IN THE SUPREME COURT OF FLORIDA

CASE NO.: SC07-1272

ROBERT RIMMER

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

BILL McCOLLUM
Attorney General
Tallahassee, FL

Leslie T. Campbell
Assistant Attorney General
Florida Bar No.: 0066631
1515 N. Flagler Dr.; Ste. 900
West Palm Beach, FL 33401
Telephone (561) 837-5000
Facsimile (561) 837-5108

Counsel for Appellee

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules

PRELIMINARY STATEMENT

Appellant, Robert Rimmer, Defendant below, will be referred to as "Rimmer" and Appellee, State of Florida, will be referred to as "State". Reference to the appellate record will be by "R", to the postconviction record will be "PCR", and supplemental materials will be designated by the symbol "S" preceding the type of record referenced, Rimmer's brief will be notated as "IB" followed by the appropriate volume and page number(s).

STATEMENT OF THE CASE AND FACTS

On May 27, 1998, Rimmer was indicted for two counts of first-degree murder, two counts of armed robbery, and two counts of armed kidnapping of Aaron Knight and Bradley Krause, Jr.; one count of armed robbery and one count of armed kidnapping of Joe Louis Moore; one count of armed kidnapping and one count of attempted armed robbery of Luis Rosario; and one count of aggravated assault upon Kimberly Davis-Burke (R.20 2112-2115). After jury trial, Rimmer was found guilty as charged on all counts (R.21 2283-2293). On February 25, 1999, the jury recommended death, by a vote of nine to three and on March 19, 1999, the trial court followed the recommendation and sentenced Rimmer to death for the first-degree murders of Knight and Krause (R.21 2320, 2346-2378, 2383-2399), and consecutive life sentences for the armed robberies and armed kidnappings of

Knight, Krause, Moore and Rosario. The court imposed a 30 year sentence for the attempted armed robbery of Rosario, and a 10 year sentence for the aggravated assault of Davis-Burke, which were to run consecutively to the death sentences, but concurrent to life sentences and to each other (R.21 2346-2378).

This court found the following facts on direct appeal.

> Appellant and codefendant Kevin Parker were jointly tried and convicted of two counts of first-degree murder, armed robbery, armed kidnaping, attempted armed robbery, and aggravated assault for the robbery and murders that occurred at the Audio Logic car stereo store in Wilton Manners, Florida. The facts in this case reveal that on May 2, 1998, appellant Robert Rimmer and possibly two others, including co-felon Kevin Parker, robbed Audio Logic, during which Rimmer shot and killed two people.FN1 The two employees, Bradley Krause and Aaron Knight, who were in the installation bay area of the store, were told to lie face down on the floor and their hands were duct-taped behind their backs. Two customers, Joe Moore and Louis Rosario, were also told to lie face down on the floor and their hands were then bound by duct tape. According to eyewitness Moore, appellant stopped him as he was leaving the store, showed him a gun tucked into the waistband of his pants, and ordered Moore to go back inside the store. Rosario, who was outside smoking a cigarette when the robbery began, also had been ordered to go inside the store, but he did not see the person who had told him to go inside. Personal items were taken from Knight, Krause, and Moore, including Moore's wallet and cellular telephone. During this episode, appellant was armed with a Vikale .380 caliber semiautomatic weapon.
>
> > FN1. The State argued that a third man was also involved but he was never located.
>
> While this was taking place, another victim, Kimberly Davis Burke (“Davis”), FN2 was sitting in the waiting room of the store with her two-year-old daughter. While there, she had observed a purplish Ford Probe

and a Kia Sephia drive up to the store. The Kia Sephia stopped in front of the store and co-felon Parker got out. He entered the store through the front door, looked inside a display case that was in the waiting room, spoke briefly with Davis and her daughter, and then exited through one of the doors that led to the bay area. Soon thereafter, Davis noticed appellant in the installation area. He then entered the waiting room and told Davis that her boyfriend Moore was looking for her. When Davis walked into the bay area of the store and observed the four men lying on the floor, she immediately understood what was happening and sat down, placing her daughter on her lap. Although appellant told Davis not to look, she observed appellant and two other individuals load stereo equipment into the Ford Probe, which was parked in the bay area.

> FN2. The record reflects that this witness was referred to as Kimberly Davis, Kimberly Davis Burke, and Kimberly Burke.

At one point, appellant asked victim Knight for the keys to the cash register. He also asked if anyone owned a weapon. Knight told appellant that he had a gun, which he kept in a desk drawer in the store. Appellant retrieved the gun, a Walther PPK. Appellant also asked the two employees if there were any surveillance cameras, and if so, where the tapes were kept. The employees told appellant that the store did not have any surveillance cameras.

When the men finished loading the Ford Probe, appellant told Davis to move away because “he didn't want this to get on her.” The victims heard appellant start to drive the car out of the bay area and then stop. Appellant returned to the bay area and said to Knight, “You know me.” Knight responded that he did not. Appellant then said, “You do remember me” and walked up to Knight, placed the pistol to the back of his head and shot him. At the sound of the gunshot, Moore jumped to his feet. Appellant pointed the gun at him and told him to lie back down. Appellant then walked over to Krause and shot him in the back of the head. Appellant then thanked the three remaining victims for their cooperation and told them to have a nice day. According to the surviving victims, the

entire episode lasted fifteen to twenty minutes.

Knight died instantly. Krause, who was still alive when the police arrived, was taken to the hospital where he later died. According to the medical examiner, although Krause did not die instantly, he would have lost consciousness upon being shot. The police recovered a spent projectile fragment and shell casings from the scene of the crime, which were later identified as .380 caliber components. According to the State's firearm expert, the projectile fragment and shell casings came from the gun used by the assailant.

On May 4, 1998, Davis provided a sketch artist with a description of the shooter. The resulting sketch was given to Mike Dixon, the owner of the Audio Logic store, and several of his competitors. One competitor, John Ercolano, recognized appellant as the person depicted in the sketch and called Dixon. Apparently, Audio Logic had installed speakers in appellant's car in November of 1997. Appellant had returned in December of 1997 complaining that the speakers were not working properly. He had also taken his car to Ercolano's shop, complaining that Audio Logic had not installed the speakers correctly. Based on records kept by Audio Logic, the police learned appellant's identity, phone number, and address.

On May 8, Davis and Moore picked appellant out of a photographic lineup and later identified him from a live lineup as the person who shot the victims. Dixon identified appellant as the person who he had spoken to about installing equipment in his car.

Appellant was arrested on May 10, 1998, after leading the police in a twelve-minute, high-speed car chase which ended at his residence. During the chase, appellant threw several items from his car, including Moore's wallet, the firearm used during the shooting, and the Walther PPK stolen from the store. At the time of his arrest, appellant was driving a 1978 Oldsmobile. Shortly after his arrest, appellant's wife drove up in the Ford Probe. Both the Probe and the Oldsmobile were registered to appellant and both cars were impounded. During a subsequent court-ordered search of the Oldsmobile, the police discovered a day-

planner organizer which contained a lease agreement for a storage facility. Appellant had rented the storage unit on May 7, just five days after the shooting incident. When the police searched the storage facility pursuant to a search warrant, they found the stolen stereo equipment. Both appellant's and Parker's fingerprints were on the equipment. A surveillance tape, which was admitted in evidence, showed appellant renting the storage unit. Parker was arrested on June 12, 1998.

During appellant's case-in-chief, appellant's wife testified that on the day of the murders, appellant had intended to go fishing with his son. She further testified that she drove the Ford Probe that day, not appellant. The defense also called two experts who testified about appellant's visual impairment. Apparently, appellant wears corrective lenses. It was the defense's theory that appellant could not have been the shooter because he wears glasses and the person who committed the murders was not wearing any glasses. The State presented rebuttal testimony from a Detective Kelley who also wears corrective lenses. Over defense counsel's objection, Detective Kelley testified about his ability to see without wearing glasses. At the close of all the evidence, the jury returned guilty verdicts on all counts charged in the indictment as to both defendants.

During the penalty phase, the trial court severed the proceedings so that each defendant could present mitigation evidence separately from the other. The court held Rimmer's penalty phase proceeding first. Parker's penalty phase proceeding commenced after the jury rendered an advisory sentence for Rimmer. During Rimmer's penalty phase proceeding, the State introduced facts surrounding Rimmer's conviction of prior felonies and victim impact evidence. The defense presented several witnesses, who testified about Rimmer's background, work, and family relationships. The defense also presented testimony from Dr. Martha Jacobson, a clinical psychologist who testified about appellant's mental illness. According to Dr. Jacobson, appellant suffers from a schizophrenic disorder.FN6 However, she offered no opinion as to whether appellant's mental condition supported any statutory mitigators.

> FN6. At the hearing held in compliance with *Spencer v. State*, 615 So.2d 688, 690-91 (Fla. 1993), the defense presented a second expert, Michael Walczak, a neuropsychologist, who agreed with Dr. Jacobson's diagnosis.

The jury recommended that appellant be sentenced to death for both murders by a vote of nine to three. The trial court followed the jury's recommendation, finding six aggravating factors: (1) the murders were committed by a person convicted of a felony and under a sentence of imprisonment; (2) the defendant was previously convicted of another capital felony and a felony involving use or threat of violence to the person; (3) the murders were committed while the defendant was engaged in a robbery and kidnaping; (4) the murders were committed for the purpose of avoiding or preventing lawful arrest; (5) the murders were especially heinous, atrocious, or cruel (HAC); and (6) the murders were cold, calculated, and premeditated (CCP). The trial court only gave moderate weight to the HAC and murder in the course of a felony aggravators; the court gave great weight to the remaining four aggravators. The trial court found no statutory mitigators,FN8 but found several nonstatutory mitigators: (1) Rimmer's family background (very little weight); (2) Rimmer is an excellent employee (some weight); (3) Rimmer has helped and ministered to others (minimal weight); (4) Rimmer is a kind, loving father (not much weight); and (5) Rimmer suffers from a schizoaffective disorder (little weight).

> FN8. Specifically, the trial court rejected the statutory mitigator that appellant was under the influence of extreme mental or emotional disturbance at the time of the offense.

Rimmer v. State, 825 So.2d 304, 308-11 (Fla. 2002) (footnotes omitted.[1]

[1] Rimmer presented 10 issues on direct appeal:

Following this Court's affirmance of the convictions and sentences, Rimmer sought certiorari review with the United States Supreme Court where he raised five issues.[2] On November 18, 2002, certiorari review was denied. Rimmer v. Florida, 537 U.S. 1034 (2002).

By order dated August 26, 2002, the Office of Capital Collateral Regional Counsel–South ("CCRC") was appointed to represent Rimmer in his postconviction proceedings. Rimmer was granted an evidentiary hearing on claims of ineffective

---

(1) court erred in denying motion to suppress physical evidence where items seized were not part of search warrant for Rimmer's vehicle; (2) court erred in admitting pretrial and trial identifications of Rimmer by two witnesses where the procedures employed by police were unnecessarily suggestive; (3) court erred in excusing two prospective jurors; (4) court erred in allowing Detective Kelley to testify about his ability to see without prescription eyeglasses as rebuttal testimony to evidence Rimmer could not function without his glasses; (5) court erred in failing to declare mistrial when prosecutor asked Rimmer's wife whether she had ever asked Rimmer about the murders, thereby encroaching upon the right to remain silent; (6) prosecutorial comments during the guilt phase denied Rimmer a fair trial; (7) court erred in allowing prosecutor to cross-examine defense mental health expert about Rimmer's criminal history where expert did not rely on evidence in her evaluation or opinion; (8) prosecutorial comments during the penalty phase proceedings denied Rimmer a fair trial; (9) evidence is insufficient to support HAC aggravator; and (10) court erred in permitting the jury to consider victim impact evidence.

Rimmer, 825 So.2d at 311 n.9. S*ua sponte*, proportionality was addressed by this Court.

[2] Whether Petitioner's constitutional rights were violated by: (1) admission of in-court and out-of-court identifications; (2) admitting Rimmer's day planner seized during search; (3) by the excusal of Juror Vandeventer; (4) prosecutor's comments; and (5) admission of rebuttal testimony.

assistance of guilt and penalty phase counsel under Strickland v. Washington, 466 U.S. 668 (1984) and Ake v. Oklahoma, 470 U.S. 68 (1985); a conflict of interest; suppression of material evidence under Brady v. Maryland, 373 U.S. 83 (1963). The evidentiary hearing was conducted on May 10-13, 2005, during which testimony was taken from Rimmer's guilt and penalty phase counsel, Rick Garfield ("Garfield"), Ken Malnick, and Hale Schantz (Schantz"), from mental health experts, Dr. Martha Jacobson and Dr. Faye Sultan, optometrist, Dr. Teppler, eyewitness identification expert Dr. Brigham, and Rimmer's family, friends and co-workers.

Garfield testified at the post-conviction evidentiary hearing that he has been practicing criminal law exclusively since 1972 and that in 1995 he became Board Certified. He was with the Public Defender's Office for about 18 months, then the State Attorney's Office for nine years, where he attained the position of Chief of Homicide, before going into private practice. By the time of Rimmer's trial, Garfield had handled at least 16 death cases for the State Attorney and another 15 or 16 as a defense counsel. (SPCR.5 662-64). During the evidentiary hearing, Garfield reported that on June 8, 1998, he was appointed to Rimmer's case. Because he was concerned about having sufficient time to prepare this major case, on July 16, 1998, he agreed to a January 18, 1999 trial date, some six

months from appointment. (SPCE.5 596, 598-99).

Garfield offered that the cash found on Rimmer upon his arrest did not conflict with the trial defense, thus, he decided not to rehabilitate Joanne Rimmer using Rimmer's employment records and because he did not want the jury to know Rimmer had been in jail and thought the State's examination regarding Rimmer's eyesight was "lame," he did not use Rimmer's DOC records in examining his experts on Rimmer's eyesight.[3] (SPCR.5 601-606, 611-12). Also, Garfield noted that fingerprint expert, Deirdre Bucknor "was the last person" he wanted to impeach because she helped support the misidentification defense by establishing that none of the more than 200 prints found at the crime scene matched Rimmer's prints (SPCR.5 692). With respect to the reports of Officers Trephan and Schenck discussing their investigations of statements that Ford Probes, the type of car used in this case, were seen, Garfield admitted that he had received both reports. However, because of the licensing and proper operation of the headlamps of one car and the lack of follow-up on the other, Garfield did not find the reports relevant or helpful. (SPCR.6 822-23, 669-79).

[3] Rimmer's postconviction expert optometrist, Dr. Teppler merely opined that his review of the DOC records led him to conclude Rimmer had a corneal ulcer which usually discourages people from wearing contacts. He also offered that a prescription is needed for contact lenses, but no such prescription existed for Rimmer's most recent ocular visit (SPCR.2 241-42).

Between the guilt and penalty phases, Garfield penned a letter congratulating Detective Anthony Lewis on his "role in the successful prosecution of Robert Rimmer and Kevin Parker for committing the double homicide and robberies…." At the evidentiary hearing, Garfield explained the gentlemanly nature of the letter and that, for reasons unrelated to this case, he wanted to show Detective Lewis not all defense counsel make racist remarks. (SPCR.5 652-57).

When questioned about his failure to utilize an eyewitness expert, Garfield explained that such experts do not give their opinion about the validity of the identification itself, but rather, discuss factors that make an identification reliable or not (SPCR.5 697-98). He reasoned that while this type of expert could be helpful when something happens quickly and there is no other corroborating evidence, such was not the case here According to Garfield, what made such an expert useless to Rimmer was the composite that Kimberly Davis-Burke prepared which looked exactly like Rimmer. Furthermore, Garfield reasoned that the mistakes the police made were huge so he could bring those out on cross-examination, thus, and eyewitness experts would not be useful (SPCR.5 695-98). Dr. Brigham, Rimmer's eyewitness expert offered during the evidentiary hearing, admitted on cross-examination that there are factors in this case supporting the reliability of the eyewitness

identifications, that the amount of corroborating evidence in this case makes the identifications reliable, and that he is usually not called in cases where there's a lot of corroborating evidence. Dr. Brigham clarified that he would have only provided general information about the effects of stress and the opportunity to observe, he would not have provided specific information about whether the victims' identifications were reliable as he agreed that was a question for the jury (SPCR.3 393-98, 402-404).

In support of his claim of ineffective assistance of penalty phase counsel, Rimmer presented penalty phase counsel, Hale Schantz ("Schantz"), who had been appointed on December 1, 1998, after Ken Malnick[4] withdrew. Rimmer was Schantz's fourth penalty phase case; the prior three all received life sentences. Practicing criminal law since 1982, Schantz began his legal career as an Assistant Public Defender and in 1984, went into private practice (SPCR.4 432, 509, 511-12).

Schantz explained he met with Rimmer continuously throughout the case and contacted family members, friends, co-

[4] Mr. Malnick had been appointed on August 6, 1998 and withdrew November 30, 1998 because he accepted a position with CCRC. Mr. Malnick did no penalty phase investigation, other than meeting with Rimmer several times (SPCR.4 432-34).

workers,[5] anyone with relevant information. In fact, Schantz had flown to Ohio with the intent of meeting mitigation witnesses. While Schantz "got along great" with Rimmer, finding him very bright, he had difficulty getting cooperation from Rimmer's family, and Rimmer did not want Schantz to force his mother to testify. It was only after the jury returned a death recommendation that Lilly Rimmer agreed to cooperate, and thus, testified at the Spencer v. State, 615 So. 2d 688 (Fla. 1993) hearing. Likewise, Rimmer's wife, Joanne, was non-cooperative, and it was not until just before the penalty phase did she agreed to help. (SPCR.4 437-39, 449-50, 454-57, 459-64, 466-65, 475, 477, 525-26, 559-63; State's Exhibit 8).

Regarding mental health mitigation, Schantz confirmed that two weeks after his December 16, 1998 appointment, he requested Dr. Martha Jacobson be appointed as a confidential expert because they had worked well together previously and because she came highly recommended. Subsequent to her confidential evaluation, Schantz requested that she be appointed as Rimmer's mitigation expert to conduct the full mitigation psychological evaluation and to investigate whether Rimmer had a prior mental health history (SPCR.4 448-50, 462-63, 509, 512-13, 515).

According to Schantz, his penalty phase strategy was to

[5] Schantz testified that he didn't obtain the employment records from John Knox Village because he had spoken to them and had live witnesses which he thought they were better (SPCR.4 450).

"humanize" or "un-demonize" Rimmer. Schantz wanted the jury to see him as a human being, to see the whole person. The thrust of the non-expert penalty phase mitigation was that Rimmer was a loving father/husband and an excellent employee who was trying to make a better life for himself and his family. Schantz testified he had no indication from Rimmer or his family that he had been physically abused as a child. Both parents described emotional abuse and their fighting in front of the children, but no one told him about physical abuse[6] (SPCR.4 568, 590).

[6] Louis testified at the penalty phase that there was domestic violence between his ex-wife, Lilly, and himself, which was witnessed by Rimmer. Louis reported his relationship with Lilly was not calm; they argued and fought constantly, and their arguments escalated to physical violence about twice a week. He averred that after they divorced, Lilly took the children to live in North Carolina without telling him. Rimmer was nine years-old at the time. Lilly told her children that Cleveland had blown up and their father was dead. A few months later, Louis found his children and brought them back to Cleveland to live with him. Rimmer remained with his father until he was 13. According to Louis, when he became ill, he returned Rimmer and his brothers to their mother in Florida. (R.17 1867-71). Rimmer's mother, testified at the Spencer hearing, agreeing that she and Louis fought all the time and that he was not an attentive or caring father. Rimmer would become angry when his parents fought and he was very protective of his mother. Lilly agreed she did not have any contact with her children for at least three years while they resided with their father, and that Louis prevented her from seeing her children. She testified at the Spencer hearing that after their father had "done all the damage he could do to them," and was ready to move on with his life, without explanation, he sent them to live with her. According to Lilly, Louis had been telling the children that she did not love them anymore and did not want to be with them and put other negative thoughts in their heads. Rimmer and his siblings never received psychological counseling when they came to Florida. Although Rimmer had done well in school when he was

At the evidentiary hearing, the family history was consistent with that presented at trial; however, incidents of physical abuse of Rimmer were revealed, and how Louis Rimmer was an abusive, uncaring father. However, Lilly maintained she did not find out about the abuse[7] until her estranged children were returned to her after being with their father after the family separation.[8] When asked whether she mentioned the physical abuse

---

young, by the time he returned to Florida he had a difficult time with his studies. During the time her children were with their father, Lilly tried to make contact with them to see if they were doing well. She was unsuccessful in seeing the children, but they spoke to her on the telephone if Louis was not home. The boys lived with their father for five years and she stated she did not have the funds to get legal custody. In January, 1980, she moved to Florida and the children came to live with her that August. She was not given a reason for their return, she just received a call from Louis saying they were coming. Lilly heard through the grapevine that her oldest son, Odell, was beginning to get into trouble and Louis didn't want the aggravation, he was ready to move on with his life. (R.18 2049-53; SPCR.1 30-34)

[7] Although Lilly testified that Rimmer and his older brother Louis Odell ("Odell") were protective of her when she was arguing with their father; the boys would get between their parents and yell "stop." Lilly described Rimmer in his early childhood as "a happy, content" child, very smart and amiable. Lilly and Louis did not go for marriage counseling, he wouldn't have been receptive and she did not want the marriage anyway. Lilly tried to be a good mother (loving, caring), but believes her unhappiness may have interfered, made her not as effective. She was extremely unhappy in her marriage (SPCR.1 21-22).

[8] Lilly explained she was afraid to tell Louis she was leaving because she did not know how he would react, what he might do, and she did not want an altercation. She moved to Charlotte, North Carolina, with a friend, Wilton Burton, who was the church's boy scout leader. They left in '74-'75 and lived with Mr. Burton at first because she didn't have a job and didn't

to Rimmer's trial counsel, Lilly responded she "may have mentioned" the physical abuse to someone, but admitted it was "[n]othing elaborate." She claimed she did not know why she was not called to testify before the jury and denied knowing Rimmer's wife had given him an alibi for the entire day of the murders (fishing with his son) which contradicted the alibi Lilly gave him (Rimmer was with her at noon). (R.17 1867, 1869, 1870-71; SPCR.1 15-16, 19-21, 23-30, 34-37, 40, 51-52, 54-56).

Jeanette Rimmer ("Jeanette"),[9] Rimmer's aunt, testified that the boys were physically abused by their father from early childhood,[10] when the family was still living together (EH 5/9/05 107). The atmosphere of the home was one of fear/anger, not love, and the children feared their father who would use a

---

have money for an apartment. She was working as a nurse and the children were enrolled in school. Lilly stated that the boys saw it as an adventure and were happy to get away from the situation. She doesn't think she gave the boys any explanation for why they left, just said it was going to be better for them; they would be happy and the children were "definitely not" upset to leave. They did not contact Louis to tell him where they were and she said the boys did not miss him so she did not see a reason to contact them and wanted a clean break (SPCR.1 25-27).

[9] On cross-examination, Jeanette agreed she did not know that Schantz was coming to Cleveland to meet with Louis and that all Louis told her was that Rimmer had gotten in trouble, not that he was facing capital murder charges in Florida (SPCR.1 136-38).

[10] Odell, Rimmer's older brother who is serving a life sentence for first-degree murder, testified that since he was pre-kindergarten age, their father beat them, when their mother was absent. The beatings continued when they lived with Louis Rimmer in Ohio. Louis used his hands, belts, and extension cords to administer punishment (SCPR.2 197-98, 202, 204).

leather belt or razor strop to discipline his sons because that was the way he was raised. Also, the parents were unhappy in their marriage and the children were trying to make the best of it (SPCR.1 106-07, 109-12, 114-15, 124-26).

Rimmer also offered his brother, Odell, and mother to show that Odell was a bad influence upon him and led him down the wrong path. However, it was revealed that Odell went to prison 12 years before these murders. Schantz, who was aware of Odell and the life sentence, thought it would be a "horrible, horrible idea" to put Odell on because it would show the jury Rimmer came from a family of murderers (SPCR.5 569).

Through friends, Rimmer presented "good father, good son, good employee" mitigation as he had offered during the penalty phase. Melody Fritzinger reiterated her penalty phase testimony[11] relating her positive contact with Rimmer when she was his manager at John Knox Village. She described him as a wonderful, excellent employee, who interacted well with the senior residents and fellow staff. (SPCR.1 97-99, 103-04).

[11] Melody Fritzinger testified at the penalty phase that she was the manager of the assisted living facility and Rimmer's supervisor. She described him as an "excellent" employee. He started in the main kitchen and was promoted to the dining room supervisor for the facility. He interacted wonderfully with the seniors and treated the people he supervised well (T 1876-78).

Earlene Jennings ("Jennings"),[12] testified Rimmer was like a son to her, and continues to write and send her cards. According to Jennings, Rimmer was involved in his church, working with the youth program. Unaware of his marital problems, Jennings thought Rimmer had a wonderful relationship with his mother, was honorable, respectful, and an easy going person. While she was available to testify in the penalty phase, she admitted she had not reached out to let anyone know. (SPCR.1 67-76, 70-80).

Stuart Weiss ("Weiss"), owner of an auto repair shop knew Rimmer, who was interested in such work and allowed him to work with his mechanic two to three times weekly. Weiss found Rimmer to be an honest, trustworthy, and quiet gentleman. Weiss's wife also liked Rimmer and together with her husband, was shocked to hear of the murders. Weiss noted he had met Rimmer's mom, wife, and daughter and stated there was a lot of love there; Rimmer loved his wife and was a great father. Weiss admitted he was unaware of Rimmer's criminal history or that he was on conditional release when he worked for Weiss (SPCR.1 86-95).

Rimmer's mistress, Sabrina Irving, testified at the evidentiary hearing that although she knew him to be married, they started an affair within two to three months of meeting.

[12] Jennings' son Ronald Jennings ("Ronald") Rimmer had become like a brothers to him and that Rimmer was always smiling. Rimmer was a good person, who liked fishing, to talk about cars and to help everyone. Also, Rimmer seemed to care a lot for his family and was close to his mother (SPCR.1 82-84).

Irving described Rimmer as being a loving, compassionate, and caring father, who played with his children, and was close with his mother. Irving recounted an occasion when Joanne confronted Irving and Rimmer about their affair and it ended in an altercation. (SPCR.1 57-64).

Schantz testified he would not put on a client's mistress especially where such would completely contradict the "good family man" image he was trying to present of Rimmer. Regarding the remaining mitigation evidence suggested on collateral review, Schantz noted that he would not have had a problem putting on additional evidence of Rimmer's good qualities, but noted that one tries to "not overwhelm the jury with stuff that they've already heard before." (SPCR.4 471, 476, 451, 567).

With respect to the mental mitigation, Schantz testified that immediately following the jury's death recommendation, he requested the appointment of a neuro-psychologist because he was out of ideas and did not want to show up at the Spencer hearing with nothing new. He decided to get a neuro-psychologist on the chance it would show something, but that he did not have any true concern that Rimmer was suffering from neuropsychological issues. Dr. Walczak testified at the Spencer hearing and his findings were consistent with Dr. Jacobson's findings regarding the schizo-affective disorder (bizarre thinking, mood disorder and schizophrenic disorder, however, he found no signs of neuro-

psychological damage in Rimmer and agreed he has no brain damage (R.18 2010-11, 2018). Dr. Walczak had no opinion regarding the statutory mitigator of "extreme mental or emotional disturbance" (SPCR.4 492-93, 573-74).

Dr. Jacobson testified at the evidentiary hearing and offered her new opinion that the statutory mitigator of "under an extreme mental or emotional disturbance" applies to Rimmer.[13] She also stated that, in conducting a mental health evaluation and looking for mitigation, she looks for family history and past history, including school records and criminal history, but that she did not receive that type of information here. Rather, she received a copy of the warrant, probable cause affidavit, grand jury indictment, and police narratives. According to Dr. Jacobson, counsel did not alert her to any psychological problems, did not request that she contact family/friends, did not supply her with DOC records or mental health records, and did not provide her with social history. Everything she learned about Rimmer came from him and his test results. Her January 20, 1999 written report contained Rimmer's social history

[13] For collateral review, Jacobson met with Rimmer again on October 22, 2003 and conducted an extensive clinical interview and administered a battery of psychological tests, more extensive than she had in 1999. However, Dr. Jacobson stated there was the presence of a major mental disorder prior to the events in question; however, she still does not think that the statutory mitigator "capacity to appreciate/conform conduct" applied to Rimmer (SPCR.1 158-64).

including information about his childhood and background[14] (SPCR.1 149-50, 152-54, 158, 161-64).

Rimmer's postconviction mental health expert was Dr. Faye Sultan, a clinical psychologist, who admitted she is personally opposed to the death penalty. Three times Dr. Sultan met with Rimmer. In her opinion, he is suffering from paranoid personality disorder, and that Rimmer met the statutory mitigator of "under extreme mental or emotional disturbance" at the time of the crime, because he suffered from his disease for many years. (SPCR.3 314-16).

Based on the postconviction presentation and argument, the court denied relief. This appeal and related state habeas petition (case no. SC09-1250) followed.

[14] The social history described Rimmer as coming from a family where the parents divorced when he was seven or eight years old; his childhood was chaotic and dysfunctional, with frequent physical fights between his parents. The children were shifted between the parents. The father used his children as a means of hurting their and criticized her in an attempt to alienate her. The father would spend money on girlfriends or himself, but not on his children. There was a lack of food, and the children had to wear the same clothes. While the children did not get Christmas gifts, the children of their father's girlfriend did. During Rimmer's childhood, there was significant corporal punishment and violent punishment meted out. Rimmer did well in school, reaching the 10th grade, but he did not attend regularly and would skip middle school classes in Florida, to hang out with his brother. At this time he began to get into trouble, and was in juvenile jail and a program in Jacksonville. At the age of 16, he was tried as an adult and sent to prison. Rimmer denied a psychiatric history, but acknowledged his brother was treated with Thorazine (SPCR.1 155-56).

SUMMARY OF THE ARGUMENT

Issue I – The court properly excluded irrelevant witnesses from the initial evidentiary hearing, but afforded Rimmer an opportunity to address the matter again. Likewise, there was no abuse of discretion in denying the public records requests and Rimmer has failed to identify where the transcript is incomplete. A denial of due process has not been shown.

Issue II – The court correctly determined Rimmer failed to carry his burden of proving ineffectiveness of guilt phase counsel under Strickland. The court's factual findings are supported by competent, substantial evidence and its legal conclusions conform with Strickland and its progeny.

Issue III - The order rejecting the claim that penalty phase counsel was ineffective in the manner he investigated and presented the mitigation case, is supported by competent, substantial evidence, and follows the dictates of Strickland.

Issue IV - Rimmer's Brady claim was rejected properly. He failed to show suppression of information contained in the materials. Likewise, he did not prove prejudice.

Issue V – Ineffective assistance for counsel's handling o the claims of prosecutorial misconduct has not be shown.

Issue VI – The claim of conflict of interest was evaluated and denied properly as Rimmer failed to prove an actual conflict existed.

ARGUMENT

ISSUE I

RIMMER WAS NOT DENIED DUE PROCESS DURING HIS COLLATERAL LITIGATION - THE COURT'S EVIDENTIARY, PUBLIC RECORDS, AND TRANSCRIPT PREPARATION RULINGS WERE NOT AN ABUSE OF DISCRETION (restated)

Rimmer asserts the court erred by (1) granting the State's discovery request and excluding several witnesses from the evidentiary hearing; (2) denying public record requests; and (3) failing to ensure that a complete and accurate transcript was prepared. The State disagrees. The court did not abuse its discretion, thus, relief must be denied.

Exclusion of witnesses - "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 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 the exclusion of witnesses

issue has not been preserved for appeal. Following the court's granting of the discovery request and hearing on the relevancy of the defense witnesses, the court entered the following order:

> ... the State's Motion to Strike Witnesses is GRANTED to the extent that Luis Rosario, Joe Moore, Kimberly Davis Burke, Michelle Tekdogan and Kevin Parker, will not be permitted to be called as witnesses at the initial evidentiary hearing, but will be given further consideration to allowing their testimony, at a later hearing, upon a showing of sufficient relevancy.

(PCR.11 1991). Given the language of the order, the striking of the witnesses was preliminary, subject to further consideration following Rimmer's initial postconviction evidentiary presentation. Rimmer, has failed to identify where he raised the issue again and the court again precluded the presentation of these witnesses. As such, the matter is unpreserved and/or waived for appeal. Armstrong v. State, 642 So. 2d 730, 740 (Fla. 1994)(finding claim procedurally barred where judge heard motion, but never ruled); Richardson v. State, 437 So. 2d 1091, 1094 (Fla. 1983)(same). Moreover, Rimmer failed to proffer what these witnesses would state during their testimony which would shed light on the issue at hand. At best he offered that they would be used to show how a proper examination should be done. However, even if preserved, there was no abuse of discretion.

Rimmer complains that the State did not meet the dictates of Lewis v. State, 656 So.2d 1248, 1250 (Fla. 1994) before the court granted its discovery request. However, 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 evidentiary hearing was limited to issues involving Brady v. Maryland, 373 U.S. 83 (1963) and ineffective assistance of counsel claims under Strickland v. Washington, 466 U.S. 668 (1984) 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).

With respect to the striking of the five witnesses, again, there was no abuse of discretion. These were eyewitnesses and

the non-testifying co-defendant, Kevin Parker ("Parker")[15] who was tried with Rimmer. The best Rimmer had to offer was that these witnesses were needed to show that they gave prior inconsistent statements to the police and or at depositions and that it was necessary to bring this out during the evidentiary hearing (IB 36) and to question these witnesses "in ways that trial counsel did not in order to demonstrate trial counsel's ineffectiveness for not getting an eyewitness identification expert." (IB 37; SPCR.8 907-09, 912-15) The focus of the hearing is on counsel, what he had, what he did with what he had, and how Rimmer was prejudiced by counsel's actions or the State's withholding of material evidence.[16]

[15] Below, Rimmer offered that Parker may be used in the mitigation presentation, however, he does not point to that in the instant brief, thus, he has abandoned the matter, and the State will not address it unless requested to by this Court.

[16] Under Strickland, Rimmer must establish that: (1) counsel's representation fell below an objective standard of reasonableness, and (2) but for the deficiency in representation, there is a reasonable probability the result of the proceeding would have been different. Strickland, 466 U.S. at 688-89. Under Brady, Rimmer must show (1) that favorable evidence-either exculpatory or impeaching, (2) was willfully or inadvertently suppressed by the State, and (3) because the evidence was material, the defendant was prejudiced. See Strickler v. Greene, 527 U.S. 263, 281-82 (1999). However, "[a]lthough the "due diligence" requirement is absent from the Supreme Court's most recent formulation of the Brady test, it continues to follow that a Brady claim cannot stand if a defendant knew of the evidence allegedly withheld or had possession of it, simply because the evidence cannot then be found to have been withheld from the defendant." Occhicone v. State, 768 So.2d 1037, 1042 (Fla. 2000).

A postconviction evidentiary hearing is not to be a re-trial or second appeal. Medina v. State, 573 So. 2d 293, 295 (Fla. 1990) (holding "[a]llegations of ineffective assistance cannot be used to circumvent the rule that postconviction proceedings cannot serve as a second appeal"). Likewise, it is not a time to teach counsel how to conduct a cross-examination of eyewitnesses. The eyewitness testimony is a matter of record, i.e., from the trial, police statements, or depositions, and how counsel utilized those materials is the focus of the hearing. What those witnesses would say now under collateral counsel's questioning is irrelevant. Moreover, Rimmer has failed to even offer how Parker's testimony would shed any light on the claims. Parker did not waive his Fifth Amendment rights; he did not testify at the joint trial. As such, what he may say now about Rimmer's whereabouts on the day of the crime has no bearing on the limited issues in the collateral proceedings related to counsel's performance.

Recently, this Court has affirmed the exclusion of witnesses from an evidentiary hearing where their testimony was not relevant to the issues in the collateral proceeding, but merely would be revisiting testimony which was already a matter of record. Parker v. State, 3 So.3d 974, 983 (Fla. 2009) (finding "the trial court did not abuse its discretion in excluding these witnesses as their testimony was not relevant to

the issue on remand, i.e., whether counsel rendered ineffective assistance for not obtaining and presenting testimony from experts in the fields of tool marking and photography"). The same rationale should be followed here, and relief denied.

Public records – Rimmer claims the court erred in denying his additional public records requests under Rule 3.852(g) Fla. R. Crim. P. addressed to the Broward Sheriff's Office ("BSO") and Florida Department of Law Enforcement ("FDLE") with respect to 34 names of individuals found in the case records (IB 39). He asserts that the court imposed too high of a burden on him to prove relevancy. The State disagrees and notes that not only did the court properly evaluate the relevancy requirement, but also found the requests were overly broad and unduly burdensome. As such the trial court did not abuse its discretion in denying the Rule 3.852(g) requests.

This Court applies an abuse of discretion standard when reviewing a court's determination on public records. Mills v. State, 786 So.2d 547, 552 (Fla. 2001); Glock v. Moore, 776 So.2d 243, 254 (Fla. 2001). Under this standard, a ruling will be upheld unless it is "arbitrary, fanciful, or unreasonable." Canakaris v. Canakaris, 382 So.2d 1197, 1203 (Fla. 1980).

At least two hearings were held on Rimmer's Rule 3.852(g) requests of BSO and FDLE where the agencies written and oral arguments raised objections. BSO objected on the grounds Rimmer

merely listed 34 names, some with little identifying information, and pled that the records were "relevant." BSO argued this did not comply with the rule and the requests were overly broad-unduly burdensome because no timeframe was given and BSO could track only arrests, a hand search of thousands of records would be required to find the information regarding whether the listed persons "were the subject of an investigation, accused, charged and/or convicted of a crime and/or a witness, suspect or victim." (PCR.5 834-35; PCR.20 2707-10). Rimmer was afforded a further opportunity to offer proof of compliance with Rule 3.852(g).[17] (PCR.5 794, 805, 834-36, 865; PCR.20) With respect to the FDLE Rule 3.852 demand, Rimmer agreed with the deficiencies noted in his request and asked for time to amend. The court sustained FDLE's objections without prejudice and allowed Rimmer time to amend. (PCR.5 843-44; PCR.20 2735)

---

[17] The December 1, 2003 order (docketed December 15, 2003) provided:

> ... As to BSO's objection to the 34 names as demanded in the supplemental request 2(a), this Court sustains BSO's objections on the grounds of relevancy and that such is unduly burdensome. This Court would require CCRC to provide additional information regarding the relevance of each named person in 2(a) with an explanation and not just stating relevancy in a conclusory manner. The Court sustains BSO's objection to the additional demand 2(a).

(PCR.5 7).

Following Rimmer's amended public records demands, both BSO and FDLE[18] again raised relevancy and overly broad/unduly burdensome objections. (PCR.9 1624-26, 1698-1700). The court ruled:

> 1. Objections of the Florida Department of Law Enforcement to the Supplemental Requests.
>
> ...
>
> This Court finds that FDLE's objections as set forth in it Response of September 3, 2003, and its oral objections to the December 15, 2003 re-submission are sustained, as CCRC has not complied with Rule 3.852(g), and has not established relevancy. The requests are also overly broad and unduly burdensome. If CCRC finds on its own that any of ht e39 named individuals have criminal records, then CCRC may approach this Court to ask for further records from FDLE and FDLE will have an opportunity to respond to the request.
>
> ...
>
> BSO had a similar objection to the "34" names in the July 11, 2003, supplemental requests on the grounds the requests were not relevant, were overly broad and were burdensome. (Tr at 56). The only thing reasonable would be the small window of time in which the BSO's computers could get criminal histories and some suspect or witness information. (Tr. At 59).
>
> On May 10, 2004, BSO filed a response to this Court's April 19, 2004, Order requiring the Sheriff to file a response to the Defendant's claim of relevancy for information on specified civilian witnesses. The

[18] The Rule 3.852(g) demand to FDLE requested "Any and all files, records, reports, letters, memoranda, notes, drafts, electronic mail and/or files, and all other records (regardless of form) in the possession or control of your agency relating to below-listed individuals, regardless of facility, office, init or branch of your agency where records may be housed" for 33 civilians and eight employees. (PCR.5 794-800)

> Court finds that CCRC has not met its burden under Rule 3.852(g) as to the "34" names ... (Tr. At 50)... BSO is not required to run criminal histories of the 34 individuals.

(PCR.9 1736, 1740-42; PCR.25 2891-2923, 2926-37) (footnotes omitted).

Rimmer asserts the court erred by requiring a relevancy determination. However, the Court denied the demands to BSO and FDLE not only on a finding of lack of relevancy, but because the demands were overly broad and unduly burdensome. This Court has held that request that seek "[a]ll notes, memoranda, letters, electronic mail, and/or files, drafts, charts, reports, and/or other files" are not proper under this rule. See Mills v. State, 786 So.2d 547, 551-52 (Fla. 2001). The denial of public records rests on a ground other than relevancy, thus, Rimmer's complaint here fails.

Moreover, with respect to relevancy, Rimmer did not articulate how the records sought were relevant to or would lead to relevant information for his collateral claim. The pith of his request was that these names, other than the codefendants', were found in the records turned over by the agencies and had been investigated or were witnesses in the case. This Court has stressed that public records requests are not to be used for fishing expeditions and that defendants bear the burden of proving that the records they request are, in fact, related to a

colorable claim for post conviction relief. Moore v. State, 820 So. 2d 199, 204 (Fla. 2002); Glock v. Moore, 776 So. 2d 243, 253 (Fla. 2001). This Court should find no abuse of discretion.

Complete Transcript – It is Rimmer's position that the instant appellate record is incomplete as "there was argument and sidebar discussion which was (sic) not transcribed." (IB 41) However, he did not inform the trial court, and does not inform this Court of what is allegedly missing; Rimmer gives no date, subject matter if that which he claims has not been transcribed. The Claim is not preserved and meritless.

Review of whether a sufficiently complete record has been prepared is governed under Delap v. State, 350 So.2d 462 (Fla. 1977), however, where only portions of the record are alleged to be missing, ('[i]t is therefore clear that under our precedent, this Court requires that the defendant demonstrate that there is a basis for a claim that the missing transcript would reflect matters which prejudice the defendant." Jones v. State, 923 So.2d 486, 489 (Fla. 2006) (holding that when requesting a new trial on the basis of missing/lost transcripts, defendant bears the burden of demonstrating that a prejudicial error occurred in the trial court). See Armstrong v. State, 862 So.2d 705, 721 (Fla. 2003) (finding new trial not warranted where defendant "failed to link a meritorious appellate issue to the allegedly missing record and thus cannot establish that he was prejudiced

by its absence"); Darling v. State, 808 So.2d 145, 163 (Fla. 2002) (rejecting defense argument that because there were no records of pretrial hearings that occurred, meaningful review was precluded, requiring a new trial, and holding that because defendant did not demonstrate what specific prejudice, if any, occurred due to the missing transcript, the missing transcript was not shown to be necessary for meaningful review); Ferguson v. Singletary, 632 So.2d 53, 58 (Fla. 1993) (opining "[a]s to those portions which are still not transcribed, Ferguson points to no specific error which occurred during these time periods. Under these circumstances, we reject this claim.").

Following receipt of the evidentiary hearing transcripts, Rimmer moved the court to order corrected transcripts noting that there were misspelling errors, suggesting words were missing, and noting a sidebar discussion was missing from page 214 of the May 10, 2005 transcript. (PCR.12 2371-74). Subsequently, Rimmer filed a supplemental motion, noting other alleged spelling and typographical errors, however, no other sidebar or argument sections were reported as missing. (PCR.12 2383-86). Following the submission of corrected transcripts, Rimmer did not point the court to any other allegedly missing sidebar or argument sections, but stated:

> 7. Of particular note, postconviction counsel alerts this Court to the legal argument that **was previously missing** from the first version of the transcripts,

> beginning on page 212 and continuing through until (sic) 219. The argument is still not accurate. Specifically, the transcript does not accurately reflect who was speaking, attributing Ms. Bailey's (Assistant State Attorney) argument to Ms. McDermott (collateral counsel). See p. 215-6, 9-11.

(PCR.12 2403) (emphasis supplied). No mention was made of any other allegedly missing sections.

The issue should be found unpreserved as Rimmer failed to direct the trial court to a specific section of the transcript which was missing. Steinhorst v. State, 412 So. 2d 332, 338 (Fla. 1982) (opining "[I]n order for an argument to be cognizable on appeal, it must be the specific contention asserted as legal ground for the objection, exception, or motion below.") Moreover, for the same reason, failure to identify any missing argument and how such precludes appellate review, the claim should be rejected. Jones; Armstrong; Darling; Ferguson.

ISSUE II

THE TRIAL COURT CORRECTLY REJECTED RIMMER'S STRICKLAND CLAIM AND DETERMINED GUILT PHASE COUNSEL RENDERED EFFECTIVE ASSISTANCE (restated)

Rimmer asserts that the trial court erred in denying postconviction relief on his claim of ineffective assistance of guilt phase counsel. He claims he was prejudiced by counsel's deficient performance for failing: (1) to utilize Department of Corrections ("DOC") records and lay testimony to corroborate the expert testimony about his poor eyesight and to prove he did not

wear contact lenses and to rebut Officer Kelly's testimony about Rimmer's eyesight (IB 43-46); (2) to secure an eyewitness identification expert to testify (IB 46-50); (3) to question Officers Lewis and Howard and fingerprint examiner Deidre Bucknor about other suspects or why Bucknor was told not to compare the prints of other suspects to the latent prints collected (IB 51-53); (4) to rehabilitate Joanne Rimmer with Rimmer's employment records (IB 53-56); (5) to interpose a marital privilege objection during the examination of Joanne Rimmer (IB 56); (6) to preserve Rimmer's speedy trial rights (IB 56-57). Contrary to Rimmer's position, the trial court's findings are supported by competent, substantial evidence, and its legal conclusions comport with the dictates of Strickland and its progeny.

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). See Reed v. State, 875 So.2d 415 (Fla. 2004); State v. Riechmann, 777 So. 2d 342 (Fla. 2000).

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 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.").

(1) DOC records/lay witnesses to corroborate Rimmer's poor eyesight, lack of contact lenses and to rebut Officer's Kelly testimony (IB 43-46) – Rimmer asserts the trial court erred in denying relief under the wrong standard that had not "conclusively" proven he did not wear contacts at the time of the crime. Rimmer makes too much of the court's use of the word

"conclusive." As will be evident from a review of the order denying relief, the court was not referring to a standard of review, only the strength of Rimmer's evidence, how it impacted the other evidence, and whether prejudice was established. The totality of the order is clear, ineffectiveness was not proven as Garfield offered well reasoned strategy for his decisions.

The trial court found:

> ... Defendant argues that trial counsel was ineffective for not having provided the expert witness, who testified about Mr. Rimmer's bad eyesight, Department of Correction's (sic) records, showing that Mr. Rimmer could not wear contact lenses. According to the defense argument, this would have supported a misidentification defense because none of the witnesses described the Defendant as having worn glasses during the crime. Mr. Garfield testified that he did not want to present evidence showing that his client had been in prison, and that the best evidence of poor eyesight was his most recent eye examinations in 1998, and not four year old prison records (611-612). During the trial of this case, Mr. Garfield presented the testimony of Defendant's optometrists Fred Butterfield and Ralph Butterfield and Ralph Bruce Jolly (R 1307-1331).
>
> The Defendant called Dr. Teppler to testify at the evidentiary hearing. Dr. Teppler testified that he is an optometrist, that a prescription is required in Florida for contact lenses, that the Defendant's medical records indicated that he had a corneal ulcer discouraging the wearing of contact lenses and that there was no recent prescription for the Defendant to get contact lenses (EH 241-243).
>
> This Court finds that trial counsel was not deficient in not utilizing Defendant's Department of Correction's medical records to help establish Defendant's poor eyesight and that he was not wearing contact lenses. There was no conclusive evidence that the Defendant could not have worn contact lenses

> during the short period of time it took to commit the crimes. Trial counsel made a well reasoned decision to present evidence of his client's poor eye sight by calling as witnesses, two optometrists who had recently examined him, rather than risk making the jury aware of the existence of prison records for his client.

(PCR.12 2411)

Here again, the ruling is supported by competent substantial evidence,[19] and follows the dictates of Strickland. Garfield, after considering his options, decided to present updated evidence of Rimmer's eyesight through expert witnesses instead of using stale evidence for DOC records which would have informed the jury that his client had been in prison. Such is reasonable, professional conduct to accomplish a defense objective, without disclosing negative information about the

[19] Garfield explained he did not want to rely upon the DOC records because: (1) he felt the best evidence of Rimmer's eyesight was his most recent eye exams, not eye exams from one to four years ago; and (2) he did not want to use evidence from prison in the guilt phase. He claimed that even if it had been sanitized, jurors may learn of the source and it would have been a huge risk that he was not willing to take (SPCR.5 610-12). At the evidentiary hearing, Rimmer presented Dr. Teppler, an optometrist, who testified that Rimmer's DOC records show that he had a corneal ulcer which usually discourages people from wearing contacts. Dr. Teppler further opined that you need a prescription for contact lenses in Florida and that there was no such prescription for Rimmer's most recent visit (SPCR.2 241-42). The trial record shows that Garfield established through two experts, Rimmer's treating optometrist and optician, that Rimmer cannot see without eyeglasses. Furthermore, the State never alleged that Rimmer was wearing contacts at the time of the crime. Moreover, the evidence Rimmer presented in support of this argument does not decisively establish that Rimmer could not have been wearing contact lenses at the time of the murders.

defendant. Moreover, using experts in place of lay witnesses to offer the same evidence does not render the decision deficient. "Counsel cannot be deemed ineffective merely because current counsel disagrees with trial counsel's strategic decisions. Moreover, strategic decisions do not constitute ineffective assistance of counsel if alternative courses have been considered and rejected and counsel's decision was reasonable under the norms of professional conduct." Occhicone v. State, 768 So. 2d 1037, 1048 (Fla. 2000). See Ferguson v. State, 593 So.2d 508, 510 (Fla. 1992) (finding counsel's decision to not call mental health experts to be "reasonable strategy in light of the negative aspects of the expert testimony").

In support of his claim that Garfield was ineffective for not presenting sur-rebuttal challenging Officer Kelley's testimony regarding what he could see without eyeglasses, Rimmer relies upon Dr. Teppler's testimony that it is inaccurate to compare the vision of two people and basically such a comparison cannot be relied upon (SPCR.2 240-44, 246). the State never alleged that Rimmer was wearing contacts so Garfield was not required to rebut it. And finally, Garfield effectively cross-examined Officer Kelley so there was no need for an expert in sur-rebuttal. Moreover, Rimmer cannot establish prejudice under Strickland, as it is clear the result of the trial would have been different, given the overwhelming evidence of Rimmer's

guilt in this case, as established by the eyewitness identifications and the fact that he was found in possession of the stolen audio/video equipment, as well as the gun stolen from Audio Logic and Joe Moore's wallet. It is clear that the jury rejected Rimmer's defense, even with expert testimony from his optometrist and optician. Adding the fact that he could not wear contacts or presenting an expert to challenge Officer Kelley's testimony would not have changed the result. This Court should affirm.

(2) Eyewitness identification expert (IB 46-50) – It is Rimmer's position that his identification by eyewitnesses was central to his case, thus, counsel was ineffective in not securing an expert in eyewitness identification to point out the fallibility of eyewitness testimony and that the court erred in rejecting this claim. The trial court rejected the claim noting that similar ineffectiveness claims have been rejected previously. See Rose v. State, 617 So.2d 291, 297 (Fla. 1993); and Jones v. Smith, 772 F.2d 668, 674 (11th Cir. 1985). Furthermore, the court recognized that Garfield had thoroughly challenged the eyewitness identifications both pre-trial and before the jury. (PCR.12 2413-14).[20] The court also credited

[20] Garfield vigorously attacked the identifications made by the two eyewitnesses. He not only filed a pre-trial motion to suppress the out-of-court and in-court identifications of Rimmer made by the two eyewitness-victims Joe Louis Moore and Kimberly

Garfield with considering the use of such an expert, but that other issues in the case reduced/negated the need to call the expert.[21] Also, the expert agreed that he is not called in

---

Davis Burke, but he also attacked their identifications on cross-examination during the suppression hearing and at trial. Garfield brought out the inconsistencies in their descriptions of Rimmer and the inconsistencies between their descriptions and Rimmer's physical characteristics (R 790-91, 796-802, 832-861, 878-82, 902-908; SR 20-24, 28, 37-41). Clearly, both victims had ample opportunity to view Rimmer because both were able to give the police detailed descriptions of him and Davis was crucial to preparation of the police sketch of Rimmer which led to him being apprehended (SR 21-22 25, 38, 42). Rimmer argues that the descriptions are inconsistent and vary greatly from Rimmer physical characteristics. Nonetheless, the best evidence of the accuracy with which the victims viewed Rimmer is shown by the police sketch which they helped prepare that led directly to his being apprehended. Rimmer also takes issue with the identifications made by the eyewitnesses on the photo line-up. On May 8, 1998, Moore was shown a photo line-up by Detective Lewis. He viewed the photo line-up before and separately from his girlfriend, Kimberly Davis Burke, and identified Rimmer. Moore did not speak with his girlfriend after viewing the photo line-up. Davis picked out two photographs because the men looked so similar to one another. Detective Lewis did not tell her who to pick or suggest to her who to pick; she chose the person she saw in the store. (SR 25-26, 31-32, 42-43, 45-46, 80-81). Despite her statement to Lewis, with which she was confronted, Davis made it clear that Lewis did not tell her who her boyfriend had picked until after she had made her two selections and marked the form. Lewis agreed with Davis' account. Both Moore and Davis went to a live line-up on July 13, 1998, viewed the lineups separately, and each picked Rimmer. (SR 35, 44, 50, 54, 85-86, 110).

[21] At the evidentiary hearing, Garfield explained that eyewitness experts do not give their opinion about the validity of the identifications, but rather, discuss factors that identifications reliable or not. He opined that such an expert can be helpful when something happens quickly and there is no corroborating evidence. However, that was not the case here. What "killed" Rimmer in this case, Garfield explained, was the composite that Kimberly Davis-Burke prepared which looked

cases, such as this, where there is ample corroborative evidence supporting the identifications (PCR.12 2413).

For support of his appellate argument, Rimmer points to McMullen v. State, 714 So.2d 368 (Fla. 1998); Rogers v. State, 511 So.2d 526 (Fla. 1987). However, these cases discuss only whether this type of expert testimony is permissible, they do not state that counsel is ineffective for failing to offer this type of expert testimony. In fact, the expert offered by Rimmer at the evidentiary hearing in support of this claim, Dr. John Brigham, is the very same expert who was not allowed to testify in McMullen and the denial was upheld by the Supreme Court.

"When facts are within the ordinary experience of jurors, conclusions to be drawn therefrom are to be left to those jurors." McGough v. State, 302 So.2d 751, 755 (Fla. 1974). "Expert testimony should be excluded when the facts testified to are of such nature as not to require any special knowledge or experience in order for the jury to form its conclusions. We hold that a jury is fully capable of assessing a witness' ability to perceive and remember, given the assistance of cross-examination and cautionary instructions, without the aid of expert testimony." Johnson v. State, 438 So.2d 774, 777 (Fla. 1983). See Green v. State, 975 So.2d 1090, 1108 (Fla. 2008);

---

exactly like Rimmer. The mistakes the police made were huge so he could bring those out on cross-examination (SPCR.5 695-98).

Riechmann v. State, 777 So.2d 342, 355 (Fla. 2000); Simmons v. State, 934 So.2d 1100, 1117 (Fla. 2006), cert. denied, 127 S.Ct. 1334 (2007); McMullen, 714 So.2d 368; Rose, 617 So.2d at 297 (holding counsel was not ineffective for failing to obtain expert in eyewitness identification when, instead, he pointed out inconsistencies between the eyewitnesses' testimony as well as differences in the trial testimony of each witness and his or her earlier statements); Ruffin v. State, 549 So.2d 250, 251 (Fla. 5th DCA 1989) (testimony of three police officers that in their opinion defendant was man in videotape selling cocaine was prejudicial error where officers were not eyewitnesses to the crime, they lacked any special familiarity with the defendant, and they were not qualified as any type of experts in identification). Given this, the court properly denied relief, and this Court should affirm.

(3) Questioning Officers Lewis and Howard and fingerprint examiner Deidre Bucknor (IB 51-53) – Rimmer contends that the court erred in not finding counsel ineffective for not questioning Officers Lewis and Howard as well as fingerprint analysis Bucknor regarding other suspects and not comparing the latent prints to those suspects. As the trial court concluded, Garfield did not want to impeach Bucknor as her fingerprint results supported the defense case. Further, the lack of follow-up on the other Ford Probes spotted in the area or

investigation of other suspects was not deficient. As the trial court reasoned:

> ... As pointed out by the State, Mr. Garfield's cross-examination, at trial, of fingerprint witness Deirdre Bucknor, disclosed to the jury that the Defendant's fingerprints were not located in any of the key areas of the crime scene (R 1140-1145).
>
> Mr. Garfield testified at the evidentiary hearing and explained that he did not want to impeach the testimony of Ms. Bucknor because her testimony, that his client's fingerprints were not at the crime scene, was important to his misidentification defense. Mr. Garfield testified that it would have undermined his theory of defense to imply that Ms. Bucknor was not a competent fingerprint analysis. Mr. Garfield stated that "to impeach her would have been ludicrous," her testimony was "beneficial" to the Defendant (EH 692-694).
>
> This Court finds that trial counsel's questioning of witness Bucknor was based upon well reasoned trial strategy and was not a deficiency on his part.
>
> Fifth, Defendant argues that trial counsel was deficient in failing to investigate other suspects. Defendant presents additional arguments on this claim in his amended motion and related arguments in Claim IX (Brady claim) of the initial motion. At the evidentiary hearing, Mr. Garfield admitted that he did not pursue getting additional information on three suspects listed in fingerprint analyst Bucknor's conclusion sheet, except for having asked three detective's about them during their deposition (EH 617-618). Mr. Garfield testified that even though the suspects photographs were used for photo lineups, he does not know what use it would have been to him (EH 749-753).
>
> This Court finds that there was no deficiency on the part (sic) Mr. Garfield in failing to investigate other suspects whose names were provided to him without any additional information. Additionally, this Court finds that no prejudice to the Defendant had been shown by trial counsel's not pursuing further

investigated (sic) of these suspects.

(PCR.12 2412)

The pith of Rimmer's complaint is mere disagreement with Garfield's strategy in examining these witnesses and the evidence he chose to highlight. Such disagreement is insufficient to prove ineffectiveness under Strickland. 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) (recognizing "Counsel cannot be deemed ineffective merely because current counsel disagrees with trial counsel's strategic decisions. Moreover, strategic decisions do not constitute ineffective assistance of counsel if alternative courses have been considered and rejected and counsel's decision was reasonable under the norms of professional conduct"); Jennings v. State, 583 So.2d 316, 321 (Fla. 1991) (finding it is not deficient performance not to put on all information or witnesses about a subject once he presents evidence sufficient to make the defense point).

The trial and evidentiary hearing records establish that Garfield provided constitutionally effective representation and had reasoned strategy for the actions he took. The information that Bucknor was told not to conduct a comparison of the crime scene prints to determine whether any of the them matched two

other suspects, Bernard Gilbert and Greg Broughton, whose names were listed on the latent fingerprint report, came out during her deposition which Garfield attended. Further, Garfield elicited from Bucknor that neither Rimmer's nor Parker's prints matched those lifted from important areas of the store (office door, front door, and cash register) or 1991 Dodge (R 1140-41, 1144). Bucknor agreed that many of the latent prints submitted to her did not match Rimmer or Parker (R 1145). As such, the jury heard that many of the prints lifted from the crime scene did not match either Rimmer or his co-defendant.

At the evidentiary hearing, Garfield explained that Bucknor "was the last person" he wanted to impeach because she helped his defense. The fact that she did not find one fingerprint at the scene matching Rimmer was very helpful to him in arguing his misidentification defense, Garfield noted it would have been "ludicrous" for him to bring out anything negative about Bucknor because it would undermine his defense, i.e., it could have implied that the reason none of his prints were found at the scene was because she was not a competent analyst, having failed her 1997 proficiency exam. (SPCR.5 692) With respect to the reports of other Ford Probes seen in the area or the failure of the police to investigate other suspects, Garfield explained that the information was not important as the vehicles either had out-of-state plates, working headlamps, insufficient

information to follow-up on the report, or the sighting was stale, i.e., several days old. (SPCR.5 622-23, 668-70)

Garfield was not deficient for failing to follow-up on a Ford Probe that could not have been the one involved in the murders and one spotted four days after the murders. As Garfield noted, while he would like to have every piece of information available, it is not possible. Moreover, Rimmer cannot establish prejudice, the fact remains that Rimmer was identified as not only a participant in this crime, but as the shooter by two eyewitnesses who had ample opportunity to see him. Finding other participants in the crime would not lessen Rimmer's culpability. Relief was denied on this claim correctly, and this Court should affirm.

(4) Rehabilitate Joanne Rimmer with employment records (IB 53-56) - Denying relief, the trial court found:

> ... Defendant argues that trial counsel was deficient in not rehabilitating witness Joanne Rimmer to explain that the Defendant had a large sum of money on him, the night he was arrested, because he had cashed out some of his annual leave as his place of employment. Mr. Garfield testified that the issue, concerning Mr. Rimmer having $900.00 on him, was inconsistent[22] with the defense which acknowledged that Mr. Rimmer was in possession of the stolen audio/video equipment (EH 600-609). Mr. Garfield explained that he did not want to make the amount of cash his client had on him seem more important than it was. This Court finds counsels (sic) not questioning the Defendant's wife, to explain

[22] The State suggests that the court intended to say "not inconsistent" given Garfield's testimony, the State's argument, and the denial of relief.

> the amount of money he had on him, a matter of reasoned trial strategy and not a deficiency. Additionally, this Court agrees with the State's position that this evidence would have had no reasonable probability of changing the result of the guilt phase.

(PCR.12 2410-11). Contrary to Rimmer's claim that the facts are not supported by the evidence Garfield's testimony[23] establishes the facts relief upon by the court and offered his strategic basis for not utilizing the employment records he had obtained. Garfield believed it would have been a mistake to go over the testimony with Joanne because it was not inconsistent with his defense strategy and it would have given it an unwarranted importance. While Garfield had Rimmer's employment records, he did not believe it important to question Joanne about them. (SPCR.5 605-06). "Strategic decisions do not constitute ineffective assistance of counsel if alternative courses have been considered and rejected and counsel's decision was reasonable under the norms of professional conduct." Brown v. State, 894 So.2d 137, 147 (Fla. 2004). Whether rehabilitation

[23] Garfield testified that he did not rehabilitate Joanne because the State's cross-examination was "lame" and not impeaching. The fact that Rimmer had approximately $900.00 cash when arrested was not inconsistent with the defense, because, as Garfield explained, they already had conceded that Rimmer was in possession of stolen audio/video equipment, thus, having the cash was expected. Garfield deemed the State's questions were irrelevant and that Joanne had not lost credibility. Furthermore, as Garfield reasoned, the cash proceeds of the robbery were about $100.00 from the register and none of the victims lost cash. (SPCR.5 601-05).

is required is a strategic decision which Garfield properly exercised based on his defense strategy and the trial evidence. Likewise, showing another source for the $900.00 cash would not have changed the trial outcome given the eyewitness testimony and Rimmer's possession of items from the robbery. See Rimmer, 825 So.2d 308-11. This Court should affirm the denial of relief.

(5) Marital privilege objection (IB 56) – In nothing more than conclusory terms, Rimmer asserts counsel was ineffective for not objecting to questions posed to his wife regarding their marital communication. (IB 56) Such argument should be found insufficiently pled and the claim deemed waived. See Duest v. Dugger, 555 So.2d 849, 852 (Fla. 1990) (opining "purpose of an appellate brief is to present arguments in support of the points on appeal" - notation to issues without elucidation is insufficient and issue will be deemed waived); Cooper v. State, 856 So.2d 969, 977 n.7 (Fla. 2003); Roberts v. State, 568 So.2d 1255 (Fla. 1990).

Moreover, on direct appeal, Rimmer raised the issue as court error for permitting the State to question his wife about whether she asked him about the homicides. This Court held:

> In claim five, appellant argues that the prosecutor improperly solicited comment on his right to remain silent by asking his wife, Joanne Rimmer, about her conversations with appellant as to his involvement in the double homicide. Mrs. Rimmer had testified for the defense that appellant had planned on going fishing on the day of the homicides and that he did not return

> home until 3:30 p.m. She further testified that she, not appellant, was driving the Ford Probe that day. On cross-examination, the State asked Mrs. Rimmer if she had ever asked appellant about the crimes charged. The defense objected on the ground that the State was attempting to elicit testimony concerning appellant's silence by way of his failure to deny involvement in the murders. The State rephrased the question by asking Mrs. Rimmer if she ever asked her husband about the double homicides in this case. She answered no.
>
> Commenting on the defendant's exercise of his right to remain silent is serious error. *See State v. Kinchen*, 490 So.2d 21, 22 (Fla. 1985). The test to be applied in such instances is whether the statement is fairly susceptible of being interpreted by the jury as a comment on the defendant's failure to testify. *See id.; see also Jackson v. State*, 522 So.2d 802 (Fla. 1988); DiGuilio, 491 So.2d at 1136.
>
> Here the State's question comes very close to infringing on appellant's right to remain silent. However, Mrs. Rimmer testified that she did not ask appellant about the double homicides. Thus, the question coupled with the answer was not fairly susceptible of being interpreted by the jury as a comment on the defendant's failure to testify. Accordingly, we find this claim to be without merit.FN14
>
> FN14. Appellant's additional ground for reversal, that the comment infringed on the husband-wife privilege, was not preserved for appellate review because he did not object to the State's question on this ground.

Rimmer, 825 So.2d at 23.

Because no fundamental error was found, Rimmer is unable to prove prejudice under Strickland. See White v. State, 559 So. 2d 1097, 1099-1100 (Fla. 1990) (rejecting ineffective assistance of counsel claim regarding counsel’s failure to preserve issues for appeal in postconviction appeal based upon earlier finding

by court on direct appeal that unpreserved alleged errors would not constitute fundamental error); Teffeteller v. Dugger, 734 So. 2d 1009, 1019 (Fla. 1988) (finding that defendant had failed to meet prejudice prong of Strickland on issue that counsel failed to adequately argue case below given that the issue was rejected without discussion); Cherry v. State, 659 So. 2d 1069, 1072 (Fla. 1995).

Neither deficiency nor prejudice can be proven here because the "husband-wife" privilege is inapplicable under the facts of this case. The State asked Joanne Rimmer if she had ever asked her husband about the double murder, it did not ask her to disclose the substance of any conversation. As such, the "husband-wife" privilege was not implicated, and the objection was not required. Further, a violation of the "husband-wife" privilege cannot be fundamental error because it is subject to the harmless error rule,[24] thus even if an objection should have been raised, Strickland prejudice cannot be shown. Similarly, given This Court's finding on direct appeal that Joanne did not ask her husband about the murder, thus, there was no disclosure, or even potential disclosure of privileged information. Hence again, even if an objection should have been lodged, no

[24] See Koon v. State, 463 So.2d 201, 204 (Fla. 1985) (applying the harmless error rule to violation of the "husband-wife" privilege); Donaldson v. State, 369 So.2d 691, 694 (Fla. 1st DCA 1979)(applying harmless error rule).

prejudice has been shown.

(6) Speedy trial (IB 56-57) – In rejecting the claim of ineffectiveness for waiving speedy trial, the court concluded:[25]

> ... Richard Garfield testified at the evidentiary hearing that he was concerned with having enough time to prepare a major case for trial (EH 599). That he did not recall waiving speedy trial (EH 599) but that based upon his experience and the trial judges policies, a realistic trial date was agreed upon that would give him about six months to prepare. This Court finds that trial counsel's well considered and realistic anticipation of the time he would need to prepare for trial and his waiving the right to a speedy trial was not a deficiency.

(PCR.12 2410). The estimation of the time needed to prepare a capital case is within counsel's purview. Rimmer's reliance on Vega v. State, 778 So.2d 505, 506 (Fla. 3d DCA 2011) is misplaced as that case is inapposite to what happened here. In Vega, the trial was set on only 10 days notice and was set the day after counsel filed a notice of expiration of speedy trial. Further, the defendant in Vega was not provided with discovery until the day trial began. Based on those facts, the district court held

[25] These findings are supported by the evidence. Garfield, explained that on June 8, 1998, he was appointed to Rimmer's case and that while he could not recall waiving speedy trial, his concern at the July 16, 1998, status conference was to obtain sufficient time to prepare for trial. He noted that Judge Cohn's policy was to give attorneys a few weeks to get a feel for their case before holding a status conference and asking for counsel's realistic estimation of the time need to prepare for trial. Garfield recalled that they agreed upon a trial date six months later, on January 18, 1999. (SPCR.5 596, 598-99). Garfield's testimony refutes Rimmer's claim that he was placed on the July 16, 1998 "trial" docket.

that the continuance should have been charged to the State. Conversely, here, Garfield was not put in a position of going to trial before he was ready. Instead, the trial was set for January 18, 1999, an agreed upon date and unlike the defendant in Vega, Garfield was provided with the initial discovery in June 1998, well in advance of trial, and did not have to request a continuance. Relief was denied properly.

ISSUE III

THE COURT PROPERLY DETERMINED PENALTY PHASE COUNSEL RENDERED EFFECTIVE ASSISTANCE (restated)

Here, Rimmer maintains that he received ineffective assistance from his penalty phase counsel, Hale Schantz ("Schantz") because he did not conduct a sufficient investigation, provide his mental health experts with background materials or object to allegedly improper arguments by the State or object to the pecuniary gain and avoid arrest aggravators. He claims relief should have been granted and that the court erred by: (1) overlooking counsel's excessive case load (IB 61); (2) failing to address Schantz's allegedly deficient investigation and preparation of the penalty phase (IB 62-63); (3) crediting Schantz with having a strategy for not calling Louis Odell (Rimmer's brother) or Sabrina Irving (mistress) (IB 63-64); and (4) ignoring the alleged lack of strategy for failing to object to invalid aggravation and improper

prosecutorial statements. The State disagrees. The record supports the trial court's findings and conclusions of law that Schantz was not ineffective as he investigated the case, made reasoned decisions based on that investigation, and Rimmer has failed to show what information was not obtained that would have resulted in a different sentence.[26] The denial of relief should

[26] The standard of review for claims of ineffectiveness of counsel following an evidentiary hearing is *de novo*, with deference given the trial 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). For a defendant to prevail on an ineffectiveness claim, he must establish (1) counsel's representation fell below an objective standard of reasonableness, and (2) but for counsel's deficiency, there is a reasonable probability the result of the proceeding would have been different. Strickland, 466 U.S. 688-89. 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."

be affirmed.

Based on the evidentiary hearing presentation, the court denied relief concluding:

> The trial record discloses that during the penalty phase of the trial, the defense was presented by attorney Hale Schantz. ...
>
> The trial record reveals that Mr. Schantz presented to the jury, the testimony of the Defendant's father Louis Rimmer (R 1867-1875), Defendant' work supervisor at a residential retirement community Melanie Friczinger (R 1876-1881), a person he had mentored Henry Morris (R 1881-1885), clinical psychologist Dr. Marths Jacobson (R 1886-1934), Defendants wife Joanne Rimmer (R 1935-1941), and Defendant's nine year old daughter Gisel Charles (R 1941-1943). The defense presented additional testimony at the Spencer hearing through the testimony of Dr. Michael Walczak (R 2008-2046) and Defendant's mother Lilly Rimmer (R 2047-2056).
>
> At the evidentiary hearing, CCRC presented mitigation and mental health evidence through the testimony of the Defendant's mother (EH 11 -52), Defendant's coworker and girlfriend Sabrina Irving (EH 53-62), a friend Erlene Jennings (EH 63-77), and a friend Ronald Jennings (EH 77-81), a friend/coworker Stewart Weiss (EH 81-92), work supervisor Melanie Friczinger (EH 93-100), Defendant's aunt Jeanette Rimmer (EH 101-134), psychologist Dr. Martha Jacobson (EH 135-185), Defendant's brother Louis O'Dell Rimmer (EH 193-222), friend/coworker George Wellington (EH 250-255), and

---

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.").

clinical psychologist Dr. Faye Sultan (EH 258-341).

Mental health testimony was presented to the jury by Dr. Martha Jacobson. Dr. Jacobson is a licensed clinical psychologist and was accepted by the court as an expert in the field of clinical psychology (R 1890-1893). The record reveals that Dr. Jacobson conducted clinical interviews and testing of the Defendant, including MMPI, the Rorschach Ink Blot test, and SIRS (R 1895, 1899, 1902). Although Dr. Jacobson did not have extensive background information, she did have information that was provided to her by the Defendant. Dr. Jacobson testified that the results of her testing disclosed the Defendant suffered from paranoia, mania, psychopathic deviance, bizarre thought process, schizophrenia, depression and that he was not malingering and did not want to appear sick (R 1895-1902). She testified at trial that Mr. Rimmer reported some previous hallucinations and there was some evidence of delusions. She concluded that the Defendant was suffering from schizophrenia, "a fairly serious mental illness." (R 1902-1904)

Dr. Jacobson also testified at the evidentiary hearing and related that in 2003, at the request of CCRC, she conducted an additional clinical interview, performed more extensive testing of the Defendant, and was provided a background packet (EH 157, 162). Dr. Jacobson testified that her findings were consistent with the data from her earlier testing (EH 161). She related that the additional information "made more powerful my rendition of the problem he had," and that Mr. Rimmer has a significant mental disorder." (EH 169-170)

Dr. Michael Walczak testified at the Spencer hearing but was not called as a witness at the evidentiary hearing. Dr. Walczak was accepted by the trial court as an expert in the fields of forensic psychology and neuropsychology (R 2009). He testified that he interviewed the Defendant and performed a battery of tests. He concluding (sic) that the Defendant has no neurological damage, no history of drugs, was not malingering, but that he suffers from schizo-affective disorder which is considered a severe disorder (R 2010-2012). Dr. Walczak testified that his conclusions were in agreement with Dr. Jacobson's (R

2011) and that he was not short on time or money to do his diagnosis (R 2044)

CCRC called Dr. Faye Sultan as a witness during the evidentiary hearing. The Court accepted Dr. Sultan as an expert in the fields of forensic and clinical psychology and child abuse. (EH 267-269). Dr. Sultan related that she conducted clinical interviews with the Defendant and received a packet of background information from CCRC, which included records from the Department of Corrections, deposition and trial transcripts (EH 270, 310, 275-276). The Court notes that some of the documents referred to, such as the presentence investigation and direct appeal opinion, did not exist at the time of trial and could not have aided trial counsel in 1999. Additionally, the information supplied to Dr. Sultan contained the reports of the two psychologists who testified during the trial and Spencer hearing.

Dr. Sultan testified that she was aided by the background information she received from CCRC and what she learned by personally interviewing several of the Defendant's relatives and a former girlfriend (EH 287-304). Dr. Sultan testified that she believed the Defendant met the characteristics for the statutory mitigator of being unable to conform his behavior to the requirements of the law (EH 316-317). Dr. Sultan stated she believed there was sufficient information to prove several non-statutory mitigators, including mental illness without treatment, working full-time, going to school and his relationship with his children (EH 318-319). The Court notes that the same non-statutory mitigators were presented to and considered by the trial court.

This Court finds that penalty phase trial counsel was not ineffective in preparing for an presenting Defendant's mental health mitigation. The opinions and conclusions of all three mental health experts were similar and basically confirmed each other. Admittedly, the additional background information and records would have bolstered Dr. Jacobson's trial testimony, but not to the extent that the would likely have been any different. (The portion of this claim relating to mental health is also discussed in Claim VIII.)

Regarding the other mitigation that CCRC argues should have been presented at trial, this Court agrees with the State that most of the evidence is cumulative to what was presented by trial counsel, with the exception of the physical abuse inflicted on the Defendant by his father. The evidentiary hearing testimony reveals that Mr. Schantz was experienced and qualified for this type of representation (EH 510-512). Mr. Schantz met with members of Defendant's family and also traveled to Ohio to meet with the father. Mr. Schantz stated that there was some resistance and lack of cooperation from family members. (EH 559).

According to Mr. Schantz, there was no indication from anyone that his client had been physically abused as a child (EH 586). The abuse had not been disclosed by the Defendant or any of the relatives that counsel interviewed. Defendant's mother admitted during the evidentiary hearing, that she found the physical abuse to be embarrassing, so she did not bring it up (EH 48).

The record reveals that the Defendant's father testified, during the penalty phase, and related most of Defendant's background information to the jury (R 1869-1871). Mr. Schantz indicated that he made the strategic decision not to call the Defendant's broth, as a witness, because he did not want to make it appear that he [Rimmer] was from a family of murderers (EH 569). He also decided not to call Defendant's girlfriend, Sabrina Irving, as a witness because he wanted to portray his client as a good family man, and that would have been contradicted by testimony about an extramarital affair. Witness Melanie Fritzinger testified that the Defendant was a good employee at John Knox Village. Her testimony was basically the same at the evidentiary hearing as it was at trial.

This Court finds that penalty phase counsel Hale Schantz was not ineffective in preparation for and presentation of mitigation evidence at trial. The testimony presented at the evidentiary hearing was more detailed than that presented at trial, but, for the most part was cumulative, with the exception of the information about physical abuse. Counsel cannot

be considered ineffective for failing to present testimony on matters that were concealed form him. Counsel did a proper investigation and made well reasoned strategic decisions concerning the evidence that was presented to the jury. Additionally, this Court finds that the additional mitigation evidence would not likely have resulted in a different sentence.

Claim V is **DENIED**.

...

In Claim VII Defendant argues that he was denied experts psychiatric assistance as required by Ake v. Oklahoma. ...

In ruling on this claim, the penalty phase and evidentiary hearing testimony of Dr. Martha Jacobson (R 1890-1943) (EH 135-185), the Spencer hearing testimony of Dr. Michael Walczak (R 2008-2046), and the evidentiary hearing testimony of Dr. Faye Sultan (EH 258-341). All three witnesses are clinical psychologist (sic) and all three were accepted as expert witnesses by the Court. The diagnosis and conclusions of all three psychologists were basically the same. Dr. Jacobson testified at trial that the Defendant was paranoid (R 1896) and suffered from schizophrenia, a "fairly serious mental illness." (R 1899, 1904). She testified at the evidentiary hearing that her findings in 2003 are consistent with her 1999 findings (EH 161).

Dr. Walczak's testimony confirmed the findings of Dr. Jacobson. He testified that the Defendant has no neuropsychological disorder, no history of drugs and suffers from a schizo-effective disorder, which is considered a "severe" disorder (R 2010-2011). Dr. Faye Sultan testified, at the evidentiary hearing, that she had available to her records of the Defendant's prior psychological treatment and a great deal of information about the Defendant's background (EH 275-276, 292-309). Her conclusions, even with the additional information, was basically the same as the two other doctors: Defendant is suffering from "paranoid personality disorder," and in the past an acute psychiatric disorder (EH 314).

> The testimony of the mental heath experts, that testified during the trial and at the evidentiary hearing, refute Defendant's argument that he did not have adequate access to and assistance of psychiatric assistance. Claim VII is **DENIED**.

(PCR.12 2415-20, 2422-23).

(1) **Allegation of counsel's excessive case load** (IB 61) - Rimmer claims the trial court overlooked Schantz's "excessive workload" and intimates that Schantz had two capital cases at the same time he was working on Rimmer's penalty phase. However, Schantz testified that his caseload was not overwhelming during the two to three months he was representing Rimmer. He did not think he had any other capital cases at the time, with the exception of a Spencer hearing in State v Dale Brown that he had been appointed to conduct (SPCR.4 433). When scheduling the penalty phase in this case, Schantz reported to the court that he was appointed to the capital case of State v. Brown (R.15 173) and told the court that he had a Spencer hearing scheduled (R.15 1731). Both at trial and in the postconviction proceedings, Schantz spoke of a scheduling conflict due to the State v. Brown case and his appointment to do the Spencer hearing. Consequently, the court's finding that Schantz's case load was not overwhelming and that he had one capital case besides Rimmer's case pending at the time is supported by the record evidence. Rimmer has not shown error.

(2) **Schantz's investigation and preparation of the penalty phase** (IB 62-63) - Contrary to Rimmer's allegation that the court did not address Schantz's preparation and penalty phase presentation, the entire analysis of the ineffectiveness claim addresses Schantz's penalty phase actions and decisions.[27] The evidentiary hearing testimony supports the court's findings. Overall, the postconviction presentation establishes that almost all of the evidence Rimmer maintains was not discovered or presented was in fact gathered during counsel's investigation and developed before the jury and/or trial court in the Spencer hearing. Most of his "new" evidence is cumulative to what was presented originally.

Regarding the one fact that was not presented at trial, the physical abuse of Rimmer by his father, the evidence shows counsel did a proper, thorough investigation, but was not told of the physical abuse by anyone, including Rimmer, his mother,

[27] Rimmer points to Ken Malnick's appointment to the case approximately three months after indictment and his withdrawal four months later having done no investigation at all. Schantz's was appointed on December 1, 1998 and trial started on January 7, 1999. However, the penalty phase did not commence until February 25, 1999 (R 460). Rimmer points to the seven months before Schantz was appointed as proof of ineffective assistance (IB 59) however, that is not the test. As noted in Williams v. Taylor, 529 U.S. 362 (2000), the focus is on **what** efforts were undertaken by counsel and **why** that strategy was chosen. As such, the focus here is on what Schantz did once he was appointed and was that reasonably professional representation under Strickland. Malnick's actions or inactions are of no moment here.

father and wife. The fact that a sentence discussing corporal punishment was included in Dr. Jacobson's report establishes neither deficiency nor prejudice in light of the testimony from Rimmer's relatives and the aggravation in this double homicide case. Moreover, the mitigation offered at the evidentiary hearing does not establish prejudice. Had the mitigation been presented, the result of the penalty phase would not be different as the evidence was either cumulative or would not have changed the result of the proceeding. Penalty phase counsel fulfilled his professional responsibility under Wiggins; Rompilla v. Beard, 125 S.Ct. 2456, 2463 (2005) (noting "the 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."); Williams; Ake; and Strickland.

Regarding what he did to develop mitigation, Schantz explained that he met with Rimmer continuously throughout the case and contacted family members, friends, and co-workers; he did not require anyone to come to his office, but would meet at a place of their convenience. Schantz explained that he obtains a family history and studies the family "dynamics" so that by the time of the penalty phase he knows the family better than it knows itself (SPCR.4 438-39, 458, 466). While Schantz "got

along great" with Rimmer, he had problems getting cooperation from the family. Schantz flew to Ohio to meet Rimmer's father, Louis, but did not meet with anyone else in Cleveland because he was not told that any other witnesses existed even though Schantz told Louis to let anyone else who could help know to come by and speak with him, but no one else showed up. Rimmer's mother, Lilly,[28] and his wife Joanne were not co-operative. Even when Schantz met Lilly, she was more guarded than Rimmer's father and required more prodding to obtain information. Lilly did agree to until after the jury recommended death cooperate. She was presented at the Spencer hearing. Rimmer's wife, Joanne, also did not co-operate immediately. Schantz had to go to her home and convince her to meet him and they discussed her relationship with Rimmer and his background; she did not fully cooperate until right before the penalty phase. (R 1873; SPCR.4 455-57, 459-61, 467, 475, 477, 525-26, 559-63).

Regarding mental health mitigation, two weeks after his appointment, on December 16, 1998, Schantz requested that Dr. Martha Jacobson be appointed as a confidential expert. Schantz had worked with Dr. Jacobson before and she had been highly recommended by Dr. Block-Garfield. Subsequent to Dr. Jacobson's confidential evaluation, Schantz requested that she be appointed

[28] Rimmer did not want Schantz to force Lilly to testify, even though she was under subpoena.

to conduct the full mitigation psychological evaluation. He explained that he told her that she had been retained to be his mitigation expert, not just to conduct an analysis, and he wanted her to investigate whether Rimmer had a prior mental health history (SPCR.4 448-50, 412-13, 515).

Schantz explained that his mitigation strategy was to "humanize" Rimmer. The major thrust of the non-mental health mitigation was that Rimmer was a loving father and husband and an excellent employee who was trying to make a better life for himself and his family. The only real difference between the penalty phase mitigation and what was presented at this evidentiary hearing was the fact that Rimmer had suffered physical abuse as a child. However, Schantz testified he had no indication from the mother, father, wife or Rimmer that Rimmer was physically abused as a child. While both parents described emotional abuse and fighting in front of the children, no one ever told him about physical abuse (SPCR.4 568, 590).

At the penalty phase, Schantz's primary mitigation witness was Rimmer's father, Louis. He discussed Rimmer's childhood, the fighting and discord in the home, and the other turmoil in Rimmer's childhood. Louis testified at the penalty phase that there was domestic violence between he and his ex-wife, which was witnessed by Rimmer. The Rimmer children were taken by one parent then by the other until finally Louis gave his children

back to their mother when Rimmer was about 13 years old (R.17 1867-71; SPCR.5 563). Rimmer's mother, Lilly, testified at the Spencer hearing, agreeing that she and Louis fought all the time. She stated Louis was not an attentive or caring father and Rimmer would become angry when his parents fought. Lilly admitted she had no contact with her children for the three years they lived with their father and stated he returned the children without explanation after he had "done all the damage he could do to them," and he was ready to move on with his life. Louis told the children Lilly did not love or want them; he put negative thoughts in their heads. The children never received psychological counseling when they came to Florida. While Rimmer did well in school when he was young, by the time he came to Florida he had a difficult time (R.18 2049-53).

Lilly's evidentiary hearing testimony varied on certain points and was more extensive than her Spencer hearing account (SPCR.1 15-16 19-33), however, the only new information was that she reported that the boys had been physically abused by their father. Lilly did not allege that physical abuse occurred while they lived together as a family. On the contrary, the reason she gave for leaving Louis was that she did not want him to start abusing the children after one fight between Lilly and Louis led to Odell pulling a knife on his father, and Louis pushing Odell down a flight of stairs. According to Lilly, it

was not until the boys returned to her in Florida, after living with their father, that she noticed scars and welts on their bodies and cigarette burns on their buttocks. When questioned, the boys told her that their father had beaten them, sometimes extremely badly. They told her that their father kept them in the house and that they went for long periods of time with no meals, no food. Louis spent all of his time and money on women and their families (SPCR.1 23-24, 34-35).

According to Lilly, she "may have mentioned" the physical abuse to Rimmer's counsel, but admitted it was "[n]othing elaborate" because of "embarrassment;" she did not feel comfortable bringing it up and they did not ask specific questions, so she did not bring up the issue. However, Lilly willingly had let the boys leave North Carolina to spend Christmas in Ohio with Louis. Lilly claimed she did not have contact with Louis' family to ask them about the abuse, but acknowledges she had telephone contact with the boys while they lived with their father. On cross-examination, Lilly claimed she did not know why she was not called to testify before the jury and denied knowing Rimmer's wife had given him an alibi for the entire day of the murders (Rimmer took son fishing all day) which contradicted the alibi Lilly offered (Rimmer was with her around noon). (SPCR.1 30, 36-37, 51-52, 54-56).

Rimmer's aunt, Jeanette ("Jeanette") and Odell, testified

at the evidentiary hearing and confirmed the physical abuse. Louis beat his boys with a leather belt, razor strop, or whatever he could find to make them "mind." Sometimes marks were left on the boys.[29] (SPCR.1 106-07, 109-12, 114-15, 124-26). Odell, who is serving a life sentence for first-degree murder, reported that his father beat them, from pre-kindergarten age, when their mother was not home and live with him in Ohio. Louis would use his hands, belts, or extension cords (SPCR.2 197-98, 201, 206).

Based on this, Schantz was not ineffective for failing to discover and present evidence of this physical abuse as mitigation. Instructive on this issue is Marshall v. State, 854 So.2d 1235 (Fla. 2003), wherein Marshall raised a similar claim, arguing that counsel was ineffective for failing to adequately investigate, develop, and present available mitigating evidence regarding his family background and abusive childhood. At the evidentiary hearing, Marshall presented testimony from three of his brothers and five of his cousins detailing extensive physical abuse by his father, including beatings with extension cords, tree branches and electrical wire. However, his trial counsel testified that he conducted a thorough pretrial

[29] Jeanette admitted that she did not know Schantz was coming to Cleveland to meet with Louis; all Louis told her was that Rimmer had gotten in trouble, not that he was facing capital murder charges in Florida (SPCR.1 136-38).

interview of Marshall, who advised him that he came from a loving home with some physical discipline which he did not describe as abusive. Marshall also denied being abused when examined by mental health experts. Finally, Marshall's version of his childhood was corroborated by his father, and nothing in his prison or school records indicated abuse. This Court held that counsel was not ineffective.

In so holding, this Court cited Stewart v. State, 801 So.2d 59 (Fla. 2001), wherein it had also rejected a claim that trial counsel was deficient for not investigating/presenting evidence of alleged childhood abuse. As in Marshall, Stewart generally described a happy childhood and never informed counsel, or the defense psychiatrist, about any abuse he suffered. Further, trial counsel indicated that he personally interviewed Stewart's stepsisters, but neither mentioned the abuse. Similarly, Stewart's stepfather never led counsel to believe anything other than that he was a loving and caring father. This Court concluded, "by failing to communicate to defense counsel (or the defense psychiatrist) regarding any instances of childhood abuse, [the appellant] may not now complain that trial counsel's failure to pursue such mitigation was unreasonable." Id. at 67 (citing Cherry v. State, 781 So.2d 1040, 1050 (Fla. 2000)). See Van Poyck v. Florida Dept. of Corrections, 290 F.3d 1318, 1324 (holding lawyer is not ineffective for failing to discover

mitigation when defendant does not mention abuse).

Moreover, a review of the testimony presented at the evidentiary hearing shows that it was all evidence that Rimmer was a good father, husband, son and employee, which the jury and judge had heard previously. Penalty phase counsel cannot be deemed ineffective for failing to present cumulative mitigation during sentencing. Gilliam v. State, 817 So.2d 768, 781 (Fla. 2002)(finding record refutes any claim of prejudice, as the substance of the testimony that Gilliam argues should have been presented would have been largely cumulative to the evidence presented at trial); Downs v. State, 740 So.2d 506, 516 (Fla. 1999) (affirming denial of defendant's claims that counsel was ineffective for failing to investigate and present additional mitigating evidence where the additional evidence was cumulative to that presented during sentencing); 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); 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.").

Although Rimmer did not describe a happy childhood, he never told Schantz that he had been physically abused, nor did his mother, father or wife. While the mother and father described physical abuse between themselves and emotional abuse of Rimmer (being used as a pawn in his parents' divorce), they never mentioned physical abuse. Moreover, there was no mention of physical abuse in any records, even those Rimmer claims Schantz was ineffective for not providing to the mental health experts. While Dr. Jacobson's report indicates that Rimmer told her his father used "corporal punishment," a belt and a switch and would often punch the children or slap them on the head" he never described the treatment as "abuse" but rather, as punishment. Consequently, Rimmer has failed to show where the trial court erred in its order denying relief.

Even if this Court were to find such an omission deficient, Strickland prejudice has not been shown. Rimmer would not have received a life recommendation even if the jury heard about the physical abuse. The jury heard and the court found a total of six aggravating factors in this case and applied great weight to four of them: (1) Rimmer, a convicted felon, committed the double murder while under sentence of imprisonment (Conditional Release Program) (great weight); (2) three prior violent felony convictions (great weight); (3) double homicide was for the purpose of eliminating witnesses (great weight); (4) CCP for

double murders (great weight); (5) HAC (moderate weight) and (6) felony murder (moderate weight) (R.21 2383-2399). The statutory mitigator of extreme mental or emotional disturbance had been rejected and the non-statutory mitigation, was that Rimmer was an excellent employee and had helped or ministered to others in the past (minimal weight), and family background, that he was a good father, and his mental illness (very little weight) were out-weighed by the aggravation. Adding a physical abuse non-statutory mitigator would not have outweighed the weighty and numerous aggravators that had been established. The jury did hear about Rimmer's dysfunctional family life and chaotic childhood and found it did not outweigh the weighty mitigators. Clearly, the outcome of the penalty phase would not have been different had the jury been told of the physical abuse.

Schantz's penalty phase presentation stressed "good father, good son, good employee" mitigation. Melody Fritzinger (R.17 1879-78; SPCR.1 97-98, 103-04), Renee Zaldivar (R.17 1879-80), and Joanne Rimmer and her daughter Giselle Charles (Rimmer's step-daughter) (R.17 1881-84, 1936-39), and Henry Morris a church friend who knew Rimmer from childhood (R.17 1881-84) all supported the mitigation themes. This is not a case where no investigation was done or where the lay witness reports were introduced solely through defense investigators. Merely because additional witnesses were available to discuss

his childhood and social history does not establish deficiency where much of what was brought out by these new witnesses was cumulative to that presented originally. It is well settled, counsel does not render ineffective assistance by not placing before the jury cumulative evidence. Rutherford, 727 So. 2d at 225 (finding additional evidence offered at postconviction hearing was cumulative to that presented in penalty phase, thus, claim was denied properly).

Turning to the mental health investigation and presentation, it is clear effective assistance was rendered here. As mental health mitigation, Schantz put on clinical psychologist, Dr. Martha Jacobson, who conducted two clinical interviews and gave multiple tests and found Rimmer, who denied having seen a mental health professional previously, suffered from found a schizophrenic disorder, a mood disorder, mania and depression and that these in turn allowed Rimmer to argue for the statutory mental mitigator of under the influence of extreme mental or emotional disturbance. (R.17 1890-1904, 1912, 1930). Immediately following the jury's death recommendation, Schantz requested the appointment of a neuro-psychologist, Dr. Walczak. Garfield explained that was out of ideas and didn't want to show up at Spencer with nothing new. He decided to get a neuro-psychologist on the chance it would show something, but he didn't have any real concern that Rimmer was suffering from

neuropsychological. (SPCR.4 492-93, 573-74). Dr. Walczak testified at the Spencer hearing that he met with Rimmer three times, preformed testing and a clinical interview resulting in findings consistent with Dr. Jacobson. (R.18 2009, 2030; SPCR.4 574). He concurred with Dr. Jacobson's diagnosis, opining that Rimmer has a schizo-affective disorder, but that there were no signs of neuro-psychological damage; Rimmer has no brain damage. Dr. Walczak had no opinion regarding the statutory mitigator of "extreme mental or emotional disturbance." Dr. Walczak spoke of an incident, when Rimmer was eight, where he held a rifle to his sleeping father but did not to kill him (R.18 2010-12, 2018).

The major difference in Dr. Jacobson's postconviction testimony from her penalty phase opinion is that she now believes the statutory mitigator of "under an extreme mental or emotional disturbance" was applicable to Rimmer in 1999, but she does not believe statutory mitigator "capacity to appreciate/conform conduct" is applicable.[30] She stated that, in

[30] Jacobson met with Rimmer again on October 22, 2003 and conducted an extensive clinical interview and administered a battery of psychological tests, more extensive than she had in 1999. There was a significant amount of paranoia, signifying a major mental disorder was present, but the schizophrenic-type symptoms were more in check, his thinking was not as loose, he was not suggestible. Rimmer's depression was not as significant, he was not malingering and he did not meet the cutoff for psychopath. Asked whether the testing confirmed the earlier diagnosis of schizo-affective disorder, Dr. Jacobson noted it was within the same general category of psychotic disorders, but there was less depression, hallucinatory, loose

conducting a mental health evaluation and looking for mitigation, she looks for family history and past history, including school records and criminal history, but that she did not receive that type of information here. Rather, she received a copy of the warrant, probable cause affidavit, grand jury indictment and police narratives. The attorney did not alert her to any psychological problems (Rimmer denied having any type of mental illness), did not request that she contact family/friends, did not supply her with DOC records or mental health records and did not provide her with social history. Everything she learned about Rimmer came from him and his test results.[31] (SPCR.1 147, 149-50, 158-59).

---

thinking, and less signs of schizophrenia. She did not find this surprising given the structured environment - outwardly psychotic individuals do better in structured environments. The MMPI was fairly identical to the earlier one (SPCR.1 161-64).

[31] In 1999, she diagnosed him as having schizo-affective disorder, which combines symptoms of schizophrenia and a mood disorder (either depression or bipolar). Her diagnosis was based on the test results and things she had been provided. She described it as a very severe mental disorder, involving psychosis, a break with reality, hallucinations, delusions, illogical, distorted thinking. Paranoid thought processes also showed up in the testing, which impair your judgment. She drafted a written report on January 20, 1999. The evaluation contains a social history, which includes information about Rimmer's childhood and background (SPCR.1 152-54). The social history describes Rimmer as coming from a family that was divorced when he was seven or eight; that his childhood was chaotic and dysfunctional. There were frequent physical fights between his paren.2ts, the children were taken back and forth between the parents. The father used the children as a means of getting back at the mother and criticized her in an attempt to

"The presentation of changed opinions and additional mitigating evidence in the post-conviction proceeding does not establish ineffective assistance of counsel." Hodges v. State, 885 So.2d 338, 347 (Fla. 2004). Here, Rimmer claims that Schantz was ineffective for failing to provide Dr. Jacobson with his DOC records, his employment records[32] and his school records. However, he has failed to demonstrate how anything in those records would have made any difference in Dr. Jacobson's evaluation. First, Rimmer has failed completely to allege what was in the school and employment records that would have helped Dr. Jacobson. Second, Rimmer told Dr. Jacobson, in 1999, that he received mental health treatment at Appalachian (sic) Correctional Institute (R.17 1912). Thus, if she believed those records were necessary for her evaluation she could have requested them. Last, the records from Appalachee Correctional

---

alienate her. Father would spend money on girlfriends or himself, not on the children. There was a lack of food, they had to wear the same clothes, didn't get Christmas gifts, but girlfriend's children did and there was corporal punishment used in significant amounts, violent punishment used in his childhood. Rimmer did well in school, got to 10th grade, didn't attend regularly, began to skip middle school in Florida, to hang out with brother, began to get into trouble, there was juvenile jail experiences, he was in a program in Jacksonville, was tried at age 16 as an adult, had prison incarcerations. Rimmer denied a psychiatric history, but acknowledged brother treated with Thorazine (R 151-52).

[32] Schantz testified that he didn't obtain the employment records from John Knox Village because he had spoken to them and had live witnesses which he thought they were better (R 446).

show that Rimmer requested group therapy and a few years later complained about disturbing nightmares on several occasions (R.2 280-83). There is no diagnosis of a mental illness and no treatment at a mental health facility. Consequently, they would not have been much help to Dr. Jacobson in her evaluation and do not support her changed opinion that Rimmer had the statutory mitigator of "under extreme mental or emotional disturbance" in 1999[33] See Hodges, 885 So.2d at 348-49 (rejecting ineffectiveness claim for counsel failing to provide background materials which resulted in changed expert opinions since nothing in school, military or medical records referenced mental health diagnosis or brain damage); Sochor v. State, 883 So.2d 766 (Fla. 2004). Dr. Jacobson's diagnosis of schizo-affective disorder was accurate, even without knowing about the prior nightmares. Her diagnosis was based on her extensive interview with Rimmer and psychological testing. There's been nothing presented in the records to show that was inaccurate or incomplete. In fact, Rimmer has now received a less severe diagnosis because he has benefitted from living in a structured environment. Based on this, Rimmer has failed to show where the trial court's rejection of his claim erred on the facts or law.

Similarly, merely because Rimmer has now found one new

[33] Dr. Jacobson testified, in 1999, that Rimmer's condition was long-standing so it was arguable that she was giving him the statutory mitigator at that time.

mental health expert to give a different opinion at the evidentiary hearing doesn't make counsel ineffective. Dr. Faye Sultan, a clinical psychologist, who admitted that she is personally opposed to the death penalty, opined that Rimmer is suffering from paranoid personality disorder. She thinks he could have had a more acute psychotic disorder in the past. According to Dr. Sultan, Rimmer had the statutory mitigator of "under an extreme mental or emotional disturbance" at the time of the crime because he has suffered from disease for many years. (SPCR.3 314-16), Rimmer's finding of a new expert to offer a different opinion, does not call into question the constitutionality of Schantz's performance. See Jones v. State, 855 So.2d 611, 618 (Fla. 2003) (finding no ineffectiveness where defendant's new doctors conflicted with original experts); Asay v. State, 769 So.2d 974, 986 (Fla. 2000) (finding court correctly found counsel conducted reasonable investigation into mental health mitigation, which was not rendered incompetent merely because defendant now secured the testimony of a more favorable mental health expert)[34]

[34] 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).

Rimmer points to Parker v. State, 3 So.3d 974 (Fla. 2009), however, such is distinguishable. In Parker, counsel was deemed ineffective for conducting no investigation beyond accepting a preliminary investigation by the originally appointed public defender, and not fleshing out the meager mitigation testimony he did offer. Counsel did not prepare his witnesses, but relied almost exclusively on hearsay evidence and the defendant's self-reported account when there was extensive statutory and non-statutory evidence available. Here, Schantz conducted his own investigation, spoke to Rimmer's family, friends, and co-workers, obtained two mental heath experts and presented substantive evidence of mitigation. Schantz's penalty phase presentation was not the "bare bones" presentation decried in Parker, 3 So.3d at 983-85.

Moreover, in this collateral litigation, Rimmer merely offered a new non-statutory mitigator of physical abuse as child which had been hidden from penalty phase counsel previously and a Dr. Jacobson's modified conclusion that the statutory mitigator of extreme mental or emotional disturbance applies. The level of the initial investigation was much greater here than in Parker. Moreover, the new mitigation offered here was either cumulative to of a modification of that which had been offered previously unlike the significantly more expansive mitigation offered in Parker's collateral litigation. Parker

does not establish ineffectiveness here. Likewise, Orme v. State, 896 So.2d 725, 733 (Fla. 2005) does not further Rimmer's position here as Schantz obtained two mental health experts and Rimmer has failed to show that his experts or Schantz missed significant mitigation evidence.

A review of the above testimony establishes that Schantz's preparation for the penalty phase was constitutionally proper as found by the trial court. In order to prove ineffectiveness in this area, there needs to be an almost total abdication of counsel's duty to investigate mitigation. See Rompilla, 125 S.Ct. at 2465 (finding ineffectiveness where counsel did almost nothing to prepare for penalty phase); Wiggins, 123 S.Ct. at 2542 (finding counsel ineffective where there was a complete abandonment of representation - counsel did not investigate or present mitigation, but merely accepted a presentence report). Moreover, counsel is not ineffective merely because, years later, one can point to something different or more that could have been done. See Chandler v. United States, 218 F.3d 1305, 1312-13 (11th Cir. 2000). Finally, Rimmer did not establish prejudice because it is clear that in light of the significant and weighty aggravators found in this case and discussed above, the additional statutory mitigator rejected previously and the non-statutory mitigator of physical abuse as a child, would not have resulted in a life recommendation. This Court should

affirm the denial of relief.

(3) Crediting Schantz with having a strategy for not calling Louis Odell (Rimmer's brother) or Sabrina Irving (mistress) (IB 63-64) – Rimmer claims that the court erred in finding Schantz offered a reasonable strategy for not calling Odell Rimmer or Sabrina Irving in the penalty phase given that Schantz had not talked to either witness or obtained Odell's records. The record does not support Rimmer's complaint.

Odell Rimmer was offered to show his negative influence upon his brother. However, merely given the timeframe of Odell's entry into prison for murder, 12 years before the instant robbery/homicide, there is little likelihood Odell had any influence on his brother. Nonetheless, while Schantz may not have spoken to Odell or obtained his records, Schantz stated that he was aware of Odell and knew he was serving a life sentence for murder. He thought it would be a "horrible, horrible idea" to put the brother on because it would show the jury that Rimmer came from a family of murderers. Schantz thought that would present an awful situation (SPCR.4 569). "[C]alling some witnesses and not others is 'the epitome of a strategic decision.'" Chandler, 218 F.3d at 1314 n.14 (citation omitted). Hence, to the extent that Rimmer can claim less than a complete investigation, "reasonable professional judgments support the limitations on investigation" as Schantz knew the

pertinent facts of Odell's history. It cannot be said that no reasonable attorney would have excluded Odell from testifying at his brother's first-degree murder trial. See Strickland, 466 U.S. at 690-691. Schantz's strategy to not call the brother who he knew to be serving a life sentence for murder was reasonable.

Likewise, not calling Rimmer's mistress, Sabrina Irving,[35] to testify in the penalty phase when the mitigation theme was good father, husband, and son, cannot be deficient. Schantz testified that he was not going to call Irving based on the extra-marital affair; "[n]ot in a million years" would he consider putting on the mistress as such would have completely contradicted the "good family man" image he was trying to present of Rimmer. Regarding the remaining evidence, Schantz noted that he would not have had a problem putting on additional evidence of Rimmer's good qualities but noted that you try to "not overwhelm the jury with stuff that they've already heard before." (SPCR.4 471, 476, 481, 567). Such is reasoned

[35] Irving reported she knew Rimmer from work, and even though he was married, they started a romantic relationship a few months after meeting. Irving described him as a loving, compassionate and caring father, who spent time with his children. Likewise, Rimmer's relationship with his mother was close. Rimmer confided in Irving that his marriage, that he wanted to better himself, but his wife was happy the way things were financially. Joanne Rimmer was unhappy about Rimmer's affair and on one occasion started a verbal and physical altercation in public which Rimmer might impact his probation. Also, Irving was aware of Rimmer's criminal history, but discounted it as having happened when he was young and hanging around with the wrong people. Rimmer got along well with co-workers (SPCR.1 57-66).

professional representation. See Ferguson v. State, 593 So.2d 508, 510 (Fla. 1992) (finding counsel's decision to not put on witness to be "reasonable strategy in light of the negative aspects of the expert testimony"); 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"). Further, Rimmer has failed to establish prejudice, that is, he cannot show there is a reasonable probability that the result of the proceeding would have been different because the testimony is cumulative to what was presented at trial, contains negative aspects which would detract from the mitigation theme, and is of insufficient weight to overcome the strong aggravation. Strickland, 466 U.S. at 694. The jury's recommendation would not have been different had it heard this cumulative, non-statutory mitigation. The properly denied relief.

(4) Alleged lack of strategy for failing to object to invalid aggravation and improper prosecutorial statements[36] (IB 68) - Rimmer asserts counsel was ineffective for not objecting to the pecuniary gain and avoid arrest instructions. (IB 69 n.35). Other than noting pecuniary gain was not found at trial, Rimmer offers nothing to support his argument. The matter

[36] This issue is addressed in Issue V below.

should be found waived,[37] however, it is also without merit.

The evidence in this case supported the giving of both the felony murder (robbery) instruction as well as the pecuniary gain instruction, so long as these facts if found were not doubled. In Francis v. State, 808 So.2d 110, 137 (Fla. 2001), this Court concluded that it is not error to instruct on both aggravators stating: "even if the trial court had instructed the jury on both aggravators, our case law indicates that where the jury is instructed on both of those aggravators, no error occurs so long as the judge ultimately merges the two into one, as was done in this case. See, e.g., Gaskin v. State, 737 So.2d 509, 516 n. 13 (Fla. 1999) ("[A]ny error in considering both factors would have been harmless because the trial judge merged the pecuniary gain aggravator with the murder committed during the course of a [robbery] aggravator.")."

Rimmer does not explain how the avoid arrest aggravator was improper or should have garnered an objection.[38] Nonetheless,

---

[37] See Duest v. Dugger, 555 So.2d 849, 852 (Fla. 1990) (opining "purpose of an appellate brief is to present arguments in support of the points on appeal" - notation to issues without elucidation is insufficient and issue will be deemed waived)

[38] The court's order on the avoid arrest aggravator stated:

> After the Defendant's car was loaded with the electronic equipment taken from Audio Logic, the Defendant's car was removed from the bay area. The Defendant got out of his car and approached Aaron Knight who along with Bradley Krause, Jr., Joe Louis

based on the fact Rimmer started to leave the Audio Logic store, but returned to ask the victims whether they knew him and shot both in the head as they lay tied up on the floor face down supports the finding of the aggravator. See Hertz v. State, 803 So.2d 629, 648-49 (Fla. 2001) (finding avoid arrest aggravator proper when the defendants expressed an apprehension about being arrested and were not prevented from leaving the premises once they secured the victims' property).

ISSUE IV

RIMMER'S CLAIM OF A BRADY VIOLATION WAS DENIED PROPERLY (restated)

Rimmer points to FDLE reports, Palm Beach investigation, reports on a Plantation homicide; and Wilton Manors Police

---

> Moore and Louis Rosario were laying face down on the floor of the bay area with their hands tied behind their backs with duct tape. The Defendant, who had had previous contact with Mr. Knight and/or Mr. Krause at Audio Logic, asked Aaron Knight, "you know me, don't you?" Mr. Knight replied "no." The Defendant using a .380 semi-automatic handgun, fired a single shot into the head of Aaron Knight lacerating his brain and brain stem thereby killing him. The Defendant then turned to Bradley Krause, Jr. and asked him the same question. Mr. Krause replied, "no." The Defendant then fired a single shot into the head of Mr. Krause in the same manner as was done to Mr. knight. Mr. Krause died later that day.
>
> It is abundantly clear from the evidence that the sole or dominant motive for each of these murders was the elimination of these witnesses who one or both had previously dealt with the Defendant.

(R.20 2388-89)

Department ("WMPD") BOLO reports as suppressed Brady material. He claims his constitutional rights were violated by this suppression or "to the extent that counsel was or should have been aware of this information. Counsel was ineffective in failing to discover and utilize it."[39] An evidentiary hearing was held on this claim and relief was denied.

Recently, in Pagan v. State, 2009 WL 3126337, 3 (Fla. Oct. 12009), this Court set forth the proof necessary to prove a Brady violation and the standard of review:

> Pursuant to *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), the State is required to disclose material information within its possession or control that is favorable to the defense. *See Mordenti v. State*, 894 So.2d 161, 168 (Fla. 2004). To establish a *Brady* violation, the defendant has the burden to show (1) that favorable evidence-either exculpatory or impeaching, (2) was willfully or inadvertently suppressed by the State, and (3) because the evidence was material, the defendant was prejudiced. See *Strickler v. Greene*, 527 U.S. 263, 281-82, 119 S.Ct. 1936, 144 L.Ed.2d 286 (1999); *see also Way v. State*, 760 So.2d 903, 910 (Fla. 2000). To meet the materiality prong, the defendant must demonstrate a reasonable probability that had the suppressed

---

[39] This argument should be found legally insufficient and waived. See Asay v. State, 769 So.2d 974, 989 (Fla. 2000) (finding "one sentence" conclusory allegation that counsel was ineffective is an improper pleading and attempt to relitigate procedurally barred claims); Duest, 555 So.2d at 852 (opining "purpose of an appellate brief is to present arguments in support of the points on appeal" - notation to issues without elucidation is insufficient and issue will be deemed waived). Moreover, by this stage of the litigation, Rimmer should be able to tell this court whether counsel had the document or not, and thus, whether he is maintaining a Brady violation or ineffectiveness claim.

> evidence been disclosed the jury would have reached a different verdict. *See Strickler*, 527 U.S. at 289, 119 S.Ct. 1936. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *See Way*, 760 So.2d at 913; *see also Strickler*, 527 U.S. at 290, 119 S.Ct. 1936. The remedy of retrial for the State's suppression of evidence favorable to the defense is available when "the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *Strickler*, 527 U.S. at 290, 119 S.Ct. 1936 (*quoting Kyles v. Whitley*, 514 U.S. 419, 435, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995)). Giving deference to the trial court on questions of fact, this Court reviews de novo the application of the law and independently reviews the cumulative effect of the suppressed evidence. *See Mordenti*, 894 So.2d at 169; *Way*, 760 So.2d at 913.

Pagan, 2009 WL 3126337, 3. Additionally, this Court noted agreed the where the defense is aware of the exculpatory information from a different source, the information is not suppressed. Pagan, 2009 WL 3126337, 9 (citing Occhicone v. State, 768 So.2d 1037, 1042 (Fla. 2000) (holding "[a]lthough the 'due diligence' requirement is absent from the Supreme Court's most recent formulation of the Brady test, it continues to follow that a Brady claim cannot stand if a defendant knew of the evidence allegedly withheld or had possession of it, simply because the evidence cannot then be found to have been withheld from the defendant")). See Way v. State, 760 So.2d 903, 911-12 (Fla. 2000) (noting that evidence is not "suppressed" where the defendant was aware of the exculpatory information).

After noting the items Rimmer claimed were suppressed, and

the law attendant to Brady claims, the court concluded:

> Mr. Garfield testified that he did not have the documents included in Defense Exhibit 43 [documents prepared by FDLE]. According to Mr. Garfield, some of the documents relate only to the codefendant and/or would not have provided him with any useful information that he did not already have (EH 671-685). According to Mr. Garfield, some of the information in the FDLE documents was provided to the FDLE by WMPD, and not the other way around (EH 681). Peter Magrino, the trial prosecutor also testified that the FDLE reports were a synopsis of the Wilton Manors reports and that all the FDLE did was assist in compiling a photo lineup (EH 778-789).
>
> The Court heard testimony at the hearing concerning a West Palm Beach Police Department report of an investigation they conducted of a "chop shop" and a suspect Greg Langman. It was learned that Langman went to a vocational school attended by the Defendant and that the gun used in the crimes was connected to the "chop shop." (EH 686-688) Mr. Garfield testified that he was aware of this information because it was contained in a report from WMPD (EH 686). Mr. Garfield also stated that the West Palm Beach Information is not something he would have used because it would have associated his client with other crimes and the last thing he wanted to do was establish that his client had the murder weapon prior to the day he was arrested and to associate with "a gang of thieves in West Palm Beach." (EH 686-688).
>
> There was also testimony, at the evidentiary hearing, about a Plantation Police Department Investigation of a murder at a muffler shop. Mr. Garfield testified that he does not believe he could have used this information because the crimes are not similar enough to each other, to get into evidence, and that jury's expected you to prove it was the other person (689-692). Concerning the reports that two Wilton Manors Police Officers observed Ford Probes, the same kind of car used in the crimes, Mr. Garfield stated that this information would not have been any use to him because there was nothing to follow-up on (EH 669).
>
> …

> The Court agrees with the analysis of this claim presented by the State, in its written closing argument, that Defendant has not established a Brady violation. The evidence from the hearing does not establish that any reports, not provided to the defense, contained favorable evidence, or did not contain information that the defense already had. This Court finds that the Defendant was not prejudiced by not having received any of the reports. Additionally, this Court finds no deficiency on the part of trial counsel related to the issues raised in this claim.

(PCR.12 2423-25)

At the evidentiary hearing Garfield agreed that he did not have the FDLE documents, but noted that several of the pages dealt with Kevin Parker exclusively, others had had nothing to do with Rimmer, and the rest did not supply him with information he did not already know or could use.[40] (SPCR.5 624, 671-80,

[40] Garfield noted that the first three pages of the composite dealt exclusively with Kevin Parker and do not provide him with an information he did not already know. Likewise, page four of the composite did not contain anything that Garfield he did not know. It does not apply to the photo line-up of Rimmer. Similarly the next page contained information about the storage facility and Garfield had all of the information he needed about that. The "lead request" sheet was exclusive to Parker, and of no relevance to Garfield. The next four documents were copies of driver's licenses–- Rimmer's, Parker's and the three suspects listed on Bucknor's fingerprint list–-Broughton, St. Louis and Gilbert. There was also a photo line-up that was too blurry for Garfield to comment upon. He explained that these documents would not give him any information that he did not have previously. He had no indication that the line-ups were used. Rimmer admitted in his motion that the photo line-up with the additional suspects was not used by the police. The next document, entitled "Case Opening Profile" is a second-hand summary of the case, a re-hash of the probable cause affidavit. It would not have been important to Garfield and no help because

753).[41] With respect to the West Palm Beach investigation documentation of a "chop shop",[42] Garfield noted that he did have this information in an abbreviated form, and pointed to a one-page report from WMPD which identified Greg Langman and the stolen murder weapon being found in a stolen Corvette in his "chop shop" and that he and Rimmer attended Atlantic Vocational with Rimmer. Garfield explained that even if he had the full West Palm Beach Report he would not have used it because he would not want to tag Rimmer with another crime (stolen weapon and possession of stolen weapon) and would not want to associate

---

it listed the amount stolen as $600 when it was actually $100 so he would not have used it. The next document was a two-page report prepared by Special Agent Bart Ingram (while listed for the evidentiary hearing, Rimmer did not call him as a witness) which Garfield noted did not contain anything with which he was not familiar. Garfield explained that Ingram cut and pasted from Detective Lewis's reports; thus, it was not information that FDLE was imparting to the Wilton Manors Police Department, but rather, information that FDLE had learned from Wilton Manors. FDLE did not do any original investigation in the case. The prosecutor, Pete Magrino, agreed that the FDLE reports were a synopsis of the Wilton Manor reports and that all FDLE did was to facilitate the compiling of a photo line-up; FDLE was not involved in the investigation (SPCR.5 624, 671-82, 753, 778-79).

[41] Rimmer asserts in his motion that FDLE prepared two photo line-ups, one containing the codefendant's photo and the other containing the photos of the other suspects. Thus, these line-ups don't even involve Rimmer.

[42] The report mentions Greg Langman who was one of the main suspects in the West Pam Beach "chop shop" investigation and provides that the murder weapon in this case, the gun used by Rimmer, had been stolen in February, 1998 and was found in a stolen Corvette in this "chop shop." It revealed that Langman went to Atlantic Vocational, which is the school Rimmer was attending. (SPCR.5 685-88).

Rimmer with a ring of thieves in West Palm Beach. The same held true for the Indictment of Langman (SPCR.5 685-88)

Considering the Plantation Police Department reports of the murder at the Meineke Muffler Shop that occurred on April 27, 1998, about one week prior to these murders, Garfield noted he was unaware that Rodney Thomas has already been prosecuted, convicted and sentenced to life for that crime. However, Garfield explained that he would not have used the information in any event as he never wanted to put on evidence like this unless he has something for the jury to link the two crime together because the jury expects you to prove it. It is Garfield's goal to try very tight cases, he does not like to open doors to things and start asking "dumb questions" which forget the big picture and end up making the client look guilty (EH 5/11/05 686-88, 744).

Based on this testimony, Rimmer has failed to show where the trial court erred on the fact or law in rejecting the Brady claim. Where Garfield had the information, Rimmer has failed to prove suppression. Pagan. Likewise, where the information was not relevant to Rimmer's case, materiality has not been shown. Further, Garfield explained in great detail why he would not have used any of these reports. Further, Rimmer cannot prove prejudice. Based on the undisputed eyewitness testimony, there is no doubt that Rimmer participated in this crime and in fact,

was the shooter. Finding evidence of other participants would not lessen his culpability.

ISSUE V

THE CLAIM OF INEFFECTIVE ASSISTANCE FOR NOT RESPONDING PROPERLY TO INSTANCES OF PROSECUTORIAL MISCONDUCT WAS DENIED PROPERLY (restated)

In Claim VII below and in Issues III and V here, Rimmer argues that counsel was ineffective because he "either failed to object, and/or failed to make the proper objections and/or failed to request curative instructions in response to several instances of prosecutorial misconduct.[43] In Issue III he cites to the prosecutorial comments: (1) describing shootings as "vicious and brutal executions;" (2) describing the mental health expert's opinion as "legal mumbo-jumbo;" (3) that prisons are filled with individuals like Rimmer with antisocial personality disorders; (4) telling jury to do its job and return the "morally correct death sentence; (5) reciting victim impact testimony and telling jury that Florida releases prisoners

[43] This sort of argument should be found legally insufficient and waived. See Asay v. State, 769 So.2d 974, 989 (Fla. 2000)(finding "one sentence" conclusory allegation that counsel was ineffective is an improper pleading and attempt to relitigate procedurally barred claims); Duest v. Dugger, 555 So.2d 849, 852 (Fla. 1990) (opining "purpose of an appellate brief is to present arguments in support of the points on appeal" - notation to issues without elucidation is insufficient and issue will be deemed waived)

through conditional release program; and (6) in Spencer hearing referring to Rimmer as "worthless piece of fecal matter … whose death should come prior to natural causes." (IB 68-69 n.36). In **Issue V**, Rimmer references counsel's response to allegations of prosecutorial misconduct including his failure to object: (7) to the prosecutor's reenactment of the murders including holding the murder weapon, (8) to comparing an officer's eyesight to Rimmer's eyesight, (9) to offering the victims' experienced fear before their deaths, and (10) repeating victim impact testimony. The rejection of this ineffectiveness claim was proper on the facts as well as this Court's findings on direct appeal of either harmless or no fundamental error. See Rimmer, 825 So.2d at 322-25. The denial of relief should be affirmed.[44]

In denying relief, the trial court concluded:

> … Defendant argues that his rights were violated because the prosecutor's arguments presented impermissible considerations to the jury, misstated the law and facts, and were inflammatory and improper. The Defendant argues that the misconduct of the prosecutor denied him a fair trial and sentencing proceeding. The actions of the prosecutor, that are the subject of this claim, include calling Officer Kelly in rebuttal and putting on a demonstration to

[44] The standard of review for claims of ineffectiveness of counsel following an evidentiary hearing is de novo, with deference given the trial 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).

show that a person with bad eyesight could carry out the crimes; demonstrating the firing of the gun at the victims during the penalty phase closing argument; stating outside the presence of the jury "if the jurors should do something stupid, recommend life;" stating at the Spencer hearing that "this defendant is a worthless piece of fecal matter whose death should come prior to natural causes;" and permitting one victim's father, at the Spencer hearing, to ask the judge "to follow the recommendation and sentence him to the electric chair."

In its response, the State argued that prosecutorial misconduct during the trial is procedurally barred and without merit. This Court agrees with, and adopts the arguments raised by the State, as to this claim. The inappropriateness of Officer Kelly's rebuttal testimony was raised and rejected on direct appeal and ruled to be harmless error. Rimmer, 825 So.2d at 321-22. Since the matter was raised and ruled upon in the direct appeal it is now barred from consideration in a postconviction proceeding. See Finney v. State, 831 So.2d 651 (Fla. 2002).

This Court agrees with the State's argument that the prosecutor's comments regarding the mental and emotional demonstration with the gun, which was in evidence, are matters that could have been raised on appeal. Further, the comments and demonstration were relevant to the issues being considered.

The prosecutor's comments made outside the presence of the jury were matters raised on direct appeal and are thus barred in this proceeding. Rimmer, 825 So.2d at 325. Additionally, the comments were not heard by the jury and there is nothing in the record to indicate that eth comments influenced the court in reaching its decision. The comments made at the Spencer hearing, by the father of one of the victims, is also procedurally barred as it could have been raised on direct appeal and there is no reason to believe the particular comment influenced the sentence.

The Court argues with the State's argument, that there is no reasonable likelihood that the results that results of the penalty phase would have been different, absent the complained of conduct.

(PCR.12 2412-22).

Each of the underlying errors was raised and rejected on direct appeal. Claims of trial court error couched in terms of ineffective assistance of counsel will be found procedurally barred. State v. Riechmann, 777 So.2d 342, 353 n.14 (Fla. 2000) (finding claims procedurally barred because defendant was couching them in terms of ineffectiveness when they had been raised and rejected on direct appeal); Medina v. State, 573 So. 2d 293, 295 (Fla. 1990) (holding "[a]llegations of ineffective assistance cannot be used to circumvent the rule that postconviction proceedings cannot serve as a second appeal").

Moreover, on direct appeal this Court reasoned that the objected to comments were harmless, and those where an objection was not raised, where either not error or no fundamental error was shown. Rimmer, 825 So.2d at 322-25. As such, Rimmer is unable to show Strickland prejudice arising from counsel's actions or inactions. Rimmer is not entitled to relief on a claim of ineffective assistance of counsel where there has been an earlier appellate court finding that an unpreserved error did not rise to the level of fundamental error. See White v. State, 559 So.2d 1097, 1099-1100 (Fla. 1990) (rejecting ineffective assistance of counsel claim regarding counsel's failure to preserve issues for appeal in postconviction appeal based upon

earlier finding by court on direct appeal that unpreserved alleged errors would not constitute fundamental error); Teffeteller v. Dugger, 734 So.2d 1009, 1019 (Fla. 1988) (finding defendant had failed to meet prejudice prong of Strickland on issue that counsel failed to adequately argue case below given it was rejected without discussion); Cherry v. State, 659 So.2d 1069, 1072 (Fla. 1995). Rimmer is not entitled to relief.

ISSUE VI

THE COURT PROPERLY REJECTED RIMMER'S CLAIM OF INEFFECTIVENESS BASED ON AN ALLEGED CONFLICT OF INTEREST ARISING FROM COUNSEL'S LETTER TO DETECTIVE LEWIS (restated)

Rimmer alleges Garfield suffered under a conflict of interest, as evidenced by a letter he wrote to Detective Lewis between the guilt and penalty phases. He submits that his constitutional right to a fair trial was violated because Garfield had an actual conflict of interest, which rendered him *per se* ineffective. It is Rimmer's position that relief should have been granted. The State disagrees.[45]

The trial court rejected this complaint finding:

> … Mr. Garfield testified during the hearing and explained why he wrote the letter. Mr. Garfield state that he did not have a social relationship with

[45] "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).

> Detective Lewis, but felt that the Detective deserved to be commended for the good work that he does. Mr. Garfield explained that he had been treated very professionally by the Detective, on a previous case, and was aware of some racial prejudice shown toward the Detective, on another case he had been working (EH 653-658). The record also demonstrates that Mr. Garfield was aggressive in challenging work done by Detective Lewis, both at trial, and pretrial. Mr. Garfield cross-examined Detective Lewis during eth trial and advanced legal arguments critical of the work done in the case by Detective Lewis.
>
> This Court finds Mr. Garfield's explanation for the letter to be adequate and does not find that there was any conflict of interest that affected the Defendant's case. … As the State points out, "a possible, speculative or merely hypothetical conflict is 'insufficient to impugn a criminal conviction.'" Owen v. Crosby, 854 So.2d 182, 193-94 (Fla. 2003), citing Hunter v. State, 817 So.2d 786, 791-92 (Fla. 2002). The Defendant has not proven an actual conflict of interest existed.

(PCR.12 2420-21).

To establish a conflict of interest claim a "defendant must 'establish that an actual conflict of interest adversely affected his lawyer's performance.' A lawyer suffers from an actual conflict of interest when he or she 'actively represent[s] conflicting interests.' To demonstrate an actual conflict, the defendant must identify specific evidence in the record that suggests that his or her interests were compromised. A possible, speculative or merely hypothetical conflict is 'insufficient to impugn a criminal conviction.'" Owen v. Crosby, 854 So.2d 182, 193-94 (Fla. 2003) (citing Hunter v. State, 817 So.2d 786, 791-92 (Fla. 2002). See Overton v. State, 976 So.2d

536 561 (Fla. 2007); Sliney v. State, 944 So.2d 270 (Fla. 2006).

The letter at issue was penned by Garfield, on January 29, 1999 (between guilt and penalty phases), congratulating Detective Lewis on his "role in the successful prosecution of Robert Rimmer and Kevin Parker for committing the double homicide and robberies…." A letter such as this, written after the jury returned guilty verdicts, and viewed in light of the vigorous attack Garfield conducted in this case which included filing multiple motions to suppress key evidence based on errors made by the detective, does not demonstrates Garfield "actively represented conflicting interests." Garfield reported he does not have any type of friendship with Lewis, and described the letter as a gentlemanly handshake after the pointed cross-examination he conducted of Lewis. Garfield explained he had appreciated Lewis' professionalism on an unrelated rape case and wanted to show he was a "good loser" as Lewis had been on the rape case. Further, Garfield was disturbed by some racial prejudice exhibited toward Lewis, and wanted to show that not everyone was like that. (SPCR.5 652-57).

Given this explanation, and the vigorous defense of Rimmer via motions to suppress, challenging of the State's case on cross-examination, and in argument before the jury, the letter offers no proof of conflict. Rimmer has failed to show the existence of an "actual conflict and that the conflict had an

adverse effect upon" Garfield. He has not identified where the trial court erred in its factual findings or as a matter of law. Relief was denied properly.

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: Linda McDermott, Esq., McClain & McDermott, P.A., 141 N.E. 30th Street, Wilton Manors, FL 33334 and Celeste Bacchi, Esq. Office of the Capital Collateral Regional Counsel - South, 101 N.E. 3rd Avenue, Suite #400, Fort Lauderdale, FL 33301 this 26th day of October, 2009.

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,

BILL McCOLLUM
ATTORNEY GENERAL

LESLIE T. CAMPBELL
Assistant Attorney General
Florida Bar No. 0066631
1515 N. Flagler Dr.; Ste. 900
Telephone: (561) 837-5000
Facsimile: (561) 837-5108

COUNSEL FOR APPELLEE