IN THE SUPREME COURT OF FLORIDA

CASE NO.: SC06-2176

DWAYNE IRWIN PARKER

APPELLANT

VS.

STATE OF FLORIDA

APPELLEE

ON APPEAL FROM THE CIRCUIT COURT OF THE SEVENTEENTH JUDICIAL CIRCUIT, IN AND FOR BROWARD COUNTY, FLORIDA, (CRIMINAL DIVISION)

ANSWER BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

Appellant, Dwayne Irwin Parker, Defendant below, will be referred to as "Parker" and Appellee, State of Florida, will be referred to as "State". References to the appellate records are:

1. "ROA" for the record on direct appeal;
2. "1-PCR" for the postconviction record from SC02-1471;
3. "2-PCR" for the instant postconviction record SC06-2176;
3. "S" before the record cite for supplemental materials;
4. "IB" for the initial brief.

STATEMENT OF THE CASE AND FACTS

Parker is appealing the denial of postconviction relief on two claims remanded for an evidentiary hearing on the claims of "counsel's failure to present expert testimony on photography and tool marking and failure to present significant mitigation evidence at the penalty phase" pursuant this Court's opinion in Parker v. State, 904 So.2d 370, 379 (Fla. 2005).

On May 11, 1989, Parker was indicted for the first degree murder of William Nicholson, attempted first degree murder of Robert Killen and Keith Mallow, and nine counts of armed robbery. Parker v. State, 641 So.2d 369, 372 (Fla. 1994). He was convicted on May 10, 1990 of first-degree murder, nine counts of armed robbery charges, and two counts of aggravated battery with a firearm. Id., 641 So.2d at 373. By an eight to four vote, the jury recommended death which the court imposed upon finding four aggravators (prior violent felony, felony

murder, great risk, and avoid arrest) and no mitigation. On the non-capital counts, Parker was sentenced to concurrent term of year sentences (ROA 2026-29, 2325, 2383-92, 2862, 2887-95).

On direct appeal, this Court found the following facts:

> Shortly after 11 p.m. on April 22, 1989, Ladson Marvin Preston and Dwayne Parker entered a Pizza Hut in Pompano Beach. Preston was unarmed, but Parker was armed with both a small pistol and a semi-automatic machine pistol. They forced the manager to open the safe at gunpoint, and then Parker returned to the dining room and robbed the customers of money and jewelry. Sixteen customers and employees were in the restaurant, and Parker fired six shots from the machine pistol during the robberies, wounding two customers.
>
> While Parker was in the dining room, an employee escaped from the restaurant and telephoned 911 from a nearby business. Broward County deputies arrived shortly, and first Preston and then Parker left the restaurant. Deputy Killen confronted Parker in the parking lot, and Parker fired five shots at him with the machine pistol. Parker then ran into the street and tried to commandeer a car occupied by Keith Mallow, his wife, and three children. Parker fired the machine pistol once into the car and then fled.
>
> When someone entered a nearby bar and told the patrons that the Pizza Hut was being robbed, several of those patrons, including William Nicholson, the homicide victim, left the bar and went out into the street. Tammy Duncan left her house when she heard shots and saw Parker, carrying a gun, running down the street with Nicholson running after him. She heard another shot and saw Nicholson clutch his midsection and then fall to the ground.
>
> Eventually deputies Baker, Killen, and McNesby cornered Parker between two houses. McNesby's police dog subdued Parker, and he was taken to the sheriff's station. The machine pistol and some of the stolen jewelry were found on the ground when Parker was taken into custody. At the station money and more of the

> stolen jewelry were found on Parker.
>
> The state charged Parker with one count of first-degree murder, two counts of attempted murder, and nine counts of armed robbery. Six shell casings were found inside the restaurant, five in the parking lot, and one in the street near where Nicholson fell. The state's firearms expert testified that all twelve shell casings, as well as the bullet recovered from Nicholson's body, had been fired from Parker's machine pistol. The theory of defense, however, was that the bullet was misidentified and that a deputy shot Nicholson. The jury convicted Parker as charged on the murder and armed robbery charges and of aggravated battery with a firearm on the two counts of attempted murder. The trial court agreed with the jury's recommendation and sentenced Parker to death.

Parker, 641 So.2d at 372-73.

During the penalty phase, the defense presented Parker's mother, Marion Sanders ("Sanders"), Investigators, Howard Finkelstein ("Finkelstein"), and Carlton Moore ("Moore"), co-defendant, Ladson Marvin Preston, Jr., and Dr. Caddy, a mental health expert. Finkelstein looked into Parker's case with Moore and between them, they interviewed Parker, his mother, sister, brother, Rev. Parker, teachers, the sister's foster parent, and the mother's ex-boyfriend. Dr. Caddy spoke to Parker and his mother in addition to reviewing the police statements and Preston's deposition (ROA 2202-05, 2238-41).

Sanders testified she left Parker's father when Parker was three months old and she was first committed to a mental hospital when Parker was six years old. She had been committed so often she could not recall the number. Family and friends

had reported to Finklestein Parker's early life was dysfunctional; his father left at an early age and his mother had serious and numerous mental problems. Sanders had periodic "breakdowns", one almost every six months. Rev. Parker did not take custody of Parker or Charrie Ferrette ("Princess") when their mother was hospitalized. Sanders' behavior was extremely bizarre and threatening; it included running down the street and through the house naked and speaking or yelling for God. On one occasion, Sanders pushed out a second floor screen and acted as though she would throw Parker from the window. Moore reported that during one of Sanders' mental breakdowns, when Parker was six, she held him by his pants belt while hanging him out a fourth story window and threatening to drop him. Sanders treated Parker harshly when disciplining him and he felt his sister was treated better. Because Sanders was not permitted to take Parker or Princess to the mental hospital, and Rev. Parker would not take them, the children were left with HRS which sent them to separate foster homes. Dr. Caddy echoed much of what the investigators reported regarding Parker's childhood including incidents of sexual, mental, and physical abuse. (ROA 2183-90, 2202-05, 2278-81).

Parker's first criminal arrest came in 1979 when he was involved in a shooting. Dr. Caddy discovered that by 12 or 14 years of age, Parker had been arrested for burglary and

shoplifting; by 12, Parker had formed a lifestyle of living on the streets. By ninth grade, he was associating with a "bad crowd" and began smoking marijuana and drinking; he had a recurrent pattern of getting drunk. As part of his coping mechanism, Parker, a nervous person, would self-medicate (ROA 2202-05, 2244-46, 2178-90).

Due to Sanders' mental condition, family members would take in Princess, but Parker would be sent to foster care; this caused him to feel abandoned. In foster care, Parker was ill treated. He was beaten with an electrical cord and had been known to lie under his bed screaming for hours at a time. On the occasions Princess was sent to foster care, it was to the same stable family; she had a better experience than Parker. Parker felt the separation from his sister was cruel and harsh (ROA 2205, 2279, 2281).

When Sanders was released from the mental hospital, she would seek her children, but then have a relapse and return them to foster care. This cyclical behavior lasted for years with Parker going to numerous foster homes and up to 17 schools before graduating. Finkelstein reported this constant change precluded Parker from building social systems or developing friends; there was no one to teach him right from wrong and he never had anyone upon whom he could trust. (ROA 2206 2280)

Parker reported to the investigators he would run away from

his foster homes due to mistreatment. At seven, he was sexually assaulted numerous times. He was forced to offer sex in exchange for shelter, yet, often after having sex, the men would not give Parker the shelter promised. He endured several sexual batteries as a child at the hands of three foster parents, a teenager, and various babysitters. Parker was an unwilling partner and was afraid of beatings. Dr. Caddy opined Parker's sexuality was blurred and he was mocked in school and suffered a disparaging nickname for years. Parker felt like an outcast; he had no friends. Finkelstein concluded Parker was abused mentally, sexually, and physically. The abuse continued into his high school years (ROA 2208-09, 2243-44, 2281).

Although Rev. Parker had not been a part of Parker's life since he was very young, Parker tried to reinitiate contact a few years before the trial, but Rev. Parker made it clear he wanted nothing to do with his son. Dr. Caddy reported Rev. Parker left the family when Parker was about two years old. Once he departed, he never provided for his son. Parker was in and out of HRS' custody due to Sanders' hospitalization and diagnosis of paranoid schizophrenia. He had been picked upon a "fair bit" as a child and was beaten while living in foster homes. By eight or nine, he learned to protect himself by using a broken soda bottle; in fact, once he cut a child who came after him. During his school years, Parker attended

approximately 12 to 15 schools (ROA 2209, 2238-41).

Parker’s home and school life were unstable which caused instability in his relationships. He had relatively poor social skills and developed no real sense of self worth. The only people who had any meaning for Parker were his mother and children. Having serious troubles in school with below average intelligence, Parker did not do well scholastically. Often, he had tantrums in school, throwing himself on the floor, kicking and screaming as though having a fit. Eventually he was placed in special education, but, those teachers ignored him. (ROA 2240-42, 2248-49).

It was Dr. Caddy’s opinion Parker had a major alcohol problem and sociopathic tendencies, but was not under the influence of extreme mental or emotional disturbance at the time of the crime. While Dr. Caddy found Parker was under the influence of alcohol and was emotionally impaired, he had to admit the co-defendant reported Parker was not so impaired he did not know what he was doing. Dr. Caddy opined Parker’s capacity to appreciate the criminality of his actions and to conform his conduct to the law was mildly impaired, but did not prevent him from judging his actions criminal (ROA 2246, 2250, 2262-63 2270-71).

Upon conclusion of the case and after receiving the jury's eight to four recommendation of death, the trial judge

considered each statutory mitigating factor in his sentencing order. The Court reasoned in part:

> 2. The capital felony was committed while the Defendant was under the influence of extreme mental or emotional disturbance. ... This Court finds that this mitigating circumstance does not apply to the Defendant. Although the Defense claimed that the Defendant was under the influence of alcohol, the evidence adduced at trial established that the Defendant acted intentionally and deliberately at the time of the crimes for which he was convicted. **His co-defendant, Ladson Marvin Preston, Jr., testified at the Sentencing Hearing that the Defendant knew what he was doing when he robbed the Pizza hut Restaurant. Further, Dr. Glenn Caddy, who was declared an expert in the field of psychology, testified on cross-examination at the Sentencing hearing that the Defendant was not so impaired that he did not know what he was doing, and that the Defendant was not under the influence of extreme mental or emotional disturbance**.
>
> ...
>
> 6. The capacity of the Defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.... This Court finds that this mitigating circumstance does not apply to the Defendant. Although the Defense claimed that the Defendant was under the influence of alcohol, **the Defendant's own expert, Dr. Glenn Caddy, testified on cross-examination at the Sentencing Hearing that the Defendant was only mildly impaired, and that this impairment did not prevent the Defendant from being able to make the judgment that what he was doing was criminal, and that the Defendant knew that his conduct was criminal**.

(ROA 2892-93) (emphasis supplied). The court considered evidence offered for the "catch-all" mitigator opining:

> 8. Any other aspect of the Defendant's character or record, any other circumstances of the offense. This

> Court finds that this non-statutory mitigating circumstance does not apply to the Defendant. At the Sentencing Hearing held on May 25, 1990, the Defendant was allowed the unrestricted presentation of evidence in mitigation. To that end, the Defendant presented the testimony of Mr. Cary Kultau, Howard Finkelstein, Esquire, and Carlton Moore, who all testified s to the Defendant's social and behavioral history. Mr. Kultau also testified as to the victim's criminal record. The Defendant's mother, Marian Sanders, testified as to the Defendant's childhood and her shortcomings as a parent. Ladson Marvin Preston, Jr. the Defendant's co-defendant testified as to the Defendant's alcohol consumption, impairment, and the circumstances of the robbery. Dr. Glenn Caddy testified as to his psychological evaluation of the Defendant and the Defendant's childhood history and life experiences. This Court has considered all of the evidence presented at the Sentencing Hearing, along with the circumstances of the offense and finds nothing in the Defendant's character or record to be in mitigation. This Court does not consider the fact that the victim, who was an innocent bystander, had a criminal record, to be a mitigating circumstance.

(ROA 2893-94)

In aggravation, the trial court found: (1) prior violent felony; (2) knowingly created a great risk of death to others; (3) felony murder (robbery); and avoid arrest. Parker, 641 So.2d at 377 (ROA 2888-92). The court found that in spite of the penalty phase presentation, no mitigation was established. Id. at 377 (ROA 2894). Upon direct appeal review, Parker's conviction and sentence[1] were affirmed Id. at 378 and on January

[1] On direct appeal, Parker raised issues addressed to: (1) Jury Selection; (2) Discovery Violation; (3) Failure to Inquire About Counsel; (4) Jury Instructions and Argument to Jury; (5) Ex Parte Proceeding; (6) First Degree Murder During Flight from a Felony; (7) Motion for New Trial; (8) Jury Penalty Proceedings;

23, 1995 certiorari was denied. Parker v. Florida, 513 U.S. 11331 (1995).

On March 24, 1997, Parker filed a shell postconviction motion (1-PCR 1-112) and on June 5, 2000, an amended motion raising 25 claims (1-PCR 299-426). The State responded (1-PCR 469-1147) and on April 18, 2001 a Huff v. State, 622 So.2d 982 (Fla. 1983) hearing was held. On February 12, 2002, relief was denied summarily (1-PCR 1484-1532, 1537-58, 1559-80). On appeal, this Court affirmed the denial of collateral relief with the exception of two claims of ineffective assistance of counsel addressed to the decisions not to call experts in photography and tool marking and for failing to present significant mitigation evidence. Parker, 904 So.2d at 379. Additionally, Parker's state habeas corpus petition was denied. Id.

On remand, the court conducted the required evidentiary hearing on February 16, 17, 20, 21, and March 6, 2006, at which, Parker called guilt phase counsel, Bo Hitchcock, Esq. ("Hitchcock"), penalty phase counsel, Ted Booras, Esq. ("Booras"), friends/family members (Virginia Holcomb, Princess Ferrette, Gregory Pender, Dr. Larry Richardson), investigators used by counsel in 1989/90 (Howard Finkelstein, Carlton Moore, and Cary Kultau ("Hultau")), mental health experts (Dr. Glenn

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(9) Circumstances Found by the Trial Court; (10) Failure to Consider or Weigh Mitigation; (11) Proportionality; and (12) Constitutionality of Section 921.141. (1-PCR 621-98).

Caddy, Dr. David Pickar, Dr. Jethro Toomer, and Dr. Barry Crown), and photography expert, Robert Wyman. Absent from Parker's witnesses was an expert in tool marking.

The evidentiary hearing testimony revealed that Parker was indicted on May 11, 1989 and the public defender was appointed, only to be replaced in September, 1989, by Hitchcock, who had been practicing criminal law exclusively for 12 years. Hitchcock secured the appointment of Booras as second-chair/penalty phase counsel, as he had conducted or prepared several capital penalty phases previously. They explained that they received the materials and information gathered during the public defender's investigation (2-PCR.3 18, 21-23, 93-95, 129-30) and that their theory was to show Parker's "horrific childhood" and to humanize him to obtain a life sentence. Toward this end, they presented the two public defender investigators, Howard Finkelstein ("Finkelstein"), Carlton Moore ("Moore"), Parker's mother, his co-defendant, Ladson Preston, and Dr. Caddy.

At the evidentiary hearing, Dr. Caddy, Finkelstein, Moore, Kultau, Ms. Holcomb, Ms. Ferrette, Mr. Pender, and Dr. Richardson, offered testimony which was cumulative to that which was offered at trial regarding Parker's social/family history. Drs. David Pickar, Jethro Toomer, and Barry Crown, offered mental health mitigation which was undermined by test scoring errors, was cumulative to trial testimony, and/or was merely a

more favorable, although unsupported, diagnosis by a new expert. The judge, who had been the sentencing judge, rejected the newly offered mitigation as either cumulative to that which was presented at the original penalty phase or not credible evidence,[2] thus, not supporting the Strickland v. Washington, 466 U.S. 668 (1984) claim.

Similarly, the court rejected the claim of ineffective assistance with respect to the allegation counsel failed to present forensic experts in photography and tool marking, to challenge the origin of the bullet which killed the victim. This was based in part on the unrefuted trial testimony which revealed that the bullet removed from the victim's bone was the one photographed and put into evidence.[3] (ROA 375-78, 1560-64;

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[2] The trial court stated:

> As was noted earlier, the defense presented various mental health experts during this post conviction hearing. These experts were allowed to render opinions in their field about emotional, psychological and mental health of the defendant. The court having considered the knowledge, skill, training, education and experience of the experts, and most importantly, having considered the reasons for their opinions, finds that their opinions are not credible to a large extent and in no way would undermine or change the original proceedings or result in this case.

(2-PCR.2 351-52)

[3] Dr. Bell explained the victim died from a single gunshot wound fired from a distance of two to twenty-four inches. After removing the bullet, he washed and photographed it, placed it in an evidence envelope, and initialed the envelope. He made an in court identification of the bullet and envelope, explaining the

1623-24, 1631-32, 1635-47, 1650-64, 1704-54, 1764-70, 1776-86, 1799-07, 1800-04). In fact, on direct appeal, this Court concluded: "Detective Cerat attended the autopsy and took the photographs that yielded the original and subsequent prints and testified that, because of the flash, the bullet in the original prints appeared white in the middle and gold[4] at the edges. Parker cross-examined Cerat extensively about photography." Parker v. State, 641 So.2d 369, 374 (Fla. 1994).

At the evidentiary hearing, Hitchcock admitted he was a

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slide evidence taken by him was overexposed, but reflected the bullet extracted from the victim was copper in color with a small cut. He avowed the State's photos depicted the fatal bulletWhile he admitted describing the bullet in his autopsy report and initial deposition, as silver with very little deformation, upon review of the slide negative, he concluded the bullet was copper in color with a cut caused when removing it from the victim (ROA 375-78, 1623-24, 1631-32, 1635-43, 1645-46). Detective Cerat ("Cerat") was at the autopsy and testified he photographed the copper bullet removed from the victim (ROA 1560-64). When the State sought to present Dr. Besant-Matthews, as an expert forensic photographer to testify Cerat's photo was a photo of the fatal bullet, the court excluded the testimony because of his late disclosure and cumulative nature of his testimony. Firearms examiner, Patrick Garland, testified Parker's gun held 33 cartridges, was recovered with 20 copper-jacketed rounds, and the shell casings collected from the scenes were fired from that gun. Over defense objection, he testified Cerat's photo accurately depicted the fatal bullet (ROA 1704-54, 1764-70, 1776-86, 1799-07).

[4] Dr. Bell and Detective Cerat have described the color of the bullet as gold or yellow. The Patrick Garland, the lead attorneys, and Florida Supreme Court referred to it as "copper" or "gold". Parker v. State, 641 So.2d 369, 374 (Fla. 1994). For consistency, the State will refer to the bullet as gold, except when quoting from a witness' testimony. What is important is the bullet was described as having some form of a yellow cast as opposed to a silver color.

professional photographer as well as an attorney. While Parker presented Robert Wyman to confirm that the color of a photograph may be alerted, the court noted that no experts in tool marking were called and that no experts were presented who could refute the origin of the fatal bullet. The court stated in part:

> It must be pointed out that in the post conviction evidentiary hearing, the defense could not produce one witness who testified any differently than the testimony that was presented at the trial. Therefore, the Court must come to the conclusion that the defense could not and therefore did not find one person on earth that will render an opinion that the bullet that the State and jury said killed the victim was not in fact the bullet that not only killed the victim, but also the same bullet that came out of the victims (sic) body and was presented as evidence in court.

(2-PCR.2 353). As a result, the court concluded that Parker failed to carry his burden under Strickland, and denied relief.

SUMMARY OF THE ARGUMENT

Issue I - The trial court correctly resolved any credibility issues and factual disputes in determining that defense counsel effectively investigated and prepared a penalty phase case, and that the postconviction presentation of mitigation was either not credible or merely cumulative to the original penalty phase presentation. Likewise, the court applied the proper law as outlined in Strickland and its progeny in determining that counsel was not ineffective. The denial of relief must be affirmed.

Issue II - Parker has failed to carry his burden under Strickland. Trial counsel, also a professional photographer, professionally tied this case and challenged the State's photographic evidence. Further, as the trial court concluded, Parker failed to present any expert witnesses to refute the origin of the fatal bullet. As such, neither deficient performance nor prejudice under Strickland were found. The court's resolution of the facts is supported by competent, substantial evidence, and the law was applied properly. This Court should affirm.

Issue III - Parker had a fair evidentiary hearing on the remanded ineffective assistance of counsel issues.

Sub-issue A - The trial court correctly determined that the motion for recusal was legally insufficient and denied it

accordingly. This Court should affirm.

Sub-issue B – The court properly precluded Parker from calling Dr. Bell, Cerat, and State Attorney Michael Satz. , as their proffered testimony was not relevant to the Strickland issue, but was beyond the scope of the remand. The issue before the court was whether defense counsel should have obtained photography and tool marking experts to refute the origin of the fatal bullet. Calling those persons who established the chain of custody of the bullet and who had testified extensively at trial or prosecuted the case could add nothing to the Strickland issue before the court. This issue focuses on defense counsel's actions, and whether counsel could have/should have found an expert to refute that the bullet photographed in the victim's sacrum and entered into evidence was of the same color as Parker's ammunition and came from his gun. As the evidence bore out, Parker was unable to find any expert to refute the trial evidence.

ARGUMENT

ISSUE I

PENALTY PHASE COUNSEL RENDERED EFFECTIVE ASSISTANCE UNDER STRICKLAND V. WASHINGTON (restated)

Parker complains that the court erroneously determined that counsel rendered effective assistance of counsel. It is Parker's position that counsel was ineffective for relying upon prior counsel's seven month investigation of mitigation. He asserts that a new, independent mitigation investigation should have been conducted, and counsel should have personally interviewed and presented witnesses, obtained additional records, and offered mitigation of Parker's: (1) severe deprivation and abuse as a child and (2) mental infirmities. Not only did counsel interview some witnesses, but it was proper for him to rely on the investigation others conducted. He presented the investigators who spoke to family, friends, and others who knew the defendant, and obtained the services of a mental health expert who also testified at trial. All this fell within the broad range of professional conduct.

Furthermore, Parker's complaints are meritless. As the trial court found, "there was little difference between the penalty phase presentation at the trial and the post conviction (sic) presentation," in fact, "the evidence introduced at the [postconviction] hearing was nothing more than cumulative to

that which was presented at the trial" and any new evidence "offered nothing which would undermine the confidence of the original proceeding, or the jury's recommendation." (2-PCR.2 350-51) Further, upon consideration of the "knowledge, skill, training, education and experience [of Parker's postconviction mental health] experts, and most importantly, having considered the reasons for their opinions" the Court found those opinions "not credible to a large extent" and in no way supportive of a change from the original trial proceedings. (2-PCR.2 351-52) These findings are supported by competent, substantial evidence and the legal conclusion comports with the law as set forth in Strickland and its progeny. This Court should affirm.

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

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

> of fact and, likewise, on the credibility of the witnesses and the weight to be given to the evidence.

Arbelaez v. State, 898 So.2d 25, 32 (Fla. 2005)[5]

To prevail on an ineffectiveness claim, the defendant must prove (1) counsel's representation fell below an objective standard of reasonableness, and (2) but for the deficiency, there is a reasonable probability the result of the proceeding would have been different. Strickland, 466 U.S. 688-89.

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

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

In Davis v. State, 875 So.2d 359, 365 (Fla. 2003), this

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

Court reiterated that the deficiency prong of Strickland requires the defendant establish counsel's conduct was "outside the broad range of competent performance under prevailing professional standards." (citing Kennedy v. State, 547 So.2d 912, 913 (Fla. 1989). With respect to performance, "judicial scrutiny must be highly deferential;" "every effort" must "be made to eliminate the distorting effects of hindsight," "reconstruct the circumstances of counsel's challenged conduct," and "evaluate the conduct from counsel's perspective at the time." Strickland, 466 U.S. at 689; Davis, 875 So.2d at 365. In assessing the claim, the Court must start from a "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Strickland, 466 U.S. at 688-89. The ability to create a more favorable strategy years later does not prove deficiency. See Patton v. State, 784 So.2d 380 (Fla. 2000); Cherry v. State, 659 So.2d 1069 (Fla. 1995). "A court considering a claim of ineffectiveness of counsel need not make a specific ruling on the performance component of the test when it is clear that the prejudice component is not satisfied." Maxwell v. Wainwright, 490 So.2d 927 (Fla. 1986).

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

> In finding that [the] investigation did not meet *Strickland*'s performance standards, we emphasize that *Strickland* does not require counsel to investigate

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

Wiggins, 539 U.S. at 533. From Williams v. Taylor, 529 U.S. 362 (2000), it is clear the focus is on **what** efforts were undertaken and **why** a strategy was chosen. Investigation (even non-exhaustive, preliminary) is not required for counsel reasonably to decline to investigate a line of defense thoroughly. See Strickland, 466 U.S. at 690-91 ("[s]trategic choices made after less than complete investigation are reasonable precisely to the extent the reasonable professional judgments support the limitations on investigation.").

Following the evidentiary hearing, the trial court noted in its order denying relief, its superior vantage point having presided over Parker's 1990 trial and his 2006 evidentiary hearing where the court was being asked to evaluate penalty phase counsel's performance especially with respect to the quantity and quality of the mitigation presentation and the impact such would have on the sentence. The court reasoned:

It should be noted that the author of this opinion is the same Judge who presided at the Defendants (sic) trial in 1990. Furthermore, this Judge has reviewed the testimony of the witnesses presented at the hearing on the post conviction issues, independently determined the credibility of the witness' (sic) and is in a unique position to evaluate the post conviction relief claims relative to the testimony and other evidence presented at the original trial of the defendant, and to evaluate and determine the quality of representation the defendant received throughout the entire case.

The Court is aware of the standards and requirements set forth in Strickland v. Washington, and the various and numerous Florida Supreme Court opinions applying, construing and interpreting the Strickland standards. All findings of fact and application of law are entered with knowledge of, and conformity to those opinions.

...

At the most recent evidentiary hearing, Parker called as witness (sic) his guilty phase trial counsel, Robert Hitchcock; penalty phase counsel, Ted Booras; various friends and family members, investigators used by counsel for preparation of the guilt and penalty phases, mental health experts, (including psychologists and other witness (sic) who were allowed to express opinion testimony), and a photography expert.

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Parker was indicted on May 11, 1989 and the office of the Public Defender was appointed to represent him.

On September 7, 1989 special assistant public defender Robert Hitchcock was appointed to represent Parker. Hitchcock was and is an experienced, capable, and talented criminal defense attorney.

As part of the preparation for this case, Hitchcock had discussions with the original public defender and met with and obtained the investigative

materials generated by the public defender during the five month period he represented Parker.

Hitchcock requested and obtained second chair counsel, Mr. Booras, who had served as the attorney in several capital penalty phase trials previously. In essence, Hitchcock conducted the guilt phase of the trial while Booras led the penalty phase. Together they secured the assistance of Dr. Glenn Caddy, as a confidential mental health expert, and the services of private investigators Gary Kaltau, and Lee Betz, as well as a ballistics and rook marketing expert, Ed Wittacker.

Much of the investigation and testimony on behalf of Parker was done by Howard Finkelstein who is now the duly elected Public Defender of the 17th Judicial Circuit; and Carlton Moore, who at the time was and still is a city commissioner of the City of Fort Lauderdale, Florida.

Both Mr. Finkelstein and Commissioner Moore were called as witnesses during the penalty phase of the trial in an attempt to humanize parker to the jury. These witnesses were allowed to testify about Parkers "horrific childhood" without being substantially cross examined on that issue. Therefore, the defense was allowed to present the most dismal and mitigating factors of Parkers (sic) life to the jury through the use of articulate, credible and well prepared witnesses. The Finklestein/Moore mitigation presentation was a credible, condensed, unimpeachable and heart rendering version of Parkers (sic) early life based on the information they had gathered during their investigation. It presented Parker in the best light possible to the jury, considering the circumstances.

At the mitigation phase of trial, the following persons also testified: Cary Kultau, one of the investigators; Parkers (sic) mother, Marion Sanders; Co-defendant, Ladson Marvin Preston, Jr.; and Dr. Caddy.

All were thoroughly prepared and through much hearsay testimony, presented what they knew or what they had learned, in an effort to help Parker. There

was little difference between the penalty phase presentation at the trial and the post conviction presentation.

The trial Court permitted Dr. Caddy to present Parkers (sic) biography and to humanize him, without subjecting his testimony to meaningful cross-examination. The record reflects that the State objected to this defense strategy, but the defense prevailed and placed Parkers (sic) difficult childhood before the jury at least three times, without the State being able to challenge the underlying representations made by the witness' (sic).

In this post conviction hearing, Parker repeated the same method used at the trial, by presenting several different witnesses who testified about his difficult childhood. However, the evidence introduced at this hearing was nothing more than cumulative to that which was presented at the trial. The new evidence offered nothing which would undermine the confidence of the original proceeding, or the jury's recommendation.

Following the penalty phase and prior sentencing, the defendant was able to place before the Court additional evidence supporting his plea that a life sentence should be imposed, even though this procedure was not specifically allowed by Florida case law at that time. Approximately two years after his sentencing, the Florida Supreme Court in the case of Spencer v. State, 615 So.2d 688, 691 (Fla. 1993) ruled that the defendant be given another opportunity to present mitigating evidence to the court before sentencing.

Prior to imposition of sentence, again Carlton Moore and Howard Finkelstein testified to the court about Parkers (difficult) childhood and other mitigating factors. Also, Dwayne Bontrager, a therapist from the jail, was called as a witness to say that Parker had been in therapy, that he was helpful, genuinely sensitive, and would be a model prisoner.

As was noted earlier, the defense presented various mental health experts during this post

> conviction hearing. These experts were allowed to render opinions in their field about the emotional, psychological and mental health of the defendant. The court having considered the knowledge, skill, training, education and experience of the experts, and most importantly, having considered the reasons for their opinions, finds that their opinions are not credible to a large extent and in no way would undermine or change the original proceedings or result in this case.
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> Therefore, the defendant has failed to prove the greater weight of the evidence through these mental health experts that his trial counsel was ineffective for their failure to find and call these witnesses in the mitigation phase of his trial.
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> In summary, the defendant was not able to present any new or different testimony or evidence on statutory or non statutory mitigating factors, no amount of investigation or research could have produced any more or better witnesses that were presented at his trial, and the evidence that was presented at the hearing does not meet the Strickland standard requiring any further proceedings.
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> The defendant has failed to meet the Strickland standard on this issue. Post conviction relief is therefore Denied on this issue of whether or not Parker failed to present significant mitigation evidence at the penalty phase of his trial.

(2-PCR.2 348-52). The record supports these findings of fact and conclusions of law.

On September 7, 1989, some five months after appointment of Warner Olds ("Olds"), of the Public Defender's Office, a conflict was declared, and counsel was placed by Robert "Bo" Hitchcock ("Hitchcock"), who had been practicing criminal law exclusively for 12 years. By the time Hitchcock took over Parker's case, he had done two or three first-degree murder

cases, in addition to non-capital felony and misdemeanor trials. Hitchcock’s experience also included taking a defense seminar for capital cases and litigation (2-PCR.3 18, 21-23, 93-95).

Hitchcock specially requested and obtained second-chair counsel, Ted Booras (“Booras”), who had conducted or prepared for several capital penalty phase trials previously. The case preparation work was divided between the attorneys, although they consulted with each other on both phases; Hitchcock conducted the guilt phase, while Booras led the penalty phase. Together, Hitchcock and Booras secured the appointment of Dr. Glenn Caddy, as a confidential mental health expert, and utilized the services of private investigators Cary Kultau,[6] and Lee Betz, as well as a ballistics/tool marking expert, Ed Wittacker. (2-PCR.3 129-30). Additionally, as part of his preparation for the case, Hitchcock had long discussions with Olds, and obtained the investigative materials and files of the Public Defender's Office which included notes and records obtained by its investigators, Howard Finkelstein, and Carlton Moore, both of whom Booras called during the penalty phase to testify about Parker’s life and to humanize him.

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[6] Mr. Kultau was an 11-year veteran of the Pompano Beach Police Department’s Homicide Unit. He may have done another capital case along with Parker’s as a private investigator. (2-PCR.3 119-20; 2-PCR.5 384-85).

Booras had been an attorney for about four years at the time of Parker's trial, had taken the capital seminar taught by Richard Green,[7] lectured on various areas of criminal issues both locally and nationally, and had prepared for ten penalty phases, including one for Duane Owen,[8] although Parker's was the only one he took to trial. Subsequently, Booras has been declared an expert in criminal defense. As noted by Hitchcock, the defense theory for the penalty phase was to show Parker's "horrific childhood" and that he was someone who deserved life imprisonment. While Booras' memory was clouded, he recalled his investigation entailed discussions with Parker, Parker's mother, Parker's wife, investigators, Finkelstein and Moore, and a third investigator, Cary Kultau, hired by the defense to look into the Victim's background. (2-PCR.5 269-72, 285-86, 294, 297-301).

The appellate record supports Booras' testimony that his strategy was to try and humanize Parker. Toward this end, Booras filed a motion in limine to preclude the State from discussing Parker's 1990 robbery and two 1979 convictions. Similarly, he waived the statutory mitigator of lack of prior significant criminal history to further support his argument

[7] Richard Green was one of the best capital appellate attorneys in Florida, if not nationally. (2-PCR.5 300-01).

[8] Booras successfully represented Dwayne Owen on appeal, obtaining a new trial. Further, he started the penalty phase investigation before moving to the State Attorney's Office.

that the prior convictions should be excluded and the pending robbery charges should not be presented to the jury. (ROA 2090-94). Borras affirmed that the penalty phase strategy was to downplay or exclude the negative actions/criminal activities of Parker, while highlighting his difficult childhood. The defense highlighted the vicissitudes Parker faced when abandoned by his father, his troubles during the times his mother would decompensate, succumb to her schizophrenia, and be hospitalized and Parker would be sent to foster homes where he would endure sexual, physical abuse at the hands of his foster parents, peers, and neighborhood residents.

These themes and strategy were brought home when Booras spoke in his opening statement about Parker's father abandoning his family and then argued, because the father was not called as a witness, that his father did not care about his son to that day as he was not willing to help even when Parker faced the death penalty. (ROA 2104-06). Booras used the testimony of two investigators to paint the picture of Parker's life before the jury. This enabled the defense to avoid cross-examination of the individual fact witnesses and permitted the investigators to outline Parker's entire life in a coherent story.[9] The

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[9] Such a presentation escaped the oft-times disjointed and piecemeal accounts of a parade of family and friends who may not be able to give an overall picture of the defendant's life. Individual fact witnesses if called by the defense would have

Finkelstein/Moore mitigation presentation was a condensed, unimpeachable, and distilled version of the information they had gathered during their investigation.

Although additional family and friends were called to testify at the evidentiary hearing, it is interesting to note that the postconviction presentation was almost identical to the trial presentation. To fully understand the cumulative nature of the postconviction case, it is necessary to understand what was actually presented at trial with respect to mitigation. At trial, the defense presented investigator Cary Kultau to report on the Victim's prior burglary convictions, Parker's mother, Marion Sanders ("Sanders"), Investigators Finkelstein and Moore, co-defendant, Ladson Marvin Preston, Jr. ("Preston"), and Dr. Caddy, a mental health expert. Finkelstein looked into Parker's case with Moore and between them, they interviewed Parker, his mother, father, sister, brother, teachers, the sister's foster parent, and the mother's ex-boyfriend. Dr. Caddy spoke to Parker and his mother in addition to reviewing the police statements and Preston's deposition (ROA 2202-05, 2238-41). While Finkelstein testified at the evidentiary hearing that his

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been subject to their own credibility issues, whereas Booras' use of Finkelstein, an articulate attorney/investigator, who was to become the elected Public Defender for Broward County and, Moore, an equally articulate and sitting elected City Commissioner gave the mitigation presentation a cohesive, intelligent, and serious quality.

five month investigation was merely preliminary, the appellate record belies that claim as the trial court concluded. Moreover, the cumulative nature of the postconviction presentation likewise undercuts Finkelstein's characterization of his investigation and establishes that counsel was not ineffective as defined by Strickland.

Booras' use of investigators, Finklestein and Moore, as well as Dr. Caddy, permitted the defense to present Parker’s “biography” and to humanize him without subjecting the evidence presented to cross-examination. The record reflects that the State objected to the defense strategy (ROA 2179, 2207), but the defense prevailed, and placed before the jury a triple accounting of Parker’s history. Three times, through three witnesses, the jury heard about Parker’s difficult childhood, his mother’s mental condition, the physical, sexual, and emotional abuse he suffered, and other aspects of his life. Again, all without the State being able to challenge the underlying facts. During the postconviction proceedings, Parker repeated his penalty phase presentation by offering several different witnesses, but no new information. The evidentiary hearing presentation was nothing more than evidence cumulative to that which was presented before. Furthermore, several of the mental health experts’ opinions were discounted because they relied upon the results of another expert which were shown, and

conceded to be, erroneous. As the court found, Parker offered nothing which would undermine confidence in the representation he received or the sentence imposed. The Strickland burden was not met and relief was denied properly.

At the penalty phase Sanders, Parker's mother, reported:

1. Father abandoned Parker at 3 months of age - father always refused to take custody of Parker;

2. Mother committed to mental hospital; she was in and out of mental hospitals and committed so many times she could not keep record;

3. Because father did not want Parker and refused to take him when asked on several occasions, Parker went to HRS and to different foster care homes each time his mother was placed in a mental hospital;

4. Parker was abused in foster homes and ran away periodically because he was beaten and abused;

5. Mother describes Parker as a good son;

6. Mother reported that Parker had been paying her rent in Jacksonville;

7. When paying his mother's rent in Jacksonville became a hardship, Parker moved his mother to Fort Lauderdale where she lived with Parker and his wife;

8. Mother discusses incident where Tyrone was shot and it was thought he would be paralyzed; Mother and Tyrone's family prayed together for Tyrone;

9. Parker was a small child growing up.

10. Mother had a second child, Princess Ferotte, who also went to foster care when her mother fell ill;

11. Mother noted that Princess and Parker went to separate foster homes;

12. While Parker went to a different foster home each time

his mother had a relapse, Princess went to the same foster home.

13. Princess' foster home mother was described as a very good mother, whereas, Parker's mother had learned Parker had been abused in his foster homes.

(ROA 2185-95).

Finkelstein told the sentencing jury he met Parker within 24 hours of the arrest. He compiled a social history based on what Parker told him, then corroborated the information with Parker's mother, sister, brother, and father (ROA 2203). Finkelstein reported:

1. Parker's early life was dysfunctional;

2. Father left Parker at "extremely early age;"

3. Mother had "serious mental problems resulting in numerous breakdowns, almost periodically" - "six months apart" - during the breakdowns, mother exhibited "extremely bizarre and threatening behaviors" - she "would run naked through the house" "speaking and yelling to God" or run naked down the street "speaking and yelling to God;"

4. On one occasion, mother ran naked through the house up to the second floor, pushed out the screen, and Parker thought mother was going to throw him out of the house;[10]

5. As a result of mother's breakdowns, Parker was "shuffled to foster homes" (sister was cared for by family members) - Parker's foster homes Parker were opened merely for profit, not to care for children;

6. Parker felt abandoned by father and again, when sent to foster homes when his mother was institutionalized;

[10] Sander's denied hanging Parker out the window. (ROA 2369-70).

7. Parker treated differently than other children in the foster homes - he was beaten with an electrical cord at some homes - at the foster home, Parker “would lie under his bed and scream for five and six hours at a time;”

8. Because of mother’s recurring insanity, Parker attended 17 different schools before graduation and was in as many different foster homes;

9. Because Parker was in so many different foster homes and schools, he “was never able to make or build any social systems” - he “never had any friends, he never had anybody teach him right from wrong";

10. All Parker was taught was “how to survive in each individual home” - if the home was run in “militaristic” fashion, that was how Parker would behave;[11]

11. Parker’s childhood lacked any consistency - he lacked a home, family, nurturing, and love - he had no one he could count on and trust - he had no one to love;

12. Parker fled his foster homes because he was mistreated - he was assaulted sexually numerous times starting at age seven;

13. When Parker would run away from his foster homes, he would have to rely on others for shelter only to learn that the shelter was in exchange for sexual favors, and at times once the sexual favors were paid, he was denied shelter;

14. Parker “was abused, sexually, mentally, and physically on a constant basis by both people he loved, and people he didn’t know” - the sexual, physical, and mental abuse continued into his high school years;

15. Parker’s natural father was a minister in Miami;

16. Parker married at time of crime;

[11] The State’s objection to investigator giving an opinion was overruled. (ROA 2206-07).

17. Parker showed signs of being highly intoxicated when Finkelstein saw him shortly after the arrest

(ROA 2202-16)

Moore, a sitting City Commissioner and Public Defender's investigator, did an extensive investigation of Parker's life in hopes of discovering mitigating evidence. This included talking to family, Parker's minister, teachers, a foster parent of Parker's sister, an ex-boyfriend of Parker's mother, and a social worker as well as traveling to Parker's home town of Jacksonville, Florida where he spent five days gathering more evidence.[12] Moore informed the jury that the information Parker gave him was factually corroborated during his investigation:

1. Parker's mother had several mental problems;

2. During the time Parker's mother was hospitalized, he and his sister were placed in separate foster homes - Parker's sister had a more stable foster home situation than he did;

3. Parker was sent to many different foster care parents, and thus, to many different schools - between sixth and tenth grade, Parker went to 16 different schools;

4. Parker "suffered several sexual batteries, he was molested as a child on many occasions by three of the foster care parents, as well as one individual who was a teenager during the time that Dwayne was about nine

[12] Even though he tried to find all of Parker's teachers, only two could be located as many had retired, there had been redevelopment in the community, and many of the addresses no longer existed. He also tried to get HRS records, but some were destroyed based on age, so it was impossible to find Parker's foster parents. (ROA 2280, 2282, 2284).

years old;”

5. Parker “suffered several sexual encounters that he did not care to be a part of as a willing mate;”

6. Parker’s childhood was tragic;

7. When Parker “was approximately six years old, his mother suffered a mental lapse and held Dwayne by his pants belt out of a four-story window and threatened to drop him; Parker recalls this “in a very impacted way”;

8. Parker’s mother often disciplined him very harshly when she was having her mental difficulties;

9. Parker would try and sneak from his foster home to the one where his sister was placed - he felt his separation from his sister was cruel and harsh;

10. Parker’s father never took custody of his son even after Parker asked him to take custody;

(ROA 2276-81).

After being declared an expert in forensic and clinical psychology,[13] Dr. Caddy testified at the penalty phase and reiterated Parker’s dysfunctional childhood for a third time and offered mental health statutory mitigation along with other

[13] He explained he had his Bachelors and Doctoral degrees from the University of New South Wales in Australia and since then had completed continuing education classes, obtained advanced credentials in his field, such as a “diplomate” and fellow of an international academy and became board certified in behavioral medicine and clinical psychology. Dr. Caddy also belonged to psychological societies, wrote articles, and held staff privileges at hospitals and military facilities. At the time of trial, Dr. Caddy estimated that 60 to 70 percent of his work was forensic psychology and “involved the application of various knowledge in psychology and the behavioral sciences to problems of the legal system.”

mitigating factors:[14]

1. Most of Parker's life, up until the present, "has been reasonably chaotic;"

2. Father left the family when Parker was very young - that father never provided assistance to the family after that - Parker was left in his mother's care;

3. Parker was in and out of his mother's care for a number of years - he was in and out of the care of HRS and/or foster care homes because of his mother's "long history of very severe mental illness", paranoid schizophrenia, and her numerous hospitalizations in mental institutions for substantial periods of time;

4. Parker loved his mother and sister;

5. Parker "really didn't know and seems to have a ... distress in regard to his relationship with his father;"

6. When a young child, Parker was "picked on a fair bit by other children;"

7. Parker "was often beaten in some of the foster placements;"

8. When Parker was eight or nine years of age, he was shown how to defend himself with a broken bottle, and after defending himself once when attacked by several children, he was not bothered anymore;

9. Parker spent very little time with his great-grandmother;

10. Most of the time he was put in foster care when his mother was mentally ill and as a result of that chaos, he attended some 12 to 15 different schools;

11. Not only was there instability in Parker's home life,

[14] **During the evidentiary hearing, Dr. Caddy noted that there was nothing new in the postconviction documents, only a little more depth, color to the information, but nothing he saw would cause him to alter his original opinion**. (2-PCR.6 407-10, 417, 425, 428-46, 450-52, 458-59, 463-64).

but there was “instability of establishing any consistent relationships with peers, going from one school to another, and to another” - in a number of instances, Parker was the new kid in the environment, and he had to face it “having relatively poor social skills” - in reality “very poor social skills;”

12. Parker developed “no real sense of his own worth;”

13. Going from school to school, Parker “had real serious troubles in school”- Parker was unable to succeed in school - he did not do well scholastically - Parker is of “below normal intelligence”- because Parker “was bounced around so much, he wouldn’t have established much of a continuity of good education;”

14. Parker threw tantrums in school, threw himself on the floor, and kicked and screamed almost as if engaged in a fit; Parker did this to get attention, but people also stopped paying attention;- because of his “fits”, the teachers did not want to deal with Parker, and he ended up in special education;

15. However, even in special education, Parker “didn’t get dealt with” - he went from grade to grade and from school to school able to create an environment for himself by looking crazy so that people did not look at him - this “protected him from having to deal at least with authority figures in the school system;”

16. As a child, Parker “had some really pretty devastating things happen to him” - he “was sexually abused as a child” and as an adolescent - he “was physically abused as a child”- sexual abuse caused him to “become involved in some issues around his sexuality, such that it wasn’t clear to him just where the barriers were, and he became mocked at school, because after engaging in some sexual behavior with other young boys, those boys made a public declaration and so he became known in very vulgar terms for a year or so” - he “felt like he had no friends and he had to distance [himself] from the people at school because he simply was an outcast because of him being defined ... as a ‘cocksucker’; he had difficulty - his “disorder connected to his evolving sexuality” - Parker was abused by his various babysitters - Parker was in fear of being beaten by “Handsome Hall” - eventually he

developed a “more pathological way of generally coping” - he had his first experience with a female at age 14 - it was then that he concluded he was not homosexual;

17. By age 14 he was getting into “various sorts of difficulty” - shoplifting and other “low grade, illegal activity” - at 12 years of age, he had been arrested for shoplifting and burglary;

18. By age 12, Parker “had really formed a lifestyle of being on the streets with what appears to have been very limited, if any, supervision;”

19. Parker would run away from foster care - foster homes could not hold Parker - when he ran away enough, he would get into trouble with HRS, he would be brought back into the system, but the system “didn’t manage him terribly well or he wasn’t easy to manage, and the combination of those two factors led him to be essentially reared in a rather chaotic style even through his teen years;”

20. In ninth grade, Parker’s mother was very sick, and he “was just hanging around” - it was this year that his attitude changed - he “said by then he really didn’t much give a damn about anything, and he was losing any sense of confidence about accomplishment, about being anybody” - he "began hanging around with bad crowds” - the “only kids [Parker] could relate to were the kids ... who would get into trouble, the dropouts and the problems, and so he began smoking reefers, marijuana, and he began drinking alcohol, and this became a pattern, ... a recurrent pattern. Whenever he could get it he would drink, and whenever he would drink, he would get drunk;”

21. Parker is a nervous person;

22. Parker shows signs of “having been really abused and very vulnerable as a child;”

23. Parker’s alcohol became a coping mechanism - a way of making him feel a sense of confidence and self worth - a primary diagnostic indicator is that Parker “has a major alcohol abuse problem” and is an alcoholic;

24. Parker committed crimes while intoxicated, "probably every crime that he ever committed" - it dis-inhibited him; because Parker has such a poor self image, and limited ability to earn money, being drunk and committing criminal acts could be one and the same for Parker - "he probably never would have committed a criminal act in the absence of alcohol, simply because in many respects he is too inadequate a personality, and he is too vulnerable in terms of anxiety;"

25. The moral conscious normally developed in a child by age nine, "was only partially developed in Dwayne Parker, and he was very regressed, very limited in the full investment of his socialization." "He wasn't totally unsocialized in that he had no morality, but the quality of his moral investment was retarded in no small measure by his inability to be - the inability of the rearing process."

26. Parker has very little sense of self worth;

27. Parker's two children and his mother mean a great deal to him;

28. Parker most likely committed the robbery in this case because he needed money and because he had the "sense of I'm going to [commit the robbery] because I need money and I don't care, I don't care about anything, I don't particularly care if I get killed."[15]

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[15] **This analysis of Parker's mental processes directly contradicts Parker's new mental health experts who tried to offer as statutory mitigation of acting under extreme mental or emotional disturbance brought on by the responding police officer returning Parker's gun fire. Clearly, if Parker did not care if he got killed, as Dr. Caddy suggested, then being shot at by an officer was not going to trigger some extreme mental or emotional disturbance. Moreover, merely because a new expert is found to testify more favorably, does not detract form the original expert's opinion or establish ineffective assistance of counsel**. See Asay v. State, 769 So.2d 974, 986 (Fla. 2000)(reasoning first expert's evaluation is not less competent merely upon the production of conflicting evaluation by another expert and finding counsel's investigation of mental health mitigation was reasonable and counsel could not be declared incompetent "merely because the defendant has now secured the testimony of a more favorable mental health expert."); Elledge

29. Parker "to some degree" has sociopathic tendencies - he "is certainly not full-blown in his sociopathy, and I see him as potentially recoverable in an emotional sense, if resources were available to provide him with a sort of assistance that I believe professionally he needs;"

(ROA 2233-71).

Following the penalty phase and prior to sentencing, counsel was able to place before the sentencing court additional evidence in support of a life sentence even though this Court had yet to decide Spencer v. State, 615 So.2d 688, 691 (Fla. 1993) and provided Parker with an another opportunity to give the court evidence for sentencing. (ROA 2346) Parker again presented defense investigator Moore to opine that Parker did not deserve the death penalty, and Finkelstein to report once again about Parker's difficult childhood. Booras had not only Parker's mother, but Parker himself give reasons for a life sentence. (ROA 2355-60, 2368-72; 2373-74). Counsel also added Dr. Dwayne Bontrager, a therapist from the jail, to explain that Parker had been in therapy, that he was helpful, genuinely sensitive to others, and would be a model prisoner (ROA 2362-

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v. Dugger, 823 F.2d 1439, 1446 (11th Cir.) (opining "[m]erely proving that someone--years later--located an expert who will testify favorably is irrelevant unless the petitioner, the eventual expert, counsel or some other person can establish a reasonable likelihood that a similar expert could have been found at the pertinent time by an ordinarily competent attorney using reasonably diligent effort"), modified on other grounds, 833 F.2d 250 (11th Cir. 1987).

63), thereby, taking advantage of the recent case of Skipper v. South Carolina, 476 U.S. 1, 5 n.1 (1986).

Based on this evidence, counsel's performance is far from the ineffectiveness discussed in Strickland and Wiggins even in spite of counsel's reliance upon prior counsel's investigation. Indeed, when the evidentiary hearing testimony and evidence are also considered, it is clear the trial court properly denied relief. The evidence presented at the recent evidentiary hearing before this Court echoed what had been presented previously at the 1990 penalty phase.

During the evidentiary hearing, Finkelstein confirmed that he conducted a psychosocial history of Parker which was described as a "comprehensive set of questions" designed to "flesh out, what a person's life experience is." The history would include the defendant's school, medical health, mental health, social systems, family systems, good and bad things in his life, and any trauma in his life in order to obtain a full picture of the defendant's "humanness." In addition to gathering Parker's psychosocial history, Finkelstein confirmed that he talked to Parker's mother, father, sister, and half-brother. Finkelstein was looking for anything good Parker did and anything bad that happened to him. He also attempted to obtain Parker's school and foster home records, but was "running into a lot of road blocks" because a number of schools did not

keep records or had been eliminated. This is much more than a preliminary investigation. In addition to Finkelstein's efforts, Moore also investigated Parker's case for mitigation. He went to Jacksonville in search of school and HRS records. Everything collected was turned over to the public defender and then later on to Hitchcock. Finklestein met with Hitchcock and related the information and facts he had discovered already. Finkelstein may have had a phone conversation with Dr. Caddy, the defense expert, who he noted was a well known and oft used mental health professional. (2-PCR.4 167-68, 175-80, 182).

According to Finkelstein, he recalled testifying about Parker's mother's mental health problems, hospitalizations, and bizarre behavior and violence toward Parker. His testimony also included an accounting of Parker's placement and experiences in many foster homes due to his mother's cyclical hospitalizations for mental illness.[16] (2-PCR.4183-89, 194). Likewise, Moore

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[16] Finkelstein recapped his trial testimony including recounting Parker's foster home experiences, together with his being beaten with an electrical cord, and his feeling of abandonment by his parents. As a result of the numerous foster home placements, Parker went to 16 or 17 different schools, lacked a social system, friends, or anyone to teach him right from wrong. Finkelstein testified that Parker lacked anyone in his life in whom he could trust or love. Often Parker would run away from his foster home and have nowhere to go. He would exchange sexual favors for shelter, but often would not receive the shelter. Parker was sexually abused beginning at seven years of age and it was suggested he was a homosexual. Corroboration of this came from Parker's family. Finkelstein admitted that he was able to get this information before the jury, which was

testified at the evidentiary hearing and recounted his trial testimony.[17] He traveled to Jacksonville, and spent five days there, to confirm the information Parker had supplied about his childhood and history. Moore met with Parker's sister in Jacksonville so that she could introduce him to other family and friends and assist in finding addresses and school records. In fact, Parker's sister drove around Jacksonville with Moore in search of old schools, foster homes, and residences where they had lived, however, without much success. While in Jacksonville, Moore met with Parker's minister, a couple of teachers, one of the foster parents for Parker's sister, and an ex-boyfriend of Parker's mother. In spite of Moore's efforts, he was able to find only two of Parker's former teachers, as many of the addresses he had no longer existed due to community redevelopment projects. According to Moore, Parker's HRS records had been destroyed already by the time he went to

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classic hearsay, thereby precluding the State from challenging the factual assertions which it could have done had the eye-witnesses testified instead. (2-PCR.4 183-89, 194).

[17] Moore testified that he investigated Parker's case in an effort to gather evidence and witnesses regarding issues of Parker's childhood for both guilt and penalty phases. He recalled his testimony about Parker's mother's severe mental health problems, his separation from his sister when they were placed in foster homes, Parker's multiple experiences at various foster homes, and numerous different school placements; 16 foster homes and 16 schools. The jury was also informed of the sexual abuse Parker suffered at the hands of others and the physical abuse he suffered at the hands of his mentally unstable mother. (2-PCR.4 199-200, 205-12).

Jacksonville to investigate. As a result, he did not know how to find the foster parents. However, he found one case worker who spoke of the sexual abuse Parker endured. Moore also spoke to Parker’s father and wife. (2-PCR.4 199-200, 205-12).

The testimony of Finkelstein and Moore confirm that an extensive investigation was conducted into Parker’s background in an attempt to develop mitigation. Although it was done under the supervision of prior counsel, the investigation was done nonetheless. The investigation included local and out-of-town travel in search of records, many of which were destroyed, and the search for witnesses to Parker’s life, many of whom could not be located due to changes in the community and loss of records. Merely because records or witnesses could not be found at the time, does not establish deficient performance. What is clear is that defense counsel caused Parker’s case to be investigated for mitigation, and the results were reviewed with prior counsel and the investigators, and the results were presented to the jury. Counsel are entitled to rely upon such a documented investigation, without having to repeat everything the original investigators developed. See Davis v. State, 928 So.2d 1089, 1106-07 (Fla. 2006)(finding subsequent penalty phase counsel’s performance not deficient where he had access to nd utilized Public Defender’s file and interviewed additional witnesses). This is not a case where nothing was done by

counsel as was decried in Wiggins or where some obvious and critical information was overlooked as in Rompilla v. Beard, 125 S.Ct. 2456, 2463 (2005). As was shown, extensive efforts, over a five month period, were made to search for school and HRS records as well as former teachers, foster home parents, and HRS case workers. Discussions were had with family, ministers, two teachers, and a case worker. What is most telling, and belies Parker's claim of deficiency, is that even after years of postconviction investigation, the "new" records offered essentially the same information gathered by Finkelstein and Moore during their 1990 investigation. The information, as the trial court found was merely cumulative to that which was presented at trial. Moreover, as will be explained below, Dr. Caddy found the information merely richer than what he had been provided in 1990, but nothing was new or so different that he would change his prior opinion.

Dr. Caddy testified at the evidentiary hearing that he was initially a confidential defense expert who eventually testified at the penalty phase. His involvement in the case was to examine Parker for competency/sanity issues, and to look at any possible mitigation. Dr. Caddy admitted he had Finkelstein’s investigative notes for background information on not only Parker, but the family, schooling, Parker’s jobs, and mother’s mental history. Dr. Caddy admitted that Finkelstein was trying

to get medical records and that his notes described the mental history and substance abuse by other family members. The doctor noted that he had Parker's substance abuse history, sexual abuse encounters, and accounts of physical abuse, as well as Parker's criminal history and medical history. According to Dr. Caddy, Parker was a good self reporter up to a point. Dr. Caddy conceded that he spoke at trial of Parker's chaotic life, abandonment by his father, experiences with his mentally ill mother, and suffering through the numerous foster home and school placements. (2-PCR.6 407-10, 417, 425, 428-446).

The material Dr. Caddy received in 1989/90 for Parker's evaluation "was generally not inconsistent with the material that was provided to me;" it only differed in its "level of richness...complexity." Even with the new records, he would not change his original opinion or offer more mitigating factors. The new records were "richer", but would "not ultimately change what [Dr. Caddy] was saying." Other than maybe looking into the IQ a little more, but not for mental retardation because Parker is not mentally retarded, Dr. Caddy explained:

> ... if I were to give testimony today based on what is in those records, if I accepted what's in them as correct, my testimony would have probably been somewhat more intense and more flushed out, but the basic information that I gave at the time of sentencing phase, I've said to both sides in this case, I'm actually reasonably satisfied that I got a fair bit of it right.
>
> ...

> A fair bit of it right you know, all of the additional information that was provided to me, it tended to confirm a lot of the information that I was reporting, or the opinion that I was taking.
>
> I think the real distinction for me is simply the level of aberration of the mother that that I didn't really understand, or at least if I did I don't remember understanding it back then. I'm sure I knew everything that I said I knew, but the mother that's reported in those records was more aberrant, more extreme, in her bizarreness than I had knowledge of.

(2-PCR.6 407-17, 425-46). He admitted he found at trial that Parker's ability to appreciate the criminality of his conduct and/or conform his conduct to the requirements of law was only mildly impaired, and he would not substantially change his opinion even with the added information.[18] (2-PCR.6 450-52).

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[18] Dr. Caddy stated he might possibly change the word "mildly" to more severe. He may have qualified the level of impairment as "substantially greater than mildly" merely based on Parker's profound history of alcohol abuse. The doctor explained: "Now, I'm not necessarily of the view that, therefore, he (Parker) was profoundly mentally impaired, but I think the impairment was probably greater than mildly." However, Dr. Caddy admitted that this change was not based on any additional information of alcohol consumption at the time of the crime, but merely based on Parker's overall pervasive alcohol consumption; something he again was aware of at the time of the penalty phase. (2-PCR.6 450-52, 458-59). As such, this portion of his testimony should be discounted. In fact, he noted that his testimony "[w]ould not have been vastly different. My conclusions are generally today as they were then, I'm simply reporting that whether the strength of some of my opinions might have influenced the outcome I can't know." Also, Dr. Caddy stated: "much of the information that [Dr. Caddy] gave is consistent with what [he] subsequently got additional information for. So the distinction that that I'm drawing is not that my opinions would have been vastly different, they would not have been, the distinction is

Again, even after the evidentiary hearing, nothing new of import, nothing which undermines confidence in the sentencing decision, was revealed. While Parker's new lay witnesses, Virginia Holcomb ("Holcomb"),[19] Princess Ferrette ("Ferrette"),[20]

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also not that I would have changed my testimony in any significant way, I would not have, I would have simply had more information in order to be able to report in the cross examination phase in particular, that's the distinction. (2-PCR.6 463-64). Given that Dr. Caddy could not articulate any significant difference in his testimony even with additional information, then confidence in the sentence has not been shaken, and the court's conclusion in this regard should be affirmed. Parker has not carried his burden of showing that the trial court erred and that there was deficiency and prejudice arising from counsel's penalty phase preparation.

[19] Holcomb ("Holcomb"), Sanders' friend, reported Parker was an unhappy child and his mother had mental breakdowns during which she would have unusual behavior, to which Parker was subjected and suffered abuse. Two or three times Holcomb was involved in having Sanders committed to a mental institution. Sanders could not care for her children, so Parker was sent to a foster home run by Mama Hall where he was abused sexually. Often, Parker would run away from his foster homes. (2-PCR.4 216-24). This testimony was cumulative to the original penalty phase.

[20] Parker's sister, Ferrette, noted there were times when they could not live with their mother due to her schizophrenic condition. When their mother was suffering from her mental condition, her children were sent to separate foster care facilities. They would also be watched by Mama Hall who beat them or told them they would not amount to anything. Parker would run away from Mama Hall. During those times that they lived with their mother, they were afraid of her due to her erratic, paranoid behavior when the medicine was not working. The breakdowns would occur every five to six months. Sanders would act out in bizarre ways when having her breakdowns, sometimes walking around without clothes, other times not letting the children eat because she believed the food contaminated, and on occasion acting in a violent manner toward Parker. Sometimes her mother would bring men home and the children would see these men fight with their mother, sometimes

Gregory Pender ("Pender"),[21] and Dr. Larry Richards ("Richards"),[22] may have related different events than what was offered in the penalty phase, the type of event, such as sexual abuse, placement at numerous foster homes, and the mother's

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they were violent toward Parker. When Parker attended the St. Pius School, the nuns would beat him; he had few friends, and the students would harass and fight with him. (2-PCR.4 229-47). There is nothing here which was not presented at trial or uncovered by the prior investigation. The failure to present cumulative evidence does not establish ineffective assistance.

[21] Pender, a childhood friend, reported Parker had been sexually abused as a child. One of these assaults caused a ruptured rectum. Pender also reported witnessing some of Sanders' bizarre behaviors, including walking around naked after she had been drinking. He also saw her become violent with Parker. Once when Parker and Pender were being harassed, Parker defended them by cutting their attacker with a broken bottle. (2-PCR.4 255-61). Pender's evidentiary hearing testimony merely offered other instances of sexual abuse or bizarre behavior by Marion Sanders. Such is cumulative to what the jury was told.

[22] Richards ("Richards') was not presented as an expert, but testified about contact with Parker in his official capacity as a protective services worker/child abuse investigator. Richards first met Parker at a diagnostic and assessment unit where he was being evaluated because he had stopped talking. As it turned out, Parker was found **neither** to be autistic nor mentally retarded; he may have experienced a traumatic event in his life. Richards noted that Parker was placed in foster care when his mother was suffering from her bouts with mental illness. Richards had seen the house in disarray, and the mother acting in an erratic, bizarre manner; Parker's mother was nude and hysterical. When Parker lived with his mother, he frequently missed school. Also, during these placements, Parker's father refused to take his son. One of Parker's foster homes was closed by the authorities because of allegations of sexual abuse, and Parker frequently ran away from his foster homes. Parker had an unstable home-life, and a schizophrenic mother. Often children growing up in this type of environment are traumatized, psychologically and emotionally. (2-PCR.5 349-52, 357-63, 365-66). Again, such evidence is cumulative to the penalty phase testimony.

bouts of mental illness were all given to the sentencing jury and were known and used by Dr. Caddy during his original evaluation and testimony. The lay witnesses' postconviction testimony is nothing more than cumulative to that which was presented during the penalty phase. Cumulative evidence does not establish ineffectiveness under the Strickland analysis. See Rutherford v. State, 727 So.2d 216, 225 (Fla. 1998) (finding additional evidence offered at postconviction evidentiary hearing was cumulative to that presented during penalty phase, thus, claim was denied properly); Van Poyck v. State, 694 So. 2d 686, 692-94 (Fla. 1997) (finding defendant failed to prove ineffectiveness where life-history account argued for in postconviction was, in large measure, given to jury); Woods v. State, 531 So.2d 79, 82 (Fla. 1988) (reasoning "jury, however, heard about Woods' [psychological] problems, and the testimony now advanced, while possibly more detailed than that presented at sentencing, is, essentially, just cumulative to the prior testimony. More is not necessarily better."); Card v. State, 497 So.2d 1169, 1176-77 (Fla. 1986) (holding counsel cannot be deemed ineffective for not presenting cumulative evidence).

Likewise, Parker's new mental health experts do not undermine confidence in the sentence. Either their testimony is not credible because they relied upon mis-scored tests, failed to have a command of the case facts necessary to opine about the

mental health statutory mitigators, or they offered opinions in conflict with other experts. The court correctly rejected the testimony of Drs. Pickar, Crown, and Toomer.

Dr. David Pikar, is a psychiatrist whose practice is 10 percent forensic. Based upon a one hour clinical interview of Parker and a discussion with Dr. Crown, Dr. Pickar stated Parker showed no signs of schizophrenia, but he had a history of alcohol abuse and **may** have had a frontal lobe deficit. The doctor suggested Parker was under extreme mental or emotional disturbance at the time of the crime which occurred when the "set changed", i.e., when the police started chasing him and that he could not conform his conduct to the requirements of law. It was also the doctor's opinion that Parker had borderline intellectual functioning, based on an IQ test in November 1978, while in ninth grade, rendered a score of 78. Yet, he claimed ignorance of the WAIS IQ test, given by Dr. Toomer in 1997, where Parker scored a 90, and of the WAIS III, administered by Dr. Crown in 2005, where Parker scored an 87. It was on this test that Dr. Crown underscored Parker in three areas. (2-PCR.8 657-60). As admitted by Dr. Pickar, none of Parker's scores show him to be mentally retarded.[23] (2-PCR.6 483,

[23] Collateral counsel reported Parker was not making a claim of mental retardation, only borderline intellectual functioning (oft termed borderline mental retardation) and organic brain

487-90, 496; 2-PCR.7 506-07, 540-41; 2-PCR.8 657-60). What is significant about Dr. Pikar is that not only did he appear not to have a firm understanding of Florida standards regarding mitigation[24] (2-PCR.7 513), mental retardation, or the facts of the case,[25] and he relied upon Dr. Crown's testing of Parker

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damage. Even so, Dr. Pickar was unfamiliar with Florida's definition of mental retardation. (2-PCR.7 507-09).

[24] Dr. Pickar could not differentiate between the statutory mitigators of (1) the capital felony was committed while the defendant was under the influence of extreme mental or emotional distress at the time of the crime and (2) the capacity of the defendant to appreciate the criminality of his or her conduct or to conform his or her conduct to the requirements of law was substantially impaired. He tried to explain his findings as: "Because I was pretty clear that I thought of the two issues, ... the inability to conform his behavior was more clear in my mind, and the first I thought was probable. But I believe in my testimony that there was a differential from my sense as to where the probability or the strongest feeling was." (2-PCR.7 512-13). Dr. Pickar stated:

> To conform his behavior to legal standards, I think, either due to stress – let me start with that, to conform his behavior to legal standards is the one I feel most strongly about. I think I said to you before the appreciation of criminality I did not think was exactly germane to Mr. Parker, I did not find too strong a statement on that. And in terms of the ability of stress influencing his behavior, I think it was stressful, but that was less clear in my mind, emotional distress I think is the term.

[25] Although Dr. Pickar gave his opinion about statutory mental mitigation at the time of the crime, he did not seem to know all of Parker's actions during the Pizza Hut robbery. (2-PCR.7 517-31). The standard for assessing an expert's credibility, as this Court noted, is "the knowledge, skill, training, education, and experience of the witness, the reasons given by the witness for the opinions they express, and all the other evidence in the case." (2-PCR.7 520). Such confusion and lack of understanding of the case facts supports the court's rejection of this expert.

which was revealed to be erroneous in three areas. (2-PCR.6 466; 2-PCR.7 506-28). Given Dr. Pickar's poor understanding of Florida mitigation, his lack of knowledge of the case facts,[26] and reliance upon scoring errors of others, Dr. Pickar's opinions regarding mitigation were properly rejected by the

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[26] A further basis for disregarding Dr. Pikar's opinion is that he had little knowledge whatsoever of the case facts and applying such to statutory mitigation. (2-PCR.7 517-31). The trial record shows that Parker entered the Pizza Hut wearing gloves, demanded to see the manager, and before approaching the manager, sticking a gun in his face and demanding money from the safe, Parker put on a mask. He then methodically and with measured, controlled violence demanded property from the restaurant patrons. When confronted by the police, he was in control of his faculties well enough that he could out-run them, attempt to commandeer a car, and shoot to kill only when his victim was within a few feet of him. (ROA 957-62, 996-98, 1017, 1113). The forethought to wear gloves and a mask shows planning and an appreciation of the criminality of one's conduct. Cf. Jennings v. State, 718 So.2d 144, 150 (Fla. 1998) (finding use of gloves by defendant indicated attempt to avoid arrest). Moreover, Parker shot into the floor when his demands for money and property were not met by his victims quickly. This too, shows planning and control in that he shot into the floor, not his victims, to coerce compliance instead of shooting wildly. Further, as Parker fled the scene, he tried to commandeer a car, again shooting, but not hitting any of the passengers. Unsuccessful, Parker continued to run, evading numerous officers giving chase. It was not until William Nicholson, who gave chase when he heard of the robbery, was within feet of Parker, did Parker shoot to kill. The Police were not yet as close to Parker as Nicholson was. These factors show he was not so drunk, under the influence of some emotional disturbance that he could not control himself, or unable to know what he was doing was criminal. Parker's actions, contrary to Dr. Pickar's selective recollection of the facts and claim of perseveration, establish a controlled robbery and thoughtful, though unsuccessful escape.

trial court as non-credible[27] and non-supportive of the

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[27] Again, it is not logical to find an emotional disturbance, and subsequently mitigation, merely because the police stepped in to stop Parker from shooting his way out of the Pizza Hut after robbing it and injuring its patrons. There is no logic in saying that a defendant who is comfortable shooting at unarmed civilians should be under emotional stress when challenged by the police. Parker made the conscious choice to commit armed robberies, and the natural response for the police was to use force to stop and arrest Parker. The stressful situation was of Parker's making. Had he discarded his weapon upon exiting the Pizza Hut instead of firing upon the police, the police would not have returned fire and caused what Dr. Pickar incredulously described as a "change in set" which prompted the emotional disturbance in Parker. Incredibly, Dr. Pickar went so far as to suggest that robbing Pizza Huts is familiar to Parker and that this shows perseveration, which the doctor noted could be seen in autistic or brain damaged individuals, in that Parker repeats the action of robbing only fast food restaurants. Such is an incredible notion and it appears that the doctor is stretching to find some mitigation. There is no logic in the defense notion that Parker's choice to obtain a livelihood by robbing fast food restaurants, where he had worked in the past, somehow establishes repetitive behavior which, in Dr. Pickar's estimation, indicates organic brain damage. (2-PCR.7 533-35) Webster's Random House College Dictionary, 1997 defines "perseverate" as "to repeat a word, gesture, or act redundantly." The court correctly rejected such an illogical notion. First of all, executing the complex plan of robbing the same venue does not match with the definition of perseverate which deals with simple acts such as repeating a word, gesture, or act such as taking the same route to school each day. See Diagnostic and Statistical Manual of Disorders, 4th Ed. Text Revision, pages 71 and 84 (Diagnostic criteria section B). Second, merely because a serial robber will choose the same venue, such as a fast food restaurant, bank, convenience store, or some other establishment does not show brain damage or perseveration. Experience and common sense instruct that it is more likely that these crimes have been repeated because they were found to be easy to commit and lucrative for the criminal. Rather than being brain damaged, the serial robber has exploited his knowledge and prior success wisely to his advantage. Generally, when a criminal chooses one manner in committing his crime, the sum total of his actions are referred to as his modus operandi, not that such is perseverate behavior.

mitigators[28] offered or collateral relief under a Strickland analysis. At a minimum, reliance upon Dr. Crown's scoring errors, which influenced the defense experts in this case, is a firm basis upon which the trial court rested its decision that the new testimony failed to establish either deficiency or prejudice under Strickland.

Dr. Toomer was likewise discounted by the court. The testimony showed he lacked credibility,[29] failed to know the case

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[28] Dr. Pickar admitted Parker created the circumstances and stress which led to the situation he found himself in when the "set changed" from being an armed robbery to a shoot out with police chasing him through the streets. (2-PCR.7 543-44). Any emotional distress Parker may have felt as the police closed in was of Parker's own making, not brought on by some emotional disturbance. The suggestion that Parker suffered some emotional distress, as a result of his own actions, and that this was mitigating was discarded correctly by the court as lacking credibility.

[29] Dr. Toomer seemed less than knowledgeable about his practice. Beyond reporting that he testified in hundreds of capital cases, he could not say how often, if at all he was called by the State, or how many times he was hired by Capital Collateral Regional Counsel, or the defense. Also, Dr. Toomer could not say with much definity how many hours he had put into Parker's case. (2-PCR.7 581-85). A brief, non-exhaustive, computer search shows Dr. Toomer has testified for capital defendants in Knight v. State, 923 So.2d 387, 400 (Fla. 2005); Phillips v. State, 894 So.2d 28, 37 (Fla. 2004); Henyard v. State, 883 So.2d 753, 761 (Fla. 2004); Patton v. State, 878 So.2d 368, 374 (Fla. 2004); Fennie v. State, 855 So.2d 597, 606 (Fla. 2003); Sweet v. State; 810 So.2d 854, 864 (Fla. 2002); Rose v. State, 787 So.2d 786 (Fla. 2001); Hitchcock v. State; 755 So.2d 638, 641 (Fla. 2000); Castro v. State, 744 So.2d 986, 987 (Fla. 1999); Hall v. State, 742 So.2d 225, 228 (Fla. 1999); Jones v. State, 732 So.2d 313, 317 (Fla. 1999); Mendoza v. State, 700 So.2d 670, 675 (Fla. 1997); Walker v. State, 707 So.2d 300, 307 (Fla. 1997); Padilla v. State, 618 So.2d 165, 167 (Fla. 1993). Dr. Toomer's bias for

facts,[30] and could not offer information which would undermine

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the defense was at issue in Rose v. State, 787 So.2d 786 (Fla. 2001) where this Court noted bias may be shown through the frequency and expert testifies for the defense, stating:

> During the proceedings below, Dr. Toomer provided lengthy testimony regarding Rose's emotional and mental history. On cross-examination, the State asked questions relating to Dr. Toomer's prior testimony for other defendants and other questions relating to his qualifications. Contrary to Rose's arguments, we conclude the questions asked by the State were within the broad range of permissible cross-examination. In fact, this line of questioning is almost identical to the one in *Henry. See id.*

Rose, 787 So.2d at 798. See Henry v. State, 574 So.2d 66, 71 (Fla. 1991) (finding "prosecution was properly allowed to elicit from defense expert, Dr. Robert Berland, that ninety-eight percent of his clientele consisted of criminal defendants and that forty percent of his practice consisted of first-degree murder defendants represented by the Hillsborough County Public Defender's office. These questions were relevant to show bias, prejudice, or interest.")

[30] It was also Dr. Toomer's opinion Parker **is always** suffering extreme mental or emotional disturbance, even when sitting calmly in the courtroom, and that, at all times, he is unable to appreciate the criminality of his actions or to conform his conduct to the requirements of law. Dr. Toomer discounted Parker's ability to make choices, such as to rob the Pizza Hut. However, the doctor eventually agreed Parker was choosing to behave well in court. (2-PCR.7 594-97). This all flies in the face of Parker's forethought to bring a mask to the robbery, arm himself with two guns, one of which held more than 30 bullets, use a ruse to gain access to the manager, and methodically rob the restaurant patrons. While Dr. Toomer claims Parker has difficulty making decisions under stress, and that when asked to think in abstract terms fails, the facts of the crime belie those conclusions and lend support to the trial court's finding the doctor not credible. Parker went to the Pizza Hut prepared and effectuated his plan well, except for staying too long in the restaurant which allowed the police time to respond. The new offer of mitigation is not supported by the record and does not undermine confidence in the sentence.

confidence in the sentence.[31] Dr. Toomer gave the MMPI-II and agreed it showed Parker:

1. has "long-standing antisocial and sometimes bizarre behavioral patterns"[32]

2. "is quite immature and irresponsible and may engage in antisocial behavior or aberrant sexual practices for the thrill of it"

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[31] The doctor noted psychological deficits from Parker's poverty, his mother's schizophrenia, and instability in Parker's early developmental history. Based on the totality of the evidence, Dr. Toomer believed that Parker was under extreme mental or emotional disturbance at the time of the crime and his ability to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired. (2-PCR.7 563-69, 571-72, 580-81). This is the classical type of new expert testimony that has been rejected as not showing ineffective assistance of counsel. In Gaskin v. State, 822 So.2d 1243, 1250 (Fla. 2002), this Court quoted Asay, 769 So.2d at 986, affirming: "[w]e have held that counsel's reasonable mental health investigation is not rendered incompetent 'merely because the defendant has now secured the testimony of a more favorable mental health expert.'" See Damren v. State, 838 So.2d 512, 517 (Fla. 2003) (finding recent discovery of expert to testify about potential brain damage "does not equate to a finding that the initial investigation was insufficient"); Elledge v. Dugger, 823 F.2d 1439, 1446 (11th Cir.) (opining "[m]erely proving that someone--years later--located an expert who will testify favorably is irrelevant unless the petitioner, the eventual expert, counsel or some other person can establish a reasonable likelihood that a similar expert could have been found at the pertinent time by an ordinarily competent attorney using reasonably diligent effort"), modified on other grounds, 833 F.2d 250 (11th Cir. 1987); Jones v. State, 732 So. 2d 313, 320 (Fla. 1999) (same); Correll v. Dugger, 558 So. 2d 422, 426 (Fla. 1990) (same).

[32] Most incredible, Dr. Toomer failed to diagnose Parker with antisocial personality disorder and dismissed the Diagnostic and Statistical Manual of Mental Disorders, 4th Ed. Text revision (DSM-IV-TR) as a "cookbook." (2-PCR.7 587-94). While he refused to find antisocial personality disorder, the above statements indicating the disorder applied would have been the subject of cross-examination (2-PCR.7 601) and devastating to Parker.

3. “is likely to appear very uncooperative, hostile, and aggressive”

4. “denies responsibility for his behavior and tends to blame others for his problems”

5. “is likely to have a long history of legal difficulties and family problems” and “a history of poor achievement and unreliable work behavior”

6. “may attempt to manipulate others through aggression or intimidation”, “rejects demands placed on him and tends to be suspicious and mistrusting of others” and “may be threatening or physically abusive toward his wife when he feels frustrated”

(2-PCR.7 585-87). This Court has acknowledged in the past that antisocial personality disorder is "a trait most jurors tend to look disfavorably upon." Freeman v. State, 858 So.2d 319, 327 (Fla. 2003). An ineffectiveness claim does not arise from the failure to present evidence where such presents a double-edged sword.[33] See Carroll v. State, 815 So.2d 601, 614-15, n. 15 (Fla. 2002); Asay, 769 So.2d at 988. Neither deficient performance nor prejudice can be shown arising from counsel not obtaining Dr. Toomer and Parker's MMPI-II results.

Dr. Toomer also admitted Parker’s full scale IQ score was 90. (2-PCR.7 602). This contradicts completely Dr. Pickar’s testimony that Parker had borderline intellectual functioning or

[33] Given defense counsel’s strategy to humanize Parker and show he was "salvageable", Dr. Toomer’s testimony regarding the MMPI-II results alone would be a valid basis for **not** presenting the doctor. Such testimony would conflict with the defense theme.

that Parker qualified for a non-statutory mitigator based on this in that Dr. Pickar placed the upper limit of this alleged functioning problem in the 80's, usually between 70 to 84 according to the DSM-IV. (2-PCR.6 500). Given that Drs. Pickar and Toomer contradict each other, such is a valid basis for the trial court to discount the experts' opinions.[34]

Parker's final mental health professional, Dr. Barry Crown, was similarly rejected. Not only did he commit three scoring errors on the WAIS-III which rendered an IQ score of 87, (2-PCR.8 657-60), but his explanation to the prosecutor for finding extreme mental or emotional disturbance at the time of the crime undermines completely his credibility.

> Q. How was his (Parker's) behavior exhibited by this extreme mental or emotional disturbance?
>
> A. I believe that he had difficulty processing information. I wasn't there, I haven't seen a video, so I can't tell you specifically.
>
> Q. You have two volumes of background information?
>
> A. I do.

[34] Also, the conflict is ample reason for counsel not to present such double-edge sword testimony. See Carroll v. State, 815 So.2d 601, 614-15, n. 15 (Fla. 2002). Furthermore, it shows Booras rendered effective assistance when he followed the strategy of humanizing Parker and presenting his dysfunctional home life and childhood through his investigators and Dr. Caddy who reasoned that much of Parker's later difficulty with crime stemmed from his abandonment the tangible alcohol abuse. Nothing new of assistance was shown to have been overlooked by counsel and Parker has failed to carry his burden of proving otherwise under Strickland.

Q. There are witness statements, the Pizza Hut robbery victim statements are in the background information?

A. Yes, and I have read those.

Q. And there is a Florida Supreme Court opinion with a synopsis of the facts in the background materials; correct?

A. Yes, and I have reviewed it.

Q. Okay. So tell us about the defendant's behavior and how it was affected by the extreme mental or emotional disturbance that evening.

A. I believe that Mr. Parker has a neuropsychological impairment. That impairment, particularly in stressful situations, impacts his reasoning and his judgment and his capacity to understand the long-term consequences of his immediate behavior, and to that extent I believe that that is extreme mental or emotional circumstances. I can't point to specific testimony from anyone, but I don't believe that there were any experts there to assess that behavior either.

Q. Dr. Crown, how does that mental or emotional disturbance affect the ruse that the defendant used to gain access to the manager of Pizza Hut?

A. I don't know what effect that has.

Q. Do you know what ruse I'm speaking of?

A. I know that there was a ruse, but I don't know specifically.

Q. What is your understanding of that.

A. I don't recall, it's been some time since I've reviewed this, well over a month.

Q. Then if I refresh your memory, do you recall that the defendant came into the Pizza Hut with no mask on his face, brandishing neither of the two guns that he had, went to the cashier and gave her a story that he

had been calling the Pizza Hut for over three hours and no one answered the phone and he wanted to complain to the manager?

A. Yes, I'm refreshed.

Q. How does that exhibit the mitigating circumstance that you've just testified to?

A. That, taken in isolation, doesn't.

Q. What did the defendant do next after the cashier pointed out the manager?

A. I don't recall the sequence.

Q. When did he brandish the weapon?

A. Again, I don't recall the sequence.

...

Q. So since you've been qualified as an expert here today in the field of forensic psychology and neuropsychology, please tell us the defendant's actions at the time he committed these crimes and how they apply to the statutory mitigators that you have opined.

A. The action in itself is irrelevant to my analysis. My analysis is based on my assignment of determining whether Mr. Parker had a brain injury, or has a neuropsychological impairment it is my opinion that his brain capacity, his ability to reason and to engage judgment were impaired and are impaired,29 and as a result of that although there may be a recording of a sequence set of acts, that behavior is simply a set of circumstances and that his underlying neuropsychological impairment is what I assessed. ...

Q. Dr. Crown, isn't the purpose of your testimony to provide a nexus between the defendant's mental functioning and his behavior at the time he committed these crimes?

A. No. My testimony was based on two requests. The first request I received, my first assignment, was to

test this gentleman's IQ. My second assignment was to determine whether he was brain damaged. Those were my two assignments.

Q. So, Dr. Crown, you scored the IQ test wrong, and you don't know the facts of this case; correct?

A. **I made errors in scoring**, apparently, that wouldn't have altered the overall outcome. And, **no, my assignment wasn't to know the details of this case specifically**,[35] that's more the work of a clinical psychologist or psychiatrist.

(2-PCR.8 661-66) (emphasis supplied). As the court concluded, nothing in Parker's presentation proved mitigation which would result in a life sentence.

In summary, Parker's evidentiary hearing evidence consisted of discredited opinions of two mental health experts, Dr. Crown and Dr. Pickar, as each relied on the mis-scored, underscored, tests given by Dr. Crown. Parker added no new, substantial evidence regarding his childhood which was undiscovered in 1990. Together, the evidentiary hearing and trial records show that essentially the same information was developed by trial counsel during their investigation and presented through Parker's

[35] Yet, Dr. Crown was opining that Parker was under the influence of extreme mental or emotional disturbance at the time of the crime, but could recall nothing in the facts of the criminal episode which indicated a mental or emotional disturbance. Even if Parker had a brain injury, it played no role in the criminal conduct, and mitigation has not been shown. Given this expert's inability to identify anything at the time of the crime which would establish the mitigator, his testimony does not support Parker's claim of ineffective assistance of counsel. Moreover, Parker's actions were so well planned that they completely under cut any claim of extreme mental or emotional disturbance.

mother, Finkelstein, Moore, and Dr. Caddy as was gathered by Parker during his nearly ten-year postconviction litigation. This is not a case where counsel did nothing or their representation was "woefully inadequate." Miller v. State, 2006 WL 724581, *4 (Fla. 2006) is instructive and supports the denial of relief. In Miller, this Court opined:

> We conclude that the trial court did not err in rejecting Miller's argument that trial counsel Eler did not perform a proper investigation since the record supports a conclusion that Eler researched all reasonable areas of mitigation, including the work and research of prior defense counsel. The record reflects that this is clearly not a case in which trial counsel "never attempted to meaningfully investigate mitigation," ...or where counsel's investigation was "woefully inadequate." ... Here, the record demonstrates that counsel was aware of Miller's childhood, his substance abuse problems, and his mental health issues. Under these circumstances we find no error in the trial court's essential conclusion that trial counsel performed a reasonably diligent investigation. *See Rompilla v. Beard* ... ("[T]he duty to investigate does not force defense lawyers to scour the globe on the off-chance something will turn up; reasonably diligent counsel may draw a line when they have good reason to think further investigation would be a waste.") ...

Booras and Hitchcock were well aware of the need to investigate and present mitigation. Merely because they relied upon prior counsel's five month investigation, which included sending investigators to talk to family members and others who knew Parker, and having an investigator travel to Jacksonville to do further research into Parker's background, is not "doing nothing" as decried in Wiggins and Rompilla, nor is it so

inadequate as found in Hildwin v. Dugger, 654 So.2d 107, 109 (Fla. 1995). Parker's main complaint is counsel's decision to use articulate investigators to paint an overall picture of his life, instead of presenting the lay witnesses themselves and let them be subject to cross-examination. See Stewart v. State, 801 So.2d 59, 65 (Fla. 2001) (finding "[c]laims expressing mere disagreement with trial counsel's strategy are insufficient."); Occhicone v. State, 768 So.2d 1037, 1048 (Fla. 2000) (same); Cherry, 659 So.2d at 1069 (same); Jennings v. State, 583 So.2d 316, 321 (Fla. 1991) (finding "It is not negligent to fail to call everyone who may have information about an event. Once counsel puts on evidence sufficient, if believed by the jury, to establish his point, he need not call every witness whose testimony might bolster his position."). Cf. Breedlove v. State, 692 So.2d 874, 877-78 (Fla. 1997) (holding counsel was not ineffective for failing to present testimony of friends and family members that would have been subject to cross-examination). What Booras and Hitchcock presented was a professionally compiled case for mitigation. As found by the trial court, Parker has not presented anything that went completely undiscovered or would undermine the sentence.

The presentation of cumulative or richer evidence of Parker’s childhood does not undercut counsel’s investigation. See Gudinas v. State, 816 So.2d 1095, 1106 (Fla. 2002) (finding

counsel not ineffective for not presenting evidence cumulative to prior mitigation).[36] Furthermore, no prejudice was shown as Dr. Caddy would not change his original opinion, even having reviewed Parker's slightly "richer" collateral investigation information. Although Parker's doctors suggested two statutory mental mitigators apply, their opinions are not credible and were rejected properly.[37] Parker has failed to meet his burden under Strickland.

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[36] Cherry v. State, 781 So.2d 1040, 1051 (Fla. 2000) (opining "even if trial counsel should have presented witnesses to testify about Cherry's abusive background, most of the testimony now offered by Cherry is cumulative.... Although witnesses provided specific instances of abuse, such evidence merely would have lent further support to the conclusion that Cherry was abused by his father, a fact already known to the jury."); Occhicone, 768 So.2d at 1049-50 (affirming denial of relief on ineffectiveness claim for not presenting other evidence of intoxication because information was cumulative); Rutherford, 727 So.2d at 225 (same); Jennings v. State, 583 So.2d 316, 321 (Fla. 1991) (finding "It is not negligent to fail to call everyone who may have information about an event. Once counsel puts on evidence sufficient, if believed by the jury, to establish his point, he need not call every witness whose testimony might bolster his position.").

[37] First, they rest on improperly scored tests. Second, the experts are in conflict - some find both mitigators, while others barely find one; as outlined above, Parker's actions on the night of the crime belie the existence of either statutory mental mitigator. Third, the experts had limited understanding of the facts and had difficulty pointing to actions by Parker which supported the mitigators. Dr. Crown went so far as to admit his assignment "**wasn't to know the details of this case**" (2-PCR.8 666). Forth, merely because a defendant, years after his conviction, is able to obtain new experts to give a more favorable opinion, does not detract from the original expert's opinion nor establish ineffective assistance. Asay, 769 So.2d at 988 (reasoning first expert's evaluation is not less competent merely upon production of conflicting evaluation by new expert).

Given the conflicting nature of the new mental helath testimony, and limited offering of new mitigation, Parker's citation to Rose v. State, 675 So.2d 567 (Fla. 1996) is misplaced. There penalty phase counsel failed entirely to investgate and offer such evidence. From the above, it is clear Parker's attorney did not commit such an error. Booras obtained records and hired an experienced mental health expert who evaluated Parker and testified at trial.[38] Similarly, Parker's reliance on Orme v. State, 896 So.2d 725 (Fla. 2005) does not further his position. As noted above, and reiterated below, Parker has not shown that counsel missed any major mental health or other mitigation. Counsel, either individually or thorough the prior counsel's investigators, obtained records, spoke to family/friends, and utilized a mental health doctor to evaluate and present testimony along with lay witnesses. Here, Parker

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[38] Likewise, Parker's reliance upon Hannon v. State, 941 So.2d 1109, 1165 (Fla. 2006); Midddleton v. Dugger, 849 F.2d 491, 495 (11th Cir. 1998) is misplaced. Ake v. Oklahoma, 470 U.S. 68, 83 (1985) merely requires that a defendant have access to a "competent psychiatrist [or other mental health professional] who will conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense." This was afforded Parker through counsel's hiring of Dr. Caddy and supplying him with information and/or access to information for his evaluation of Parker. Further, while statutory mental mitigation is a weighty factor when well supported by the evidence, such is not the case here. Not only do Parker's new experts disagree on the mitigation, but Parker's actions on the night of the crime refute any claim of statutory mental mitigation. Given that counsel considered and presented evidence of mental mitigation available, Parker has not shown a constitutional deficiency under either Strickland or Ake.

has not established any overlooked mental health or other mitigation. He has not carried his burden, thus, relief was denied properly.

However, even if this Court were to find the court should have found deficiency and the new mitigation offered, Parker cannot show prejudice. At trial, this Court affirmed the four aggravators found to apply: (1) prior violent felony, (2) felony murder, (3) great risk of death to others (Parker shot at 23 people and uncounted by-standers), and (4) avoid arrest and agreed that the mitigation offered was not proven (ROA 2026-29, 2325, 2383-92, 2862, 2887-95); Parker, 641 So.2d at 377. The non-statutory mitigators Parker now suggests should have been considered all rest on evidence previously presented to this Court and the jury in the penalty phase.

Parker's "new" mitigators are: (1) Mother's schizophrenia, bizarre behavior, and abuse/neglect of Parker (IB 38-40); (2) suffering physical abuse at home (IB 39-40); (3) placement in multiple foster homes (IB 40-41, 43); (4) witnesses mother being beaten by boyfriends and sister beaten by mother (IB 39-40); (5) physically and/or sexually abused in foster homes, by care-givers, other children, or police causing Parker to flee foster homes and sleep on streets (IB 40-44); (6) low intellectual

functioning, neurological deficits, and brain impairments[39] (IB 43); and (7) abandoned by father (IB 43). Parker's mother, Finkelstein,[40] and Moore each reported on items (1) (2), (3), (5) and (7) (ROA 2185-95, 2202-16, 2276-81). Dr. Caddy averred to items: (1), (2), (3), (5), (6), and (7). (ROA 2233-71). Borras argued for mitigation[41] based on the above. The only item not noted as part of Parker's dysfunctional/abusive childhood was

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[39] This alleged mitigator will be discussed below when addressing other mental health mitigation claims.

[40] Parker appears to have abandoned his trial and postconviction relief motion claims of alcohol intoxication in support of the statutory and the non-statutory mitigators even though such were his theme of mitigation up until the present time.

[41] Booras argued to the jury, "Parker never had a chance" and while Parker's "early childhood, his abuse, his neglect, his personal alcohol abuse" did not give him the right to kill, these factors had to be taken into consideration regarding the ultimate sentence. (ROA 2305-06). The jury was asked to consider that Parker's father left him when he was about three months old, that his mother suffered mental breakdowns since Parker was six years old and he was "bounced from foster home to foster home, to his mother, back to the foster home, HRS, going to different schools and never having a stable family life (referencing mother's schizophrenia). (ROA 2306-07). Booras also asked the sentencers to consider: (1) the co-defendant's 15 year sentence; (2) Parker's early life and background - emotionally abused as a child; (3) emotionally disturbed as a child - unstable early life; (4) Parker was beaten; (5) he was alienated; (6) people Parker met on the street abused him (referencing sexual abuse); (7) Parker's father rejected him/Parker had no father image - father did not come to Parker's trial; (8) Parker had no family image; (9) Parker confessed to the robberies; (10) the "affect of alcohol" on Parker's actions the night of the crime; (1) Parker's alcohol abuse problems throughout his life; (12) Parker's ability for rehabilitation; (13) Parker's lack of upbringing; and (14) Parker's lack of a childhood. (ROA 2313-17).

that he was beaten by his mother and her boyfriends, yet the jury knew Parker was beaten by various foster parents, other adults, and peers. The fact his mother and her boyfriends may have hit Parker would add little to the fact that he claimed everyone else in his life beat him. The overall tenor of Parker's life was that he had a traumatic upbringing, and that was placed before the sentencing body and rejected. All of the other factors were considered by the sentencing court, Judge Moe, and found not supported. Parker, 641 So.2d at 377. Parker offered nothing in the evidentiary hearing which caused the court, again Judge Moe, to alter his conclusion with regard to Parker's non-statutory mitigation arising from his childhood.

Parker claims this Court should find proven the statutory mitigators of: (1) extreme mental or emotional distress at the time of the murder and (2) ability to appreciate his conduct or to conform his conduct to the requirements of the law was substantially impaired and the non-statutory mitigator of (3) borderline intellectual functioning. For the reasons noted above, lack of credibility of the experts and opinions not supported by the evidence, these factors were denied properly, but even if they should have been found by counsel, no prejudice has been shown. Parker’s criminal history and facts of this murder establish four agravators have been proven. Such mitigation does not undermine confidence in the death sentence

imposed. Arbelaez v. State, 898 So.2d 25 (Fla. 2005) (affirming denial of collateral relief on grounds that new mitigation did not establish prejudice under Strickland); Lawrence v. State, 698 So.2d 1219 (Fla. 1997) (finding sentence proportional based on three strong aggravators weighed against five non-statutory mitigators of learning disability, low IQ, deprived childhood, influence of alcohol, and lack of violent history); Spencer v. State, 691 So.2d 1062 (Fla. 1996) (finding sentence proportional based on aggravation of HAC and prior conviction for a violent felony, balanced against two mental health mitigators, and a number of non-statutory mitigators including drug and alcohol abuse, paranoid personality disorder, sexual abuse by his father, honorable military record, good employment record, and the ability to function in a structured environment); Pope v. State, 679 So.2d 710 (Fla. 1996) (holding death proportionate where two aggravating factors, murder committed for pecuniary gain and prior violent felony, outweighed two statutory mitigating circumstances, commission while under influence of extreme mental or emotional disturbance and impaired capacity to appreciate criminality of conduct, and several nonstatutory mitigating circumstances); Heath v. State, 648 So.2d 660 (Fla. 1994) (affirming defendant's death sentence based on presence of two aggravating factors of prior violent felony and murder committed during course of robbery, despite the existence of the

statutory mitigator of extreme mental or emotional disturbance). Based on the above analysis relief was denied properly and that decision should be affirmed.

ISSUE II

PARKER FAILED TO PROVE GUILT PHASE COUNSEL WAS INEFFECITVE FOR NOT OBTAINING EXPERTS IN PHOTOGRAPHY AND TOOL MARKING (restated)

Parker submits that guilt phase counsel was ineffective for not securing photography and tool marking experts to refute the origin of the fatal bullet. The trial court rejected this claim finding that Parker did not present such experts in his postconviction evidentiary hearing, thus, neither deficiency nor prejudice were shown. The court's factual findings are supported by the record and the proper law was applied. The denial of relief should be affirmed.

The standard of review for ineffectiveness claims following an evidentiary hearing is *de novo*, with deference given the court's factual findings. Freeman, 858 So.2d at 323. To prevail on an ineffectiveness claim, the defendant must prove (1) counsel's representation fell below an objective standard of reasonableness, and (2) but for the deficiency, there is a reasonable probability the result of the proceeding would have been different. Strickland, 466 U.S. 688-89.

In rejecting Parker's claim, the court concluded:

> The second issue under consideration is whether

or not Parkers (sic) trial counsel or his defense team was ineffective because it failed to present expert testimony on the color of the bullet in a photograph or the meaning of certain markings on a bullet in a photograph.

From the beginning of this case in 1989, the sole credible issue as to the guilt or the innocence of the defendant has been the origin of the bullet that killed the victim, William Nicholson.

The issue is not what color was a bullet in a photograph, but what color bullet actually killed the victim.

Much evidence on this issue was presented to the jury at the trial. The evidence was introduced, examined, cross examined, represented, argued, reargued and finally determined by the jury. The defense also argued theories of evidence tampering, conspiracies, collusion and cover up on the issue of whose bullet killed the victim. The jury rejected these arguments as well.

Again, at the end of the trial, the issue was not what color was a bullet in a photograph, but what bullet came out of the victim's body, and was placed in evidence for the jury to examine, re examine (sic), compare, discuss and evaluate.

It must be pointed out that in the post conviction evidentiary hearing, the defense could not produce one witness who testified any differently than the testimony that was presented at the trial. Therefore, the Court must come to the conclusion that the defense could not and therefore did not find one person on earth that will render an opinion that the bullet that the State and jury said killed the victim was not in fact the bullet that not only killed the victim, but also the same bullet that came out of the victims (sic) body and was presented as evidence in court.

On the issue of whether or not the defense could have or should have called a photography expert, even Mr. Hitchcock forthrightly admitted that it was not the color of the bullet as depicted in the photographs

> that mattered, but rather the color of the bullet removed from the victim and placed in evidence (TR 2/16/06-114).
>
> Again, nothing was presented at the evidentiary hearing to show that any photography expert could refute the trial testimony of Dr. Bell and Detective Cerat that the bullet was in fact the fatal bullet taken from the victim at his autopsy.
>
> Therefore Parker has not proved any deficiency on the part of his trial counsel as to the issue, nor the required prejudice required by Strickland.
>
> Accordingly, relief is denied on the issue of whether or not Parker received inadequate representation of counsel at trial for his failure to provide expert testimony on photography.
>
> In conclusion, it must be noted that although the body of this opinion does not contain many separate and distinct references to pages in the transcript of the trial or other post trial pleadings or proceedings, both the State and the Defendants (sic) written closing arguments do contain references to the record which supports this courts (sic) findings of fact and conclusions of law. Also, most of the issues raised in post conviction relief were discussed and rejected in the Florida Supreme Courts (sic) opinion affirming the defendant's conviction and sentence.
>
> The integrity of the trial process in this case remains intact. The defendant has failed to prove he is entitled to post conviction relief. The Motion is therefore denied.

(2-PCR.2 352-54)

As the trial court concluded, that from the outset of this case in 1989, the sole issue has been the origin of the fatal bullet. No matter the number of color photographs of different hues, variations in exposure, and intensity of light sources, the result is the same, the bullet removed from the William

Nicholson's body was fired from Parker’s gun. This is based not on the photographic documentation, which Hitchcock ably revealed to the jury could be manipulated, but on the testimony of Dr. Bell, and Detective Cerat. Both were witnesses to the autopsy and testified that the bullet removed from Nicholson, was the bullet placed into evidence, and displayed to the jury. The jury and sentencing body were able to review the color and damage to the bullet, compare it to other bullets from Parker's gun and the photograph of the bullet, while still in Nicholson's bone. That is the unassailable evidence of Parker’s guilt. Whether or not tool marking or photography experts were called in this case does not, and cannot, contradict the fact that the fatal bullet was recovered, it was copper in color, and was placed before the jury. While Hitchcock, as a good defense counsel, made the most of state witnesses’ errors in over-exposing and/or initially mis-identifying the bullet, even Hitchcock, in the end, admitted that the color photograph was not the issue, but the actual bullet (State’s Trial Exhibit 121) placed in evidence. Nothing more mattered and Parker has not produced an expert in either field who countered that evidence.

In fact, Parker presented no tool marking expert here. As such, he has waived this claim by failing to present evidence, and likewise failed to carry his burden under Strickland of showing deficiency and prejudice arising from trail counsel's

failure to present a tool marking expert. See Gore v. State, 846 So.2d 461, 469-70 (Fla. 2003) (holding, in part, defendant failed to prove ineffectiveness claim by failing to present evidence from witnesses he claimed would be helpful).[42] The court properly rejected this claim and denied relief.

Although Parker failed to present any tool marking expert for the evidentiary hearing to establish deficiency for not obtaining such expert for trial, the record reflects Hitchcock retained the services of Ed Wittacker ("Wittacker"), a ballistics and tool marking expert, but did not present him at trial. As such, Hitchcock did exactly what Parker complains he should have done, i.e., obtained a tool marking expert, even though counsel could not recall why he did not use the expert.[43]

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[42] See Holland v. State, 916 So.2d 750, 757 (Fla. 2005); Rivera v. State, 717 So.2d 477, 486 (Fla. 1998)(holding ineffectiveness had not been proven where mental health experts **did not** testify in support of allegations, thus, finding there was no evidence to support claim); Cherry v. State, 781 So.2d 1040 (Fla. 2000)(noting that if the record reflected there were no mitigators that existed to be discovered by a lawyer conducting reasonable investigation, defendant would be hard pressed to demonstrate lawyer's default made any difference).

[43] Counsel's failure to recall his strategy for not presenting Wittacker should not be held against him. With respect to performance under Strickland v. Washington, 466 U.S. 668, 689 (1984), "judicial scrutiny must be highly deferential;" "every effort" must "be made to eliminate the distorting effects of hindsight," "reconstruct the circumstances of counsel's challenged conduct," and "evaluate the conduct from counsel's perspective at the time." See Davis v. State, 875 So.2d 359, 365 (Fla. 2003); Chandler v. U.S., 218 F.3d 1305, 1313 n.12 (11th Cir. 2000). "The test for ineffectiveness is not whether

However, logic dictates Hitchcock did not call his tool marking expert because Wittacker had nothing favorable to report and Hitchcock was preserving his ability to have final closing argument which was his practice.[44] On these same grounds, the court reasonably concluded that a tool marking expert could not refute the State's claim that the bullet in evidence was the fatal bullet when postconviction counsel failed to produce such an expert.[45] Hence, as the court found below, Parker has not carried his burden of proving deficiency or prejudiced under Strickland arising from counsel's failure to present a tool

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counsel could have done more; perfection is not required." Id., at 1313 n. 12. "[A] court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Strickland, 466 U.S. at 689.

[44] Hitchcock had forwarded to Wittacker the ballistic reports and any new evidence which was disclosed. The record shows Wittacker worked with Hitchcock up until two weeks before trial. It is about this time that Dr. Bell disclosed his revised forensic findings regarding the change in the color and apparent cut in the fatal bullet. Moreover, the defense theory was that the bullets were switched and regardless of the pictures, the defense was that the bullet put in evidence was not the silver one seen originally by Dr. Bell. Also, Hitchcock testified, and others confirmed that his strategy regarding calling defense witnesses was not to give up the "sandwich" in closing argument; he believed that the burden rested with the State to prove its case. (2-PCR.3 52-64, 69, 106-11; 2-PCR.5 303-04, 394-95).

[45] Parker failed to present a tool marking expert at the evidentiary hearing to refute the testimony of Thomas Garland and Dr. Bessant-Matthews, who testified that the bullet in evidence (State's Trial Exhibit 121) was the bullet pictured in the victim's pelvic bone (State's Trial Exhibits 122, 126, 127, and 128) (ROA 1568-69, 1612, 1638-39, 1794-94, 1798, 2114, 2120, 2140).

marking expert, as Parker has not shown that there was a tool marking expert, who would contradict the State's evidence. Confidence in the verdict has not been undermined.

Also, the record supports the rejection of Parker's claim of ineffectiveness arising from the failure to call a photography expert. On the first day of trial, defense counsel sought to dismiss the case, suppress the bullet evidence due to the medical examiner's change in testimony, and/or to recuse the prosecutor for allegedly suborning the medical examiner's testimony. The motions were denied (ROA.xxx 375-78).[46]

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[46] Hitchcock argued for case dismissal, suppression of evidence, and recusal of the State Attorney.

> MR. HITCHCOCK: ...This is a Motion to Dismiss and/or Motion to Suppress. ... The week before, I took a deposition of the medical examiner in this case. I was informed throughout this case all along that there was a silver bullet in this case, and I was relying on that in preparation for this case. I then come to find out that the medical examiner had changed his testimony, ... Oh, and prior that he had never nicked the bullet with his saw while it was in this supposed victim, and that made sense. ... Then I find out that he's changed his story. Now he says he nicked the bullet, and now he says that it was a copper bullet not a silver bullet. And I asked him why this change of heart, why your change in testimony, and he said because I received a few calls from Mr. Satz. I think that in itself is highly improper. I would move to dismiss the entire case based on the interference by the prosecution with a witness to do a 180 degree turn in his testimony....
>
> THE COURT: What says the State?

Additionally, the State proffered the testimony of Dr. Bell and Detective Cerat, which established the errors committed by Dr. Bell, the discovery of such errors, and the establishment of the chain of custody of the fatal bullet.[47]

MR. SATZ: Your Honor, first I am outraged by those allegations. ... there's a photograph of the bullet that was removed from the deceased taken by Deputy Cerat at the time of the autopsy that ... indicates it is a copper color bullet with a cut in it. There's also a slide that was taken by Dr. Bell himself the time he removed the bullet ... that I called Dr. Bell and I said, Dr. Bell, do you remember what color the bullet was and what it looks like.... He called me back and indicated the bullet was copper color.

THE COURT: The Motion to Dismiss is denied.

...

MR. HITCHCOCK: Judge, then there's a motion to recuse the prosecutor.... What I am suggesting is perjury is coming forth as a result of the phone call. ... What I am saying is that this guy maintained all along one thing, and now on the eve of trial has changed his mind. ...and I would suggest that it's as a result of the pressure - whether Mr. Satz intended it or not - the pressure felt on Dr. Bell as a result of the phone call....

THE COURT: The motion to disqualify the prosecution is denied.

[47] At the proffer, Dr. Bell testified that at 10:00 a.m on April 23, 1989, he conducted Nicholson's autopsy, during which he removed a single projectile from the victim's pelvic bone. Dr. Bell identified the photograph of the bone and bullet removed from Nicholson, and noted that after removal, the projectile was washed, a slide photograph taken and the bullet was put in an envelope, which he sealed, initialed, and handed to Detective Cerat ("Cerat"). Later, Dr. Bell prepared his report describing the projectile "as a large caliber silver colored bullet recovered with very little deformation." He

In spite of the denial of the defense motions, Hitchcock, a professional photographer, as well as a seasoned criminal defense counsel, competently conveyed to the jury, through his thorough and extensive cross-examination of Dr. Bell and Detective Cerat, that the color of objects depicted in color photographs may be altered depending upon many factors. Even

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described it in similar terms during his December 19, 1989 deposition taken by Hitchcock. Dr. Bell explained that a few weeks before the hearing, Mr. Satz called to ask that he look at the photograph (slide) and project it. Upon doing this, "it became obvious that I [Dr. Bell] had incorrectly described the bullet in both my autopsy report and the ... first deposition", "there was a cut mark in the middle of the bullet which I overlooked, and the color of the bullet was incorrect as well." Dr. Bell testified the cut and color were visible in the photograph he took and: "[y]ou could see the shadow of the cut, and you can make out around the outline of the bullet the gold color. But see, my photo is a little bit more overexposed, it's more lighter (sic), and that's why when I looked at it like this at the deposition, it still looked silver in color." However, when projected, the visible color was gold. No one suggested he change his testimony - only that Dr. Bell project the bullet, report the color, and describe what he saw. After the telephone conversation, Dr. Bell accompanied Mr. Satz to the crime lab where Dr. Bell saw his initials on the envelope, which contained the bullet he recognized as the gold bullet with a cut in it. There was no doubt in Dr. Bell's mind that the bullet he removed from Nicholson was the bullet in the photograph. (ROA 535-41, 543-44). During Detective Cerat's ("Cerat") proffer, he averred he attended the autopsy, took photographs of it, and identified the bullet collected from Nicholson. Cerat witnessed the bullet being removed from the body, after which he washed it, placed it on top of the envelope, and took a photograph. The bullet was yellow, and was cut, put in an envelope, sealed and initialed by Dr. Bell, and submitted to the lab. In court, Cerat opened the envelope, compared it to the projectile in the photograph, and confirmed they were the same. The State noted there were so many different seals on the envelope due in part to the fact Hitchcock and his expert, Whitaker, had viewed the evidence on at least two occasions. (ROA 548-49, 552-53, 559-60).

Hitchcock forthrightly admitted that it was not the color of the bullet as depicted in the photographs that mattered, but rather the color of the bullet removed from the victim and placed into evidence. (2-PCR.3 2/16/06 114). Nothing was presented at the hearing to show that a photography expert could refute the testimony of Dr. Bell and Detective Cerat that the bullet in evidence was the fatal bullet.[48]

[48] At trial, Dr. Bell explained the victim died from a single gunshot wound fired from a distance of two to twenty-four inches. After removing the bullet, he washed and photographed it, placed it in an evidence envelope, and initialed the envelope. He made an in court identification of the bullet and envelope, explaining the photographic slide taken by him of the bullet was overexposed, but reflected that the bullet extracted from the victim was copper in color with a small cut. He avowed the State's photos depicted the fatal bullet. While he admitted describing the bullet in his autopsy report and initial deposition, as silver with very little deformation, upon review of the slide negative, he concluded the bullet was copper in color with a cut caused when removing it from the victim (ROA 1623-24, 1631-32, 1635-43, 1645-46). Detective Cerat ("Cerat") was at the autopsy and testified he photographed the copper bullet removed from the victim (ROA 1560-64). Firearms examiner, Patrick Garland, testified Parker's gun held 33 cartridges, was recovered with 20 copper-jacketed rounds, and the shell casings collected from the scenes were fired from that gun. Over defense objection, he testified Cerat's photo accurately depicted the fatal bullet (ROA 1704-54, 1764-70, 1776-86, 1799-07). Moreover, during the penalty phase, further corroboration for the source of the fatal bullet was developed by Dr. Besant-Matthews and Special Agent Richards of the Federal Bureau of Investigations. Dr. Besant-Matthews testified that the bullet pictured in the victim's ilium, pelvic bone, was in fact the gold bullet in evidence. Mr. Richards averred that the projectile pictured in the bone was the same bullet put into evidence under State's Exhibit 121. (ROA 2116-30, 2139-41). As such, even though collateral counsel did not present a tool marking expert, there is record evidence from a forensic

At the evidentiary hearing, Hitchcock explained that the defense theory of the case was that there was a "missing silver bullet"; that the silver bullet originally discussed by Dr. Bell was switched with a bullet from Parker's gun.[49] **However, Hitchcock admitted that the color and the photographs of the bullet were really not the issue, but rather the bullet itself was**. (2-PCR.3 114). In his opening statement in the guilt phase, Hitchcock told the jury that when Dr. Bell made his observation of the bullet's color and deformation, Dr. Bell was looking at the bullet, so "to heck with what the slide shows." Hitchcock also admitted at the evidentiary hearing that he cross-examined Detective Cerat, who held himself out as being somewhat experienced in photography, and pointed out his errors and/or areas where manipulation of the color photograph could

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photography expert that the fatal bullet, as depicted in Nicholson's bone, came from Parker's gun.

[49] The record shows that the issue of the origin and authenticity of the bullet removed from the victim and placed into evidence was hotly contested. It was part of defense counsel's opening and closing arguments as well as the subject of motions to suppress and sharp questioning of State witnesses. The jury was fully advised of the respective arguments and it became a question for the jury as to whether the photographs admitted into evidence depicted the same bullet. In particular, Dr. Bell and Detective Cerat explained that the bullet removed from the Victim was "gold" and/or "yellow" in color, that any description otherwise was error, and the bullet in evidence was the one removed from the victim (ROA 1559-64, 1635-46, 1667, 1689).

have occurred.[50] (2-PCR.3 114-20). From the cross-examination, the jury received evidence supporting the defense theory of evidence tampering and manipulation of the exposure to alter a photograph's color to make a silver bullet look yellow, by showing that the police could manipulate the light source and color development of a photograph. This was presented to the jury through Hitchcock's[51] expert cross-examination, while still preserving the defense's opportunity and strategy to be first

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[50] Hitchcock was able to get Cerat to admit (1) that any given print may have many color ranges in it - sometimes too red, sometime with a yellow cast; (2) there was no stippling around the wound (tending to show the gun was fired from a farther distance that Dr. Bell offered; (3) that enlarging a photograph from a negative may cause changes in the degree of color - color shifts, and adjustments can be made to change the color; (4) that reflective surfaces like metals cause a photographer concern, and although he could have made the light source diffuse to reduce the problem with reflection, Cerat failed to do so; (5)that Cerat could not recall where he had washed the bullet; (6) that Cerat, although at the autopsy and watching the removal of the bullet merely thought it came from a vertebrae (although other testimony showed it came from the sacrum/pelvic area); (7) that the difference between two prints from the same negative were caused by different exposures and color development - the printer used different amount of magenta and cyan when developing the different prints; and (8) had he wanted, Cerat could have taken the negative and a known color sample to a Kodak laboratory and had the color corrected in the prints to match the original natural colors of all objects depicted. (ROA 1578-79, 1585, 1596-160-09).

[51] As the record reflects, Hitchcock is an expert/professional photographer of national and international renown. He has gained recognition for his work in photography by being one of 15 or 16 people employed by Playboy to photograph its models. Hitchcock has been doing this type of work since he was 19-years old. Parker's expert, Wyman, recognized Hitchcock's reputation, stating Hitchcock was a very long-term glamour photographer with a "world-renowned" reputation (2-PCR.7 630-31).

and last to speak to the jury. A review of the trial and collateral hearing records shows Hitchcock rendered professionally reasonable representation, as the court found.

Furthermore, in spite of counsel's able, yet unsuccessful challenge to the photographic evidence, Parker has not come forth with any evidence tending to show that an expert would have been able to bring out more, or explain more to the jury. Parker's new photography expert, Wyman, offered nothing that was not already before the jury. Wyman noted in part that: (1) the photograph of the bullet in the Victim's bone (State's Exhibit 115 at trial) was over exposed due to the reflective nature of the metallic bullet and flash-back from over-lighting the subject; (2) over-exposure could mask the color of the bullet; and (3) the color could be corrected if a known color source were given to the printer (2-PCR.7 616-21). As such, this expert has offered nothing that was not presented through Hitchcock's cross-examination of Cerat.[52] Yet, more important, Wyman admitted Cerat had testified to being at the autopsy, collecting the fatal bullet, and placing it into evidence.

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[52] See Adams v. Dugger, 816 F.2d 1493 (11th Cir. 1987) (holding that defense counsel was not ineffective for failing to obtain expert pathologist where defense counsel cross-examined State expert and argued weaknesses in testimony to jury in closing argument); State v. Bolender, 503 So.2d 1247, 1250 (Fla.1987) (holding that "[s]trategic decisions do not constitute ineffective assistance if alternative courses of action have been considered and rejected").

Wyman had no reason to disbelieve Cerat's testimony. As such, given the fact that the bullet in evidence (State's Trial Exhibit 121) was the bullet removed from the victim's body and it was copper in color, no prejudice can be shown from counsel's failure to hire and present a photography expert.[53]

The State's overwhelming evidence and unbroken, unchallenged chain of custody, along with Parker's failure to present any tool marking expert to refute the chain of custody, Parker, as the trial court concluded did not carry his burden under Strickland. Neither deficiency nor prejudice arising from

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[53] Of further proof that no prejudice has or can be shown by Parker regarding the bullet origin and color, the State points to the resolution of two direct appeal issues, Point II - Discovery Violations (State's tardiness in disclosing witnesses, grand jury report, photographic prints) and Point VII - Motion for New Trial (newly discovered eye-witness, Brent Kissenger). In resolving these issues, the Florida Supreme Court reasoned:

> Parker also argues that three discovery violations occurred.
>
> ...
>
> Third, Parker claims that the court erred by allowing into evidence photographs of the bullet removed from Nicholson that were different in coloring than the original prints. Detective Cerat attended the autopsy and took the photographs that yielded the original and subsequent prints and testified that, because of the flash, the bullet in the original prints appeared white in the middle and gold at the edges. Parker cross-examined Cerat extensively about photography. ... We hold that ... Parker has demonstrated no reversible error regarding this issue.

Parker v. State, 641 So.2d 369, 373-76 (Fla. 1994).

counsel's failure to present photography and tool marking experts to refute the State's case have been established. Relief was denied properly and this Court should affirm.

ISSUE III

PARKER RECEIVED A FAIR HEARING; THE COURT PROPERLY EXCLUDED WITNESSES AND DENIED THE MOTION TO RECUSE (restated)

It is Parker's position that his evidentiary hearing was unfair as the trial court: (A) improperly denied the defense motion to recuse; and (B) erred in excluding Detective Cerat, Dr. Bell, Dr. Wright, and State Attorney Michael Satz. Contrary to Parker's complaint, the trial court properly resolved the motion to disqualify, and correctly excluded the named witnesses as their testimony was not relevant to the Strickland claim remanded for an evidentiary hearing. This Court should affirm.

Sub-issue A – Recusal - Pursuant to Gore v. State, 32 Fla. L. Weekly S438 (Fla. July 5, 2007):

> A motion to disqualify is governed substantively by section 38.10, Florida Statutes (2005), and procedurally by Florida Rule of Judicial Administration 2.330. The rule provides that a motion to disqualify shall show that "the party fears that he or she will not receive a fair trial or hearing because of specifically described prejudice or bias of the judge" ... Fla. R. Jud. Admin. 2.330(d). The standard of review of a trial judge's determination on a motion to disqualify is *de novo*. *See Chamberlain v. State*, 881 So.2d 1087, 1097 (Fla. 2004), *cert. denied*, 544 U.S. 930, 125 S.Ct. 1669, 161 L.Ed.2d 495 (2005). Whether the motion is legally sufficient is a question of law. *See Barnhill v. State*, 834 So.2d 836, 843 (Fla. 2002). The standard for determining the legal

> sufficiency of a motion to disqualify is whether the facts alleged, which must be assumed to be true, would cause the movant to have a well-founded fear that he or she will not receive a fair trial at the hands of that judge. See Fla. R. Jud. Admin. 2.330(d)(1).

"[S]ubjective fears...are not 'reasonably sufficient' to justify a 'well-founded fear' of prejudice." Fischer v. Knuck, 497 So. 2d 240, 242 (Fla. 1986).

Here, Parker makes the incendiary claim of racial bias because the court refused to allow a death sentenced defendant to sit at counsel table, but permitted him to remain in the jury box and had counsel's table abut the jury box. Parker also claims that the court's alleged bias was evident because he was ordered to remain shackled, defense counsel was admonished not to lean over the railing of the jury box, and the court voiced concern because he did not know all of the parties approaching the defendant. These allegations

Judge Moe, assigned to the Circuit Civil Division and sitting in a "extremely" insecure civil courtroom, was presiding over Parker's capital postconviction case because he was the sentencing judge. At the outset of the first day of the postconviction evidentiary hearing, Parker, an inmate under a sentence of death, was placed in the jury box by the Broward Sheriff Office ("BSO") deputy assigned to his transportation/security. The deputy was ordered to sit in the jury box with Parker (2-PCR.3 8-10). It was agreed that

counsel’s table would be moved to the jury box so counsel and client could confer. Further, at defense counsel’s request, the issue of Parker’s wrist shackling was visited. It was the deputy’s request that the wrist shackles not be removed, because the waist chains then would be of no use, and it was BSO’s procedure to transport the defendant in such a manner. (2-PCR.3 8-9). Judge Moe agreed with BSO’s security procedures, but verified that such did not “fall over the line on something unconstitutional, lack of due process.” (2-PCR.3 9)

With that concern in mind, Judge Moe noted: “Obviously, you have the opportunity to confer with [Parker] in private, and of course, I urge you to do that. If he needs to write, give him a pencil and give him a pad. I know from seeing him as he is, now, and from prior experience, he can write with a pencil and a pad the way he is now.” Defense counsel replied: “I asked him if he would be able to do that and he did say he could do it, so, if I could give him a pen and paper, that’s okay.” (2-PCR.3 9-10). Additionally, the record was clarified that counsel’s table had been moved next to the jury box “so counsel should be able to confer easily with their client.” Judge Moe recognized: “The bottom line is, the defense has complete access to the defendant prisoner, and the sheriff is satisfied with the security arrangements in this extremely, let’s say, insecure courtroom setting.” (2-PCR.3 10).

On the third day of the evidentiary hearing, Judge Moe admonished defense counsel for leaning over the jury box railing. The following transpired:

THE COURT: Don't lean over that rail.

MS. COSTA: I'm sorry. It's just hard for me to hear him.

MS. KEFFER: Judge, I'm going to object.

THE COURT: I'll give you enough time, energy, space to talk to him all you want to. Don't lean over the railing, please.

MS. KEFFER: For purpose of the record, Judge, it is difficult for us to communicate with Mr. Parker being in the jury box.

THE COURT: That's why I said I will give you all the time, energy, space you need to talk to him. I'm adamant about that. Deputy, will you state your name for the record.

...

THE COURT: Well, I appreciate you keeping your eye on things, I'm watching you, I know that you have the security of everybody in your mind ... That doesn't mean that I consider the defendant an escape risk, or anything else, but there's people in here that I don't know that I know are connected to him that, let's say, security issues jump to my mind, and I'm going to protect everybody as much as I can.

MS. KEFFER: I understand that, your Honor. If you have any concerns, though, you mentioned people that are connected to him, the only person that I know of is my investigator that works for CCRC and has no personal connection to Mr. Parker whatsoever. So, as long as that's on the record...

THE COURT: Well, I'm not going to debate that, but I know when he came in he looked at him, smiled, and had enough eye contact for me to know that they're more

than just – let’s say they’re connected in some way, either professionally or personally.

MS. KEFFER: I just wanted it clear for the record.

THE COURT: Security is my main concern in here and I’m not going to back down from that.

MS. KEFFER: I respect what your Honor is saying. I just wanted it clear for the record that the person sitting directly behind me is my investigator from my office –

THE COURT: I know who he is.

MS. KEFFER: -- a state employee, that is a professional.

(2-PCR.7 531-33) At the conclusion of the Dr. Pickar’s cross-examination, the following took place:

THE COURT: All right. Being 10:00 o’clock, do you want to confer with the defendant before you have any redirect?

MS. KEFFER: Yes, your Honor. I believe [Parker] has written some notes. Am I allowed to take a note from the defendant?

THE COURT: Within reason, sure.

MS. KEFFER: I just probably need a couple of minutes.

...

MS. KEFFER: Am I allowed to step on the other side of the jury box? Otherwise, everybody else in the courtroom can hear.

THE COURT: No. He’s in the custody of the Sheriff of Broward County, and basically she’s going to make the rules. Obviously I don’t want you walking around with the gun, Deputy, I’m sure you know that.

THE ARMED DEPUTY: I’m sorry?

THE COURT: I said I don't want you walking around like the other deputies have been doing, walking right by him wearing a side arm. I make no apology for this, I'm concerned about security, and I'm concerned mostly about your security.

MS. KEFFER: Well your Honor, I'm not concerned with my security with my client, I have no question about that.

THE COURT: Well, I'll be concerned for you.

MS. KEFFER: And for the record, it's very difficult to communicate with him if I can't even step around the bar. To be able to talk quietly so that nobody else can hear is extremely difficult.

THE COURT: Nobody else is going to be listening to what you're saying.

MS. KEFFER: Well, I don't know that I believe that, your Honor.

THE COURT: Really? Who do you think is going to listen in on the conversation?

MS. KEFFER: I don't know what he has to say to me, your Honor.

MS. MCCANN: Your Honor, the State will leave the courtroom for ten minutes so that CCR can consult.

THE COURT: Do you really think they're going to listen in on the conversation between you and the defendant?

MS. KEFFER: I don't know what it is that my client wants to consult with me about. And, no, I don't want to take the risk that somebody will overhear something.

THE COURT: All right. At any rate, security at this time when I leave the courtroom is up to the Sheriff of Broward County through its deputies. You can talk to him, do whatever you have to to communicate, within the right of counsel.

(2-PCR.3 544-46). Following this, the State left the courtroom.

Subsequently, Parker filed a motion to recuse the trial court. (2-PCR.2 153-68). Prior to the beginning of testimony on the next hearing day, Judge Moe announced that he had read the motion and that it was legally insufficient. (2-PCR.8 637). Once the court had ruled, the State asked that the record reflect that the defense had moved the counsel table against the jury box. (2-PCR.8 638-39).

As this Court is well aware, Rule 2.160 (c)-(f) Florida Rules of Judicial Administration governs the resolution of this issue. While the purpose of the rule is "to ensure public confidence in the integrity of the judicial system," caution must be taken "to prevent the disqualification process from being abused for the purpose of judge-shopping, delay, or some other reason not related to providing for the fairness and impartiality of the proceeding." Livingston v. State, 441 So. 2d 1083, 1086 (Fla. 1983). See Correll v. State, 698 So.2d 522, 524 (Fla. 1997).

The pith of Parker's complaint was that he remained shackled during a postconviction evidentiary hearing, was not permitted to sit at counsel table, although the table was up against the jury box where he was sitting. He also complains that Judge Moe showed bias because he rebuked defense counsel when she leaned over the jury box railing, and voiced concern

for the security of the courtroom in an "extremely" insecure courtroom and because he did not know all the parties involved with Parker. Once it was explained, outside the courtroom, it is alleged Judge Moe offered the CCR investigator, Christopher Taylor, an apology for any confusion.

It is well settled that the trial court is responsible for the orderly functioning of the courtroom which includes security. Dignity, order, and decorum in the courtroom is essential to the proper administration of criminal justice. Illinois v. Allen, 397 U.S. 337, 343 (1970). Under proper circumstances, a trial court's duty to maintain courtroom safety and security outweighs the risk that the defendant's presumption of innocence may be impaired. Diaz v. State, 513 So.2d 1045, 1047 (Fla. 1987), cert. denied, 484 U.S. 1079 (1988). This Court has held that shackling is permissible to be used even during the guilt/innocent phase of trial in the sound discretion of the trial court when circumstances involving the security and safety of the proceeding warrant it. See Weaver v. State, 894 So.2d 178 (Fla. 2004); Bryant v. State, 785 So. 2d 422, 428 (Fla. 2001); Derrick v. State, 581 So. 2d 31, 35 (Fla. 1991); Correll v. Dugger, 558 So. 2d 422 (Fla. 1990); Diaz v. State, 513 So.2d 1045, 1047 (Fla.1987) Harrell v. Israel, 672 F.2d 632, 635-36 (7th Cir. 1992).

Parker was before the trial court on remand for a limited

evidentiary hearing on two claims of ineffective assistance of counsel. Not only were no jurors present, but the conviction and sentence were final, this court had denied collateral relief on all of Parker's other postconviction claims. Given this procedural history, no reasonable person would be in fear of not receiving a fair hearing merely because the court was concerned about security and did not have to take into account the possible innocence of the defendant nor the jury's perception.

The record reflects that from the outset, the trial court was concerned about security in his "extremely" insecure civil courtroom. He took steps to maintain that security, while noting and giving effect to Parker's due process rights to confer with counsel. The mere fact that the court would keep a death sentenced defendant in shackles or admonish counsel for compromising the courtroom security are not factors which would give a reasonable person a "well-founded fear that he or she will not receive a fair trial at the hands of that judge." Likewise, merely because in reciting his security concerns, Judge Moe pointed to a person to whom he had not been introduced, but who clearly had a "connection" to the defendant as a possible security risk in the "extremely" insecure civil courtroom, would not put a reasonable person in fear. "[S]ubjective fears...are not 'reasonably sufficient' to justify a 'well-founded fear' of prejudice." Fischer, 497 So.2d at 242.

Judge Moe, as is required under the rule, reviewed the motion for legal sufficiency and determined, without further comment, that the motion was insufficient. Such complied with the law and should be affirmed.

Sub-issue B – Parker maintains that it was error for the court to preclude the testimony of: (1) Detective Cerat ("Cerat"), (2) Dr. Michael Bell, (3) Dr. Ronald Wright, and (4) State Attorney Michael Satz on the grounds that such was irrelevant to the issue on remand, namely, counsel's ineffectiveness for not presenting experts in photography and tool marking.[54] Further, he claims that it was error for the court to grant the State's discovery motion and require Parker to proffer the relevancy of its witnesses before calling them. The trial court, contrary to Parker's position, exercised its discretion properly in making this evidentiary ruling.

"The standard applicable to a trial court's ruling on the admission of evidence is whether there has been an abuse of discretion. *See Zack v. State*, 911 So.2d 1190 (Fla. 2005). The

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[54] The State reincorporates its answer to Issue II above with particular emphasis on the fact that the testimony of Dr. Bell and Cerat as well as the argument and representations of Michael Satz during the trial were a matter of record. Further, no tool marking experts were called to refute what was depicted in the State's evidence, especially the photograph of the bullet while still in the Victim sacrum, was anything other than what was offered at trial. The issue was what defense counsel should have done in response to the evidence, not the re-litigation of the evidence as presented at trial.

trial court's ruling will not be disturbed on appeal absent a clear showing of abuse. *See Boyd v. State*, 910 So.2d 167 (Fla. 2005)." Schoenwetter v. State, 931 So.2d 857, 869 (Fla. 2006). See Dessaure v. State, 891 So.2d 455, 466 (Fla. 2004); Ray v. State, 755 So. 2d 604 (Fla. 2000; Cole v. State, 701 So.2d 845 (Fla. 1997). Discretion is abused only when the judicial action is arbitrary, fanciful, or unreasonable. Trease v. State, 768 So. 2d 1050, 1053, n. 2 (Fla. 2000), citing Huff v. State, 569 So. 2d 1247, 1249 (Fla. 1990).

Initially, it must be noted that this issue has not been preserved for appeal. While counsel objected to being required to proffer the testimony and to the exclusion of the witnesses (2-PCR.2 371, 382-85), such was insufficient for this Court to review on appeal. In order to properly preserve a claim of erroneously excluded testimony, there must be a proffer of that testimony. See Trease, 768 So.2d at 1054 (finding claim of error unpreserved based on party's failure to have proffered testimony); Finney v. State, 660 So.2d 674, 684 (Fla. 1995) (opining "Without a proffer it is impossible for the appellate court to determine whether the trial court's ruling was erroneous and if erroneous what effect the error may have had on the result"); Lucas v. State, 568 So.2d 18, 22 (Fla. 1990) (holding party's failure to proffer witness' excluded testimony renders claim of error for the exclusion unpreserved). First,

no proffers were offered for Dr. Wright or Mr. Satz. Second, in discussing Mr. Satz, postconviction counsel stated: "Michael Satz; he was the prosecutor of this case. At this point I do not anticipate calling him." Third, the proffers for Cerat and Dr. Bell were made in very general terms and did not set forth exactly what the witnesses would say or how their testimony would support the prejudice prong under Strickland as counsel alleged such testimony would support. (2-PCR.2 376-77).

All that counsel offered was:

> Robert Cerat; he was the BSO detective in this case that actually took several of the photographs which were in question at trial. The color of the photographs were in question. It goes to the ineffectiveness of counsel for failing to call a photography expert.
>
> Michael Bell was the medical examiner in this case. He also took photographs that were in question at trial. He would go to ineffective assistance of counsel for failing to retain an expert.

(2-PCR.2 376-77). Such does not outline what the witnesses would offer at trial. This matter should be deemed unpreserved. Finney, 660 So.2d at 684 (finding matter unpreserved - defendant never proffered testimony sought from witness and the substance of that testimony is not apparent from the record"). Other than offering that the witnesses would support the Strickland prejudice prong, Parker has not explained how they would show prejudice arising from counsel not obtaining experts.

With respect to the merits, here, the State was merely asking to have a proffer of the testimony the defense expected to elicit from the witnesses it realistically expected to call. Trial courts have broad discretion in the procedural conduct of trials. Rock v. State, 638 So.2d 933, 934 (Fla. 1994). It cannot be said that requiring a proffer of the expected testimony of defense witnesses where the case in on remand for a limited purpose, is an abuse of discretion. This especially is true where "[t]he trial court has broad discretion in determining the relevance of evidence and such determination will not be disturbed absent an abuse of discretion. Hardwick v. State, 521 So.2d 1071, 1073 (Fla.), cert. denied, 665 488 U.S. 871, 109 S.Ct. 185, 102 L.Ed.2d 154 (1988)." Heath v. State, 648 So.2d 660, 664-65 (Fla. 1994). Granting the State's request for a proffer merely assists with the orderly progress of the trial and such is well within the court's broad discretion on the conduct of the trial. Cf. Cherry v. State, 544 So.2d 184, 186 (Fla. 1989) (finding no abuse of discretion to require proffer of testimony and excluding same upon finding it was irrelevant).

Furthermore, given the limited remand on the claim of ineffective assistance for not obtaining experts in tool marking and photography, trial witnesses who established the discovery and chain of custody of the fatal bullet are irrelevant and beyond the scope of the remand. Scott v. State, 717 So.2d 908,

912-13 (Fla. 1998) (refusing to expand hearing to include claim of ineffective assistance where remand was to litigate Brady issue); Way v. State, 760 So.2d 903, 915-16 (Fla. 2000) (same). Parker has yet to identify what actions or statements by the excluded witnesses have any bearing on the professionalism of defense counsel's actions. Under Strickland, the focus is on counsel's actions and decision at trial, and whether such met the reasonable standard of professional representation. Likewise, Parker had to show that but for counsel's failure to obtain expert assistance, the result of the trial would have been different. Hence, either experts would have furthered Parker's defense or not. When asked what information the excluded witnesses could shed on the Strickland claim, Parker only offered that their testimony went to prejudice. Other than a broad, unsupported allegation, Parker has not shown that the excluded witnesses would shed any light on the Strickland issues. It was proper to find their testimony irrelevant.

Also, irrespective of the exclusion of these witnesses, the evidence is clear that Parker was unable to find experts in tool marking or photography who could refute the State's evidence. Parker has not shown entitlement to re-litigate his guilt phase defense of challenging the origin of the fatal bullet.[55] See

[55] The issue before the postconviction court was defense counsel's representation once it was determined that the fatal

Scott. That issue was decided at trial. As noted in Issue II, the jury was informed that the color of photographs could be manipulated, but to date, Parker has not brought forward any evidence that counsel should have offered to refute the fact that the bullet in the victim's sacrum came from Parker's gun. Parker had access to the evidence both pre-trial and during collateral litigation, yet, as the trial court found, has offered no evidence/experts to refute the State's case or calling into question trial counsel's decision not to call tool marking or photography experts. The finding that the excluded

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bullet, as photographed while still in the Victim's ilium, was in fact a copper bullet from Parker's machine pistol, and was placed into evidence. As this Court noted in its opinion on direct appeal: "Detective Cerat attended the autopsy and took the photographs that yielded the original and subsequent prints and testified that, because of the flash, the bullet in the original prints appeared white in the middle and gold at the edges. Parker cross-examined Cerat extensively about photography." Parker v. State, 641 So.2d 369, 374 (Fla. 1994). Further, the record reflects, Dr. Bell explained the victim died from a single gunshot wound fired from a distance of two to twenty-four inches. After removing the bullet, he washed and photographed it, placed it in an evidence envelope, and initialed the envelope. He made an in court identification of the bullet and envelope, explaining the slide evidence taken by him was overexposed, but reflected the bullet extracted from the victim was copper in color with a small cut. He avowed the State's photos depicted the fatal bullet. While he admitted describing the bullet in his autopsy report and initial deposition, as silver with very little deformation, upon review of the slide negative, he concluded the bullet was copper in color with a cut caused when removing it from the victim (ROA 1623-24, 1631-32, 1635-43, 1645-46). Detective Cerat ("Cerat") was at the autopsy and testified he photographed the copper bullet removed from the victim (ROA 1560-64). Clearly, the excluded witnesses had no relevant testimony respecting why counsel did not obtain experts in tool marking and photography.

witnesses had no information relevant to the two prongs of Strickland should be affirmed.

CONCLUSION

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

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail to: Suzanne Keffer, Esq. and Barbara L. Costa, Esq., Office of the Capital Collateral Regional Counsel – South, 101 NE 3rd Ave., Suite 400, Fort Lauderdale, FL 33301 this 19th day of October, 2007.

CERTIFICATE OF FONT COMPLIANCE

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

Respectfully submitted,

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