d DCA 2000) (internal quotation marks omitted) (noting that recusing a judge may, perhaps, be proper only under those circumstances where "a modicum of reason suggests that a judge's prejudice may bar a party from having his or her day in court").

It is somewhat necessary to understand the specifics of Grim's contentions. Prior to the commencement of his trial, Grim brought forth a motion seeking to introduce hearsay statements from Campbell wherein she had allegedly stated some weeks prior to her murder, that if she were ever discovered dead and floating in Pensacola Bay, a prime suspect would be someone associated with Henry Company Homes. Grim had argued that Campbell's purported statement fell within the ambit of several hearsay exceptions. The trial court disagreed and further held that even assuming *arguendo* Campbell's alleged statements fell within a hearsay exception, they would nevertheless be inadmissible as Grim was unable to demonstrate a causal nexus between the third party he alleged was responsible for murdering Campbell and the actual crime itself.

See, e.g., California v. Hall, 718 P. 2d 99, 104 (Cal. 1986) (“evidence of mere motive or opportunity to commit the crime [by a third] person, without more, will not suffice to raise a reasonable doubt about a defendant’s guilt: there must be direct or circumstantial evidence linking the third person to the actual perpetration of the crime”); *see also Cohen v. State*, 581 So. 2d 926, 927 (Fla. 3d DCA 1991) (upholding the trial court’s determination prohibiting the defendant from arguing a third party was actually culpable for the murder she was charged with “because there [was] insufficient evidence on the record to support its relevancy”).

Grim now urges this Court to find that Grim’s attorneys improperly failed to seek the recusal of Judge Bell; which Grim argues could have been based on the grounds that Judge Bell had previously represented Henry Company Homes. Conversely, the State contends that this ground of error is procedurally barred; but, even if this Court were permitted to properly consider this claim, it should nevertheless be deemed without merit.

To recall, during the course of the proceedings, Judge Bell informed the parties that he had previously represented Henry Homes. This Court has noted in accordance with Rule of Judicial Administration 2.160(e), Grim was required to seek the recusal of Judge Bell within 10 days of learning of the potential grounds of bias; concomitantly, under section 38.02, Fla. Stat., Grim had to

file a motion to disqualify within 30 days of learning of the basis for disqualification. *See, e.g., Rodriguez v. State*, 919 So. 2d 1252, 1274 (Fla. 2006); *Waterhouse v. State*, 792 So. 2d 1176, 1193 (Fla. 2001). As the record plainly evidences, no motion was filed by Grim seeking the disqualification of Judge Bell. Grim and his attorneys were clearly aware of the alleged import of the fact Judge Bell had previously represented Henry Company Homes, but still chose not to seek the removal of him as trial judge; moreover, and most importantly, Grim never raised this issue on direct appeal, consequently he cannot now claim that his attorneys were ineffective for failing to seek the recusal of Judge Bell. *See, e.g., Schwab v. State*, 814 So. 2d 402, 408 (Fla. 2002) (“We have held that where the grounds for a judicial bias claim are known at the time of the original trial, yet are not raised, such claims are waived and cannot be raised in a postconviction appeal.”).

Additionally, this Court has recognized that in order “[t]o warrant recusal, a motion for disqualification must concretely allege a well-founded, reasonable fear on the part of the defendant that he or she will not receive a fair trial before a particular judge.” *Waterhouse*, 792 So. 2d at 1194 (citations omitted). The mere fact that a judge has ruled adversely to the interests of a particular defendant, will again, not serve as the basis for disqualification. *Id.* Moreover, a judge’s previous business

relationship with a potential witness or party does not automatically necessitate that the judge must be removed. See, e.g., *McWhorter v. City of Birmingham*, 906 F.2d 674, 678 -79 (11th Cir. 1990) (noting that the trial judge's friendship and former business relationship with the Mayor of Birmingham - who was not a party nor a witness - as well as the fact that the judge had previously represented the City of Birmingham, did not "create the appearance of impropriety").

Accordingly, this Court should hold that Grim's attorney was not ineffective for failing to seek the recusal of Judge Bell. See, e.g., *Asay v. State*, 769 So. 2d at 981 n. 13 (Fla. 2000) (recognizing that because Asay's basis for seeking the disqualification of the trial judge was "legally insufficient," the summary denial of his ineffective assistance of counsel claim was appropriate).

C. COMMENT TO THE COURT REGARDING LESSER INCLUDED OFFENSES

Grim argues that it was improper for his attorney, Richard Hill to disclose to the trial court that Grim did not wish to contest any offense less than first degree murder. Grim now contends that by affirmatively placing his litigation strategy on the record, his counsel all but conceded Grim's guilt and thereby prejudiced him.

Grim's argument is specious, as this Court has never receded from the proposition that a capital defendant is fully capable of

determining the manner and strategy his counsel will pursue at trial. This Court has clearly articulated that “[a]t the trial level, the defendant is entitled to control the overall objectives of counsel’s argument,” *Farr v. State*, 656 So. 2d 448, 449 (Fla. 1995). And the fact that Grim’s counsel chose to state on the record that his client did not wish to argue any lesser included offenses was entirely consonant with Grim’s stated objective that he did not want to spend the rest of his life in prison and therefore, only wanted his attorney to contest the first degree murder charge against him. See *id.* at 450 (“defendants have a right to control their own destinies’ when facing the death penalty”) (quoting *Hamblen v. State*, 527 So. 2d 800, 804 (Fla. 1988)).

Grim asserts that his trial counsel all but conceded his guilt; however this is untrue. Grim has not reasonably suggested that his attorneys argued he was *guilty* of first degree murder, *cf.* *Nixon v. Singletary*, 758 So. 2d 618, 623 (Fla. 2000) (noting that a client’s failure to consent to his attorney’s decision to concede his guilt would constitute *per se* ineffective assistance of counsel); instead Grim complains that his attorney stated that he would not be arguing in favor of any lesser offenses – as was Grim’s want. See generally *Boyd v. State*, 910 So. 2d 167, 189 (Fla. 2005) (recognizing that a defendant has the right to make fundamental decisions about how he wishes to proceed in his case).

Moreover, had Grim's counsel made affirmative concessions related to specific offenses, this would not have invariably constituted ineffective assistance of counsel. See, e.g., *McNeal v. Wainwright*, 722 F.2d 674, 676 (11th Cir. 1984) (recognizing that defense counsel's argument to the jury that his client should at most be found guilty of first degree manslaughter was a constitutionally permissible tactical decision).⁸

Accordingly, Grim's claim that he was denied effective assistance of counsel is entirely without merit and should be rejected.

D. GRIM'S ATTORNEY DID NOT FAIL TO CHALLENGE STATE'S CASE

Grim maintains that his attorneys should have more strenuously attempted to challenge the prosecution's case. Grim refers to several specific instances during his trial where his attorney could have challenged certain witnesses apparent testimonial inconsistencies. Grim claims that the failure to challenge these

⁸The State would also further note, even if Grim's attorney stated on the record that Grim only wanted challenge the first degree murder charge - solely as to insulate said attorney from a future ineffective assistance of counsel claim - this would not be *per se* improper. See, e.g., *White v. Missouri*, 939 S.W. 2d 887, 894 (Mo. 1997) ("There is no *per se* rule that prejudice will be presumed when counsel makes a record that has the effect of refuting subsequent claims of ineffective assistance of counsel."); *O'dell v. Virginia*, 364 S.E. 2d 491, 500 (Va. 1988) (recognizing that even if the defendant's attorney placed on the record the fact that his client did not want a psychological exam administered, solely to insulate himself from a future ineffective assistance of counsel claim, the attorney's statements to the trial court were not improper).

witnesses' testimony constituted ineffective assistance of counsel.

The State believes Grim is essentially asking this Court to reevaluate the quality of his trial counsel's cross-examination of several prosecution witnesses. For example, Grim notes that a particular witness should have been impeached regarding her recollection as to whether Grim was wearing a shirt when he was seen on the pier near where Campbell's body was dumped. Additionally, Grim believes that a police investigator should have been questioned regarding two different types of tire tracks that were seen in Grim's front yard.

Grim is essentially challenging the efficacy of his attorney's trial strategies; but, "absent extraordinary circumstances, strategic or tactical decisions by trial counsel are not grounds for ineffective assistance of counsel claims." *Kenon v. State*, 855 So. 2d 137, 147 (Fla. 1st DCA 2003). This Court has also observed that simply reviewing a cold trial record to determine what questions might have been asked is an inappropriate basis for a ineffective assistance of counsel claim; for while it is certainly true that Grim's trial counsel, Hill, could have propounded alternative questions on cross-examination, "or more strenuously examined [witnesses] on certain issues, [this] is essentially hindsight analysis. 'The standard is not how present counsel would have proceeded, in hindsight, but rather whether there was deficient performance and a reasonable probability of a different

result.'" *Brown v. State*, 846 So. 2d 1114, 1121 (Fla. 2003) (quoting *Cherry v. State*, 659 So. 2d 1069, 1073 (Fla. 1995)).

Therefore, given the overwhelming forensic evidence directly inculcating Grim for the murder of Campbell, he is unable to demonstrate a different trial result would have occurred had his trial counsel asked different questions on cross-examination.

III. GRIM WAS NOT DENIED ADEQUATE ADVERSARIAL TESTING AT THE SENTENCING PHASE OF HIS TRIAL IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT. GRIM'S SPECIALLY APPOINTED COUNSEL'S FINDINGS WITH REGARD TO MITIGATION EVIDENCE WERE CONSISTENT WITH HIS RESPONSIBILITIES UNDER FLORIDA LAW

Grim argues that both his mitigation counsel, Michael Rollo, and specially appointed mitigation counsel, Spiro Kypreos, did not adequately render their constitutional responsibilities. Grim avers that various avenues of mitigation were not explored, and as a result, his penalty phase hearing cannot withstand this Court's scrutiny.

Grim extrapolates isolated testimony which Rollo and Kypreos provided during the evidentiary hearing, wherein both attorneys suggested that they cabined their investigations regarding potentially mitigating evidence at the behest of Grim. Grim opines, without much in the way of context, that his mitigation hearing was constitutionally infirm because his representatives failed to develop substantive mitigation evidence.

Grim believes that the circumstances presented in this case are similar to those presented in *Lewis v. State*, *supra*. So as to

avoid needless redundancy, the State relies on its above-referenced arguments distinguishing *Lewis* from the instant case. However, the State would again note that Grim's mitigation counsel, Rollo, was prepared to present: several of Grim's family members who would have testified on his behalf, favorable testimony from past employers, and the testimony of Dr. Larson who had evaluated Grim more than six months before the commencement of his trial.

Grim's attempt to analogize his case with the facts found in *Lewis* is improper - given that this Court found that Lewis' mitigation counsel had abdicated his responsibilities by not securing mitigation after learning that Lewis wished to waive mitigation altogether. Moreover, the difficulties that Rollo, and most assuredly Kypreos encountered in their attempts to gather potential mitigating evidence were caused by Grim's patent refusal to cooperate with them.

The argument Grim appears to be propounding is that he was denied effective assistance of mitigation counsel. Conversely, the State believes that Grim should not be able to argue that his mitigation representatives were constitutionally ineffective when *Grim* himself was responsible for limiting their ability to pursue, and/or present, mitigation. See, e.g., *Brown v. State*, 894 So. 2d at 146 ("Trial counsel's inability to present further mitigation cannot be considered ineffective in light of Brown's limitations of counsel's penalty phase investigation."). And because the record

shows that Grim would not cooperate with Kypreos, it is indeed strange that Grim now chooses to allege Kypreos' representation fell below constitutional standards. *Cf. Wiley v. Puckett*, 969 F.2d 86, 100 (5th Cir. 1992) ("Our cases, too, have recognized that a defendant who does not provide any indication to his attorneys of mitigating evidence may not later assert an ineffective assistance claim").

Further, recall that Kypreos was not representing Grim in the traditional sense; rather, Kypreos was appointed to insure, among other reasons, that this Court had a proper basis to analyze the propriety of Grim's ultimate sentence. *Cf., e.g., Ochoa v. State*, 826 So. 956, 964 (Fla. 2002) ("this Court must examine [a defendant's] death sentence to ensure uniform application of law, evidentiary support, and proportionality"). Therefore, the State believes that both Rollo and Kypreos' preparation of mitigation evidence readily comported with the requirements of Florida law. As this Court has observed, "[w]here there is proof counsel spent substantial effort on the case and was familiar with the mitigation but [there was] also evidence that [the accused] himself interfered with trial counsel's ability to obtain and present mitigation evidence, this Court will not overrule a trial court's conclusion that counsel's performance was not deficient." *Power v. State*, 886 So. 2d 952, 961 (Fla. 2004).

Accordingly, this Court should determine that Grim was not

denied constitutionally effective representation.

IV. GRIM'S SPECIALLY APPOINTED PENALTY PHASE COUNSEL DID NOT HAVE AN "ACTUAL" CONFLICT OF INTEREST AND GRIM WAS NOT DENIED EFFECTIVE ASSISTANCE GIVEN THAT THE ALLEGED CONFLICT OF INTEREST HAD ABSOLUTELY NO BEARING ON THE APPOINTED COUNSEL'S REPRESENTATION OF GRIM DURING THE PENALTY PHASE

Grim also contends that his specially appointed mitigation counsel, Spiro Kypreos, had a conflict of interest that compromised Kypreos' ability to bring forth substantive mitigation evidence on Grim's behalf. Grim's notes that Kypreos had previously represented a criminal defendant named Tracy Coffey in an unrelated matter. Kypreos' representation of Coffey occurred prior to his serving as Grim's specially appointed mitigation counsel. The record suggests that Coffey was interviewed by the State Attorney's Office regarding the Grim case. Coffey informed the State Attorney's Office that while they were briefly incarcerated together, Grim had graphically described killing Campbell. It should be noted that Coffey was never called to testify at Grim's trial because he was deemed an incredible witness.

Grim now claims that because Kypreos had represented Coffey; and because Coffey expressed a willingness to cooperate in the Grim case; Grim's specially appointed mitigation counsel, Kypreos, had a conflict of interest. This syllogism is simply unworkable.

The State believes that Grim has grossly overstated the role that Coffey played in the instant matter. First, as noted, Coffey was not called as a witness precisely because he was not deemed to

be credible. Secondly, Grim seems willing to ignore what is actually required to demonstrate a conflict of interest claim under the Sixth Amendment and *Strickland*. "For claims of ineffective assistance of counsel based on a conflict of interest, the defendant must demonstrate that counsel actively represented conflicting interests and that an actual conflict of interest adversely affected his lawyer's performance." *Wright v. State*, 857 So. 2d 861, 871-72 (Fla. 2003) (citing *Hunter v. State*, 817 So. 2d 786 So. 2d 786, 792 (Fla. 2002)); see also *Cuyler v. Sullivan*, 446 U.S. 335, 350 (1980) (noting that a defendant is first required to demonstrate "that his counsel actively represented conflicting interests, [or] he has not established the constitutional predicate for his claim of ineffective assistance").

A defendant's conflict of interest claim is reviewed in accordance with *Strickland*, wherein "[t]he question of whether a defendant's counsel labored under an actual conflict of interest that adversely affected counsel's performance is a mixed question of fact and law." *Quince v. State*, 732 So. 2d 1059, 1064 (Fla. 1999).

This Court has previously articulated the necessary showing that must be made prior to establishing a conflict of interest claim:

As was stated in *Porter v. Wainwright*, 805 F.2d 930 (11th Cir. 1986), an "actual" conflict of interest exists if counsel's course of action is affected by the conflicting representation, i.e., where there is divided

loyalty with the result that a course of action beneficial to one client would be damaging to the interests of the other client. An actual conflict forces counsel to choose between alternative courses of action. *Stevenson v. Newsome*, 774 F.2d 1558, 1562 (11th Cir. 1985), cert. denied, 475 U.S. 1089, 106 S. Ct. 1476, 89 L. Ed. 2d 731 (1986); *Baty v. Balkcom*, 661 F.2d 391, 395 (5th Cir. 1981) (Unit B), cert. denied, 456 U.S. 1011, 73 L. Ed. 2d 1308, 102 S. Ct. 2307 (1982). To show actual conflict, one must show that a lawyer not laboring under the claimed conflict could have employed a different defense strategy and thereby benefitted the defense. *United States v. Mers*, 701 F.2d 1321, 1328-30 (11th Cir), cert. denied, 464 U.S. 991, 104 S. Ct. 480, 78 L. Ed. 2d 679 (1983). Only when such an actual conflict is shown to have affected the defense is there shown prejudicial denial of the right to counsel. *Cuyler v. Sullivan*, 446 U.S. 335, 64 L. Ed. 2d 333, 100 S. Ct. 1708 (1980).

McCrae v. State, 510 So. 2d 874, 877 n. 1 (Fla. 1987).

The State believes that given the foregoing standard, Grim has failed to articulate a cognizable conflict of interest claim. For example, Grim has not explained how Kyrpeos' presentation of mitigation evidence was compromised by the fact that he previously represented an individual (Coffey), who was never even called as a witness in Grim's trial. At minimum, Grim is required to present something more than mere conjecture as to how Kyrpeos' former representation of Coffey implicated Grim's penalty phase hearing; and similarly, to constitute a substantive conflict of interest claim, Grim must demonstrate that "but for" the alleged conflict, Kyrpeos' representation would have somehow been different.

Because Grim is unable to make these requisite showings, his conflict of interest claim must be denied.

CONCLUSION

WHEREFORE, the Appellee respectfully requests that this Honorable Court to affirm the denial of Norman Grim's 3.851 motion seeking post-conviction relief.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing ANSWER BRIEF has been furnished by U.S. Mail to Jeffrey M. Hazen, Brody & Hazen, P.O. Box 16515, Tallahassee, Fl 32317 this 13th day of November, 2006.

Ronald A. Lathan, Jr.
Attorney for the State of Florida

CERTIFICATE OF FONT AND TYPE SIZE

Counsel certifies that this brief was typed using Courier New font 12 point.

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