IN THE SUPREME COURT OF FLORIDA

CASE NO. SC07-1272

LOWER COURT CASE NO. 98-12089

ROBERT RIMMER,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE SEVENTEENTH JUDICIAL CIRCUIT,
IN AND FOR BROWARD COUNTY, STATE OF FLORIDA

INITIAL BRIEF OF APPELLANT

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STANDARD OF REVIEW

Mr. Rimmer has presented several issues which involve mixed questions of law and fact. This Court has reviewed such issues with a mixed standard of review. "Brady claims are mixed questions of law and fact. When reviewing Brady claims, this Court applies a mixed standard of review, "defer[ring] to the factual findings made by the trial court to the extent they are supported by competent, substantial evidence, but review[ing] de novo the application of those facts to the law." Johnson v. State, 921 So. 2d 490, 507 (Fla. 2005)(citations omitted). Likewise, this Court has applied a similar standard of review for ineffective assistance of counsel claims. Evans v. State, 946 So. 2d 1, 24 (Fla. 2006).

REQUEST FOR ORAL ARGUMENT

Mr. Rimmer has been sentenced to death. The resolution of the issues in this action will determine whether Mr. Rimmer lives or dies. This Court has not hesitated to allow oral argument in other capital cases in similar procedural posture. A full opportunity to air the issues through oral argument would be appropriate in this case, given the seriousness of the claims involved and the stakes at issue. Mr. Rimmer, through counsel, accordingly urges that the Court permit oral argument.

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STATEMENT OF THE CASE[1]

On May 28, 1998, Robert Rimmer was indicted with two counts of first degree murder, three counts armed robbery, four counts armed kidnaping, one count of attempted armed robbery, and one count of aggravated assault (R. 2089-92).

Rimmer's jury trial on these counts resulted in a guilty verdict on all counts. On February 25, 1999, the jury recommended two sentences of death by a 9 to 3 vote (R. 2320).

The Court followed the jury's recommendation and entered its sentencing order on March 19, 1999 (R. 2383-99).

On appeal, a divided court affirmed Rimmer's convictions and sentences. Rimmer v. State, 825 So. 2d 304 (Fla. 2002). The United States Supreme Court denied certiorari in November, 2002.

On September 4, 2002, the Office of the Attorney General, pursuant to Fla. R. Crim. P. 3.852(d)(1), sent notices of this Court's mandate affirming the death penalty to the State Attorney and the Department of Corrections (SPC-R. 87-8, 89-90). However, the State failed to send notices to any law enforcement agency.[2]

Due to the State's untimely notice to law enforcement, many state agencies turned over public records shortly before, and even after Rimmer's Rule 3.851 was due to be filed. Thus, on

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[1] The following abbreviations will be utilized to cite to the record: "R. _." – record on direct appeal; "SPC-R. _." – record on appeal on postconviction; "2SPC-R. __." - second record on appeal oh postconviction; "Ex. __." – exhibits.

[2] Notices were sent to law enforcement over 4 months later.

October 13, 2003, Rimmer requested to file a shell 3.851 motion (SPC-R. 389-95). The court denied the motion (SPC-R. 759-60).

On November 5, 2003, without having the benefit of all of the public records to which he was entitled, Rimmer filed his Rule 3.851 motion (SPC-R. 470-756).

On August 6, 2004, after a case management conference, the circuit court granted an evidentiary hearing (SPC-R. 1815-6).

On September 15, 2004, Rimmer filed an amended 3.851 motion based upon recently disclosed public records (SPC-R. 1878-903). On October 8, 2004, Rimmer filed a motion to disqualify Judge Gardiner (SPC-R. 2012-32). The motion was denied (SPC-R. 2033). Rimmer filed a Petition for Writ of Prohibition with this Court. This Court denied the petition "on the merits".

Rimmer's evidentiary hearing was held on May 9-12, 2005. Following the hearing, the transcripts had numerous inaccuracies. Rimmer requested that the circuit court order the court reporters to provide correct transcripts (SPC-R. 2295-9; 2383-7). The court granted Rimmer's motion (SPC-R. 2303-4; 2388-95). However, upon receipt of the "corrected" transcripts, Rimmer alerted the court that the transcripts were still not correct (SPC-R. 2402-5). However, the court did not require any further correction.

Closing arguments were filed (SPC-R. 2531-53; 2554-636; 2637-42), and on December 18, 2006, the circuit court denied Rimmer's Rule 3.851 motion (SPC-R. 2407-31).

Rimmer filed a motion for rehearing (SPC-R. 2432-47). The

circuit court denied Rimmer's motion (SPC-R. 2488-9).

Rimmer timely filed his notice of appeal (SPC-R. 2492).

STATEMENT OF FACTS

A. THE TRIAL

At approximately 12:00 p.m., on May 2, 1998, a robbery-homicide occurred at the Audio Logic, in Wilton Manors. Before leaving, the perpetrators shot and killed Bradley Krause and Aaron Knight. Witnesses Joe Moore, Kimberly Burke Davis, her toddler daughter and Luis Rosario were left physically unharmed.

Moore, Davis and Rosario all had a similar account of what occurred at the Audio Logic: At approximately 12:00 p.m. Rosario, was grabbed from behind and told to lie down inside the bay area of the store (R. 767). Someone then came up to Rosario and taped his hands behind his back with duct tape (R. 772).

Moore was walking out of the bay area of the Audio Logic when a black male with a gun in his waistband approached him and told him to go back inside the bay area and lie down on the floor (R. 879-80). Moore complied and lay on the floor with his face down (Id.). Moore's hands were taped together behind his back by a black male whose face he never saw (R. 885). Moore's wallet and cell phone were taken from him (R. 886).

Davis was sitting in the waiting area around noon when she noticed a vehicle pull in near the front of the store (R. 792). The vehicle was a Kia Sephia. A black male exited the vehicle and entered the front door of the store (R. 793). Once inside,

the man kneeled down and looked in the display case (Id.). Davis' daughter walked over to the man who took her hand and walked her back to her mother (Id.). Davis recalled the man walking toward the bay area and then did not see him again (R. 796). Davis identified Kevin Parker as the man who exited the Kia Sephia and entered the Audio Logic (R. 795).

A few minutes later another black man approached Davis and told her that her boyfriend called her, so she went into the bay area (R. 797). Davis identified Rimmer as the man who approached her (R. 799). Davis sat down and saw the same individual as before in the storeroom and moving boxes (R. 803). She also saw another individual moving boxes (Id.).

While Rosario, Moore and Davis were sitting and/or laying on the ground, cars were moved inside the bay area and a Ford Probe was loaded with stereo equipment (R. 774; 804; 888-90). Rosario and Moore heard a conversation about the prices of items being moved into the vehicle and one of the perpetrators ask an employee of the store if there were any guns in the store (R. 774-5; 886).

Also, Davis saw the perpetrator she identified as Rimmer with a gun. Both Davis and Moore testified that the perpetrator kneeled down next to Knight and asked what kind of gun it was (R. 806; 894). He also asked Knight about any surveillance equipment and the key to the cash register (R. 807-8; 891). Knight gave him the key to the cash register (R. 808). Davis also saw him

move her vehicle (R. 837).

Rosario and Moore then heard a car start and begin to leave, but then it was driven back into the bay area (R. 776; 895). The perpetrator exited the car and asked one of the employees of the store if "he knew him" (R. 777; 895-6). Even though the employee said "no", Rosario heard a gunshot (Id.). Moore saw the employee shot in the head (R. 896). Likewise, the shooter approached Davis and told her to lie down because he did not "want this to get on you." (R. 809). She then saw Knight shot.[3]

At this point, Moore jumped up, but the shooter told him to get on the ground (R. 812; 897).

Then the perpetrator walked over to the other employee and shot Krause (R. 778; 812).[4] The gunman then told the remaining victims to "have a nice day" (R. 779; 812; 898). The shooter entered the Ford Probe and drove away (R. 813; 898).

Rosario described the shooter as a black male, 6'2" tall and wearing a baseball cap pulled down almost to his nose (R. 768-9; 783). Despite the fact that Rosario believed he could identify the shooter, he was unable to identify anyone from the photo or live line-up as the perpetrator (R. 780-1; 783).

Moore said that the shooter, who he later identified as

[3] Knight died instantly (R. 1114). The cause of death was a gunshot wound to the head (R. 1108).

[4] Krause lost consciousness instantly (R. 1114). The cause of death was a gunshot wound to the head (R. 1113).

Rimmer, was not wearing glasses during the crimes (R. 902). He also described the shooter as 5'7" - 5'9" tall, 150-160 lbs. with reddish brown skin and a hat (R. 903; 907). Moore described the Probe as having peeling tint on the windows (R. 907).

Davis described the shooter, who she later identified as Rimmer, as a black male, 5'8" - 5'9" tall, 175 lbs., wearing a baseball cap pulled down a little bit to his eyes with the bill of the cap at a straight angle downward (R. 797-8; 834; 838). She did not recall the shooter wearing eyeglasses (R. 833), and she was not sure if he had any facial hair (R. 834). Davis also described the Probe as having alloy wheels (R. 836).[5]

As the events unfolded over the next week, Rimmer became a suspect in the robbery-homicides that occurred on May 2, 1998.

On May 4, 1998, Davis met with a sketch artist (R. 814). After the sketch was completed, Moore was shown the sketch (R. 900). He was satisfied with it.

Michael Dixon, owner of the Audio Logic, was faxed a copy of the composite sketch (R. 629). Dixon did not identify anyone from the sketch (R. 680), but faxed it to other business owners (R. 629). Shortly thereafter, John Ercolano, believed that he could identify the individual depicted by the sketch (R. 1072).

Ercolcano believed that the sketch resembled Rimmer. He had met Rimmer in February, 1998, when he (Rimmer) came into his

[5] On May 10, 1998, Rimmer was 6'2", 190-200 lbs (R. 1252). At the time of the live line-up, Rimmer had lost weight (Id.).

store about some problems he was having with his car stereo (R. 1073; 1080). Rimmer complained about the installation completed by the Audio Logic employees (R. 1076).[6]

After assisting with the composite sketch and based on the information from Ercolano, Davis was shown a photo line-up by Detective Lewis (Id.). When Davis looked at the photos Det. Lewis told her to pick out the person who most resembled the shooter (R. 843). She chose two individuals from the line-up.[7] The first photo she chose was not Rimmer (R. 845). However, because Det. Lewis told her that Moore had selected Rimmer, she then chose him. At trial Davis explained that even then, she "wasn't saying these are the guys. From what I can remember, they look like the person that most fits the description out of all the pictures he showed me." (R. 845).[8]

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[6] Based on Ercolano's statements, Dixon reviewed his records and determined that on December 12, 1997, Rimmer had some stereo equipment installed in his Oldsmobile at the Audio Logic in Wilton Manors (R. 632-6). Dixon then recalled that he had met Rimmer on a few occasions, the first time in November, 1997, at the Audio Logic in Davie, Rimmer requested a stereo system be installed in his Oldsmobile (R. 640). However, due to his volume of business, Dixon could not accommodate Rimmer (R. 642). Rimmer returned after Thanksgiving, but Dixon still did not have time to install the stereo system so he advised Rimmer to take his vehicle to the Wilton Manors store (Id.). Sometime after December 12th, Rimmer returned to the Davie store due to a malfunction in the stereo system (R. 643).

[7] Davis testified that "four of the photographs didn't look anything like the characteristics of the guy I thought committed the crime." (R. 844).

[8] Trial counsel attempted to suppress the identification of Davis (R. 2176-8). The trial court denied the motion (R. 2194).

When Moore was shown the photo line-up, he selected Rimmer's photo as being the shooter (R. 902).[9]

Det. Lewis, told Moore that he and Davis selected the same photo (R. 905). He also told Moore that Rimmer had been arrested and was in possession of Moore's wallet (R. 908). Later, Davis and Moore selected Rimmer from a live line-up (R. 816, 902).

On May 10, 1998, law enforcement attempted to locate Rimmer and search his vehicle. Rimmer engaged the police in a chase (R. 985-91). During the chase, Officer Kelley observed Rimmer throw objects from his vehicle (R. 993). The objects included a wallet with Moore's license inside (R. 1008), and a firearm (R. 1014). Upon exiting his vehicle, Rimmer ran and was apprehended (R. 992). Rimmer was searched and had $896.00 (R. 1305).

Rimmer's vehicle was searched. Based on the lease agreement seized from Rimmer's vehicle, the police learned that on May 7, 1998, he rented a storage space (R. 972; 1198). When law enforcement searched the storage space they found several items of stereo equipment (R. 1199-1200).[10] Dixon identified the items as merchandise from the Audio Logic (R. 649-62).

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[9] Trial counsel attempted to suppress the identification of Moore (R. 2176-8). The trial court denied the motion (R. 2194).

[10] Trial counsel attempted to suppress the organizer, lease agreement and items found at the storage unit (R. 7). Trial counsel argued that the organizer was beyond the scope of the search warrant of Rimmer's vehicle and that all of the items found at the storage unit were fruit of the poisonous tree (R. 10). The trial court denied the motion (R. 11).

Rimmer was indicted for the crimes that occurred at the Audio Logic on May 2, 1998 (R. 2089-92).

During the initial investigation of Rimmer, law enforcement also received information that the composite sketch of the individual seen by Davis in the waiting area of the Audio Logic was Kevin Parker. Based on this information, Det. Lewis sought to interview Parker. In mid-May, Parker's girlfriend, Jenette Potter-Mallard, learned that the police were looking for Parker (R. 953). She encouraged Parker to call Det. Lewis, which he did (Id.). When interviewed by the police, she told them that she had met Rimmer through Parker (R. 931). She had seen Parker and Rimmer together a few times (R. 957). She recalled seeing Parker and Rimmer talking once outside of her apartment (R. 936). Potter-Mallard did not know when the conversation occurred, although it may have been in the beginning of May, 1998 (R. 935).

Sometime after May 2, 1998, Parker told Potter-Mallard that he had been at the Audio Logic where he saw a little girl and her mom in the waiting area (R. 941). Parker also said that he walked to the back of the store, saw some people and left (R. 950). Parker denied being involved in the crimes (R. 962).

Over the next several months, Deidre Bucknor, an employee of Broward Sheriff's Office compared numerous fingerprints that were obtained from the crime scene and from the items recovered from the storage unit (R. 1126). She identified some fingerprints to Rimmer and Parker (R. 1129; 1134). However, numerous

fingerprints were unidentified, including fingerprints from Davis' vehicle (R. 1140-1), the door leading to the office at Audio Logic (R. 1141), the front door of the Audio Logic store (R. 1143), the cash register (R. 1143), the shelf in the storage area (R. 1144), the duct tape used to bind the victims (R. 1144-45), and other equipment and boxes (R. 1141, 1145-8). Indeed, at least fifty prints were of value but unidentified (Id.).

Rimmer and Parker were tried together in January, 1999.[11] Rimmer's trial counsel explained to the jury in his opening statement: "[T]he defense in this case is Robert Rimmer did not commit those crimes and he was not present at the Audio Logic store on May 2nd, 1998" (R. 549).

Trial counsel also presented evidence that Rimmer wore glasses all of the time because he was "legally blind without correction (R. 1322-3; see also 1344-5). Rimmer's eyesight was 20/400 without correction (R. 1325-6). Rimmer had purchased a new pair of glasses on February 23, 1998 (R. 1311). Also, counsel presented the testimony from the booking officer of Rimmer's prior arrest in March, 1998, that he was wearing glasses (R. 1290).[12] And, that on the evening he was arrested for the crimes at hand, he was wearing glasses (R. 1298).

[11] Prior to Rimmer's capital trial, trial counsel made a motion to sever Rimmer's case from Parker's (R. 3-7).

[12] In rebuttal the State presented the testimony of two investigating officers who said that Rimmer was not wearing glasses on March 25, 1998 (R. 1395; 1403).

Trial counsel also presented testimony that Rimmer drove an Oldsmobile and his wife drove a blueish-purple Ford Probe (R. 1345).[13] Rimmer's wife testified that on the day of the crimes, Rimmer took his son fishing at around 8:00 or 9:00 a.m. in the Oldsmobile and returned around 3:30 p.m. (R. 1355). Meanwhile, she used the Probe to go to the laundromat (R. 1346-7). On cross-examination, the State questioned Mrs. Rimmer about her husband's income. The State showed her payment stubs that indicated he made just over $100.00 every other week (R. 1368).

In rebuttal to the evidence of Rimmer's eyesight, the State presented Ofc. Kelley to discuss his own eyesight, which was 20/300 (R. 1404). Ofc. Kelley described what he could see without his glasses and told the jury that he had driven previously without his glasses and not gotten into any accidents (R. 1404-5). Finally, over the defense's objection, Ofc. Kelley assisted in a demonstration where the trial prosecutor lay on the floor and instructed Officer Kelley to point his finger at his (the trial prosecutor's) head (R. 1406).[14]

During the State's closing argument, the trial prosecutor emphasized the importance of the jury instruction regarding

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[13] In rebuttal the State presented the testimony of two investigating officers who said that Rimmer said he was driving the Probe on March 25, 1998 (R. 1396; 1403).

[14] This Court found that the trial court erred in permitting Ofc. Kelley to testify in rebuttal. Rimmer v. State, 825 So. 2d 304, 321 (Fla. 2002). However, the Court divided, four to three, as to whether the error caused Mr. Rimmer harm. Id. at 322, 334.

principals (R. 1492). Meanwhile, trial counsel emphasized that being in possession of the stolen property days after the crime did not mean that Rimmer was at the Audio Logic on May 2, 1998, and guilty of murder (R. 1516).

During deliberations, the jury had numerous requests for evidence concerning the identification of Mr. Rimmer by the eyewitnesses, including the composite sketch, photo line-up, a read back of Davis' testimony, the fingerprint evidence photos of the live line-up, Davis' sworn statement[15], the store display and Rimmer's day planner (R. 1616). The jury also asked a question indicating some confusion about the instruction regarding principals (R. 1715).

On January 28, 1999, the jury found Mr. Rimmer and Parker guilty as charged (R. 2283-93).

Trial counsel again moved for severance for the penalty phase (R. 1804). The trial court denied the motion, but decided to utilize a procedure where Mr. Rimmer's penalty phase proceeded first and then Parker's penalty phase would be heard (R. 1808-9).

The State presented victim impact testimony, as well as introducing testimony that Rimmer had previously been convicted of two prior violent felonies.

In mitigation, trial counsel presented the following:

[15] The jury was instructed that Davis' sworn statement was not evidence (R. 1641). During cross examination of Davis, trial counsel impeached her several times with her prior sworn statement. See R. 834, 836, 849, 853, 856-9.

Rimmer's father, Louis Rimmer told the jury that he and Mr. Rimmer's mother had fought often when he was young (R. 1870). The couple divorced and the children remained with their father (R. 1868). However, a few years later, Mrs. Rimmer took her children to North Carolina without permission (R. 1868-9). She told her children that their father had died (R. 1869). A few months later, Louis Rimmer found his children and took them back to Ohio (R. 1870). Eventually, Louis Rimmer sent his children to live with their mother in Florida (R. 1872).

The jury also learned that Mr. Rimmer had four children, one of whom was not his biological child, but that he had raised since she was an infant (R. 1873; 1936-7). Mr. Rimmer spent time with his children; he took them to the park or fishing, and often helped with their homework (R. 1939; 1942-3). He also joined the PTA at their school (R. 1939). Mr. Rimmer was also a good friend and community member according to Henry Morris (R. 1881-6). He attended church and worked with kids in gangs (R. 1882-3).

Dr. Martha Jacobson testified that Mr. Rimmer suffered from a schizophrenic disorder with some mood disorder and depression (R. 1904). Dr. Jacobson believed that Mr. Rimmer's condition was chronic (R. 1901). She formed her conclusions based on some psychological testing and an interview with Mr. Rimmer (R. 1893-4). The results of Mr. Rimmer's testing demonstrated a bizarre thought process, paranoia and mania (R. 1896-7; 1899). She explained that Mr. Rimmer's results showed that he was not in

touch with reality and that he hallucinated (R. 1898).

On cross examination, the State elicited that Dr. Jacobson had no evidence of Mr. Rimmer having mental problems in the past (R. 1910-1). And, though Dr. Jacobson informed the jury that Mr. Rimmer told her that he had seen a mental health professional while previously incarcerated, she admitted that she was never provided records to confirm that information (R. 1914-5). So, during the State's closing argument, the State referred to Dr. Jacobson's testimony as "mental mumbo-jumbo" (R. 1951). And, the State emphasized that there was no factual basis to support Dr. Jacobson's opinions (Id.). Instead, the State told the jury that Mr. Rimmer had anti-social personality disorder (R. 1959).

The jury recommended the death penalty for the shooting of both Mr. Knight and Mr. Krause by a vote of 9 - 3 (R. 2320).

A Spencer hearing was held in March, 1999, at which trial counsel presented testimony from Dr. Michael Walczak and Mr. Rimmer's mother. Dr. Walczak confirmed Dr. Jacobson's diagnosis (R. 2011), and also told the trial court that Mr. Rimmer suffered an abusive childhood (R. 2013).

Lilly Rimmer, Mr. Rimmer's mother, explained that she had taken her children from their father but she presented a somewhat different picture of Louis Rimmer, telling the trial court that he was not involved with his children and refused to let her have contact with them (R. 2049-51).

On March 19, 1999, the trial court sentenced Mr. Rimmer to

death finding six aggravating factors had been established: (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 felony involving use or threat of violence; (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)[16]; and (6) the murders were cold, calculated, and premeditated (CCP) (R. 2383-99). The trial court found no statutory mitigating circumstances and gave the nonstatutory mitigation little weight (Id.).

B. THE POSTCONVICTION PROCEEDINGS

1. Preliminary Matters.

From the outset, the State interfered with Mr. Rimmer's public records process. The State failed to notify law enforcement agencies that the mandate had issued so that the agencies would submit public records to the Records Repository (SPC-R. 1046). The State's error caused Mr. Rimmer delay in seeking additional records and thus, the circuit court required additional information in order for him to obtain records.

Prior to the evidentiary hearing, the State requested that the circuit court require Mr. Rimmer to proffer the testimony of

[16] This Court found that the evidence did not support the HAC aggravator. Rimmer v. State, 825 So. 2d 304, 327 (Fla. 2002).

his witnesses so that the court could determine the "relevancy" of the testimony (SPC-R. 1817-9; 2SPC-R. 879-921). Specifically, the State argued that Mr. Rimmer should not be allowed to present testimony from witnesses Rosario, Moore, Burke and Parker (Id.). Mr. Rimmer responded to the State's motion pointing out that there was no authority for such a request (SPC-R. 1820-3).

Based on the State's motion, the circuit court directed Mr. Rimmer to file a written proffer of testimony expected from certain witnesses. Mr. Rimmer complied with the court's directive (SPC-R. 1829-32).

Thereafter, the State requested that the circuit court strike several of Mr. Rimmer's witnesses (SPC-R. 1833-7). The circuit court granted the State's motion and ordered that Mr. Rimmer would not be permitted to present testimony from witnesses Rosario, Moore, Davis, Tekdogan and Parker (SPC-R. 1990-1).

2. Guilt Phase Issues.

At the evidentiary hearing, Richard Garfield testified that he had been appointed to represent Mr. Rimmer at the guilt phase of his capital trial (2SPC-R. 598). The theory of the defense was that someone other than Mr. Rimmer committed the offense and that Mr. Rimmer came into possession of the stolen items at a later date (2SPC-R. 608). Trial counsel wanted to attack the identifications of the eyewitnesses (2SPC-R. 609).

a. Eyewitness Identifications.

i. Mr. Rimmer wore eyeglasses in 1998.

All of the individuals who knew Mr. Rimmer and saw him regularly confirmed that he wore glasses in order to see clearly, including his mother, his employer and his friends (2SPC-R. 45; 99; 254).

Dr. Gerald Tepler testified that Mr. Rimmer needed to wear corrective lenses in order to see clearly (2SPC-R. 241). And, Mr. Rimmer's vision records[17] revealed that he had previously suffered from corneal ulcers (2SPC-R. 242). The condition often resulted in patients not wearing contact lenses (Id.). Indeed, Mr. Rimmer's vision records revealed no prescription for contact lenses, though the State of Florida requires such a prescription to obtain contact lenses (2SPC-R. 243).

In addition, Dr. Tepler opined that the comparison of Detective Kelley's vision to Mr. Rimmer's vision was an inaccurate and ineffectual comparison (2SPC-R. 244-5; 248). Dr. Tepler explained that not only was their vision acuity different[18], but also that other factors can contribute to how an individual reports perception of objects (2SPC-R. 245-6).

ii. The eyewitness identifications were plagued with flaws in the procedure.

iii.

At the evidentiary hearing, Dr. John Brigham testified about

[17] Trial counsel recalled obtaining Mr. Rimmer's Department of Corrections medical records, but did not recall reviewing them (2SPC-R. 611).

[18] Mr. Rimmer had 20-400 vision, where as Detective Kelley had 20-300 vision.

the eyewitness identifications in Mr. Rimmer's case. Initially, Dr. Brigham set forth some of the basic facts concerning eyewitness identifications (2SPC-R. 364-5). And, he explained that eyewitness identification is based on the process of memory (2SPC-R. 365-77).

Dr. Brigham also outlined some of the specific factors that could have effected the identifications by Davis and Moore. As to Davis, Dr. Brigham noted that the situation was tremendously stressful – she, her daughter and her boyfriend were all in danger; a weapon was present which likely caused weapon focus; the circumstances of the crime caused her to be distracted by multiple perpetrators and movement; the time she had to observe was limited; the perpetrator had a hat pulled down over his face, past his eyes (2SPC-R. 380-1). Likewise, Moore had even less opportunity to observe as he was laying face-down on the ground, and still the other factors effecting Davis were also present for Moore (2SPC-R. 388).

Davis and Moore spoke to each other about the descriptions of the perpetrators (2SPC-R. 384). Two days past, before Davis was asked to assist with a composite sketch, and before assisting with it she was exposed to more than fifty photos from a mug book (2SPC-R. 382-3). Rather than create a composite for Moore, he was simply shown Davis' which can cause a blending of memory or transference (2SPC-R. 389).

At the photo line-up, Davis and Moore were instructed to

approach the photos as if the perpetrator was included in them, (2SPC-R. 385, 389). And, Davis chose someone other than Mr. Rimmer as her first choice, which demonstrates the weakness of her memory (2SPC-R. 385). At some point she was told that Moore had chosen Mr. Rimmer's photo which only reinforced her later identifications (Id.).

Dr. Brigham opined that Davis and Moore's live line-up and in court identifications were meaningless, because they simply had the expectation that Mr. Rimmer was the person to choose (2SPC-R. 386-7; 390-1).

Trial counsel did not consult with an eyewitness identification expert at the time of the trial (2SPC-R. 642).

b. Other Suspects and Uninvestigated Leads.

At the time of trial, trial counsel inquired about some individuals who had been listed on a fingerprint report as "other suspects" (R. 3770). Law enforcement officials told trial counsel they were unaware who the individuals were or why they were listed as other suspects (2SPC-R. 617).

At the postconviction evidentiary hearing, trial counsel and the trial prosecutor testified that neither one of them were aware that individuals from FDLE had authored reports or participated in the investigation of the case (2SPC-R. 624; 771). Thus, neither had seen the FDLE reports admitted as a composite exhibit as Defense Exhibit 43. The reports included additional photo lineups that had been prepared to show to the eyewitnesses

that did not include Mr. Rimmer (Def. Ex 43).

Trial counsel did not receive or obtain reports regarding the gun used in the shooting (Def. Exs. 44 and 45). Nor did trial counsel receive or obtain reports concerning a robbery-homicide that occurred in Broward County, shortly before the Audio Logic crimes (2SPC-R. 641; see Def. Ex. 46).

Trial counsel believed that he was provided reports from Officers Trephan and Schenk concerning leads that were not fully investigated (2SPC-R. 622; see Def. Exs. 41 and 42). The reports contained information about other vehicles that matched the description of the Ford Probe that were seen in the area shortly after the offenses occurred (Id.).

Though trial counsel attempted to minimize the importance of the undisclosed documents, he did concede that he would have wanted to know about other suspects in the case (2SPC-R. 754).

c. Identification of the Ford Probe.

After the offense, Davis and Moore described the Ford Probe that the perpetrators had driven to leave the scene of the crime. The description of the vehicle was that it was a bluish-purple and Moore recalled that the window tint was peeling (R. 907). Davis believed that the Probe had alloy wheels and that a headlight was stuck in the up position (R. 836). At the evidentiary hearing, Mr. Rimmer was precluded from introducing information that found that the Ford Probe had problems with the headlights being stuck in an up position (2SPC-R. 627-8).

Though Mr. Rimmer owned a bluish-purple Ford Probe, at trial, his wife testified that she drove the Probe, unless her husband was taking it for a repair (R. 1345). Indeed, she testified that she was driving the car on May 2, 1998 (R. 1346-7). The Probe owned by Mr. Rimmer had neither a problem with the tint nor alloy wheels.

At the postconviction hearing, Stewart Weiss, an experienced auto mechanic and business man testified that a common problem with the Ford Probe was that a headlight would get stuck in the up position – he himself had previously repaired that problem (2SPC-R. 89).[19]

Likewise, Sabrina Irving who worked with and was romantically involved with Mr. Rimmer contradicted the evidence presented at trial that during the incident that occurred in March, 1998, when both Mr. and Mrs. Rimmer were arrested (2SPC-R. 54). Irving explained that on March 24, 1998, Mr. Rimmer was driving her home from work when his wife started following them (2SPC-R. 57). Mr. Rimmer pulled into a bank parking lot followed by his wife (Id.). Mrs. Rimmer exited her vehicle and began to hit Mr. Rimmer's vehicle with an object. Mr. Rimmer got out of his car and tried to hold his wife's arms so that she could not break the car windows. Irving was certain that she and Mr. Rimmer were driving the Oldsmobile, not the Ford Probe (2SPC-R.

[19] Trial counsel admitted that he did not research the problems with the Ford Probe (2SPC-R. 625-6; 628-9).

59). In fact, the police allowed her to drive the Oldsmobile home (2SPC-R. 60).

d. Money found on Mr. Rimmer.

At trial, the State presented evidence that Mr. Rimmer was arrested with $896.00 on his person (R. 1305). On cross-examination of Mrs. Rimmer, the State showed her pay stubs from John Knox Village that indicated her husband made just over $100.00 every other week (R. 1368).

At the evidentiary hearing, Mr. Rimmer's employment records were introduced which reflected that shortly prior to May 10, 1998, Mr. Rimmer had cashed out some of his annual leave hours, totaling $2286.26 (Def. Ex. 20). Furthermore, these records reflect that Mr. Rimmer earned more money than was presented by the State at trial. At the time of Mr. Rimmer's arrest, his payrate had increased significantly. He was taking home approximately $600.00 every two weeks in April-May, 1998 (Id.).

At the evidentiary hearing, trial counsel testified that, although he had the records to explain why Mr. Rimmer possessed a large amount of money at the time of his arrest, he believed the issue was unimportant and it was unimportant to rehabilitate Mrs. Rimmer (2SPC-R. 603; 605-6).

e. Conversations Between Mr. Rimmer and His Wife.

Trial counsel candidly admitted that he did not consider objecting to the questions by the trial prosecutor about Mr. Rimmer's conversations with his wife (2SPC-R. 607).

3. Conflict.

After Mr. Rimmer was found guilty of two counts of first degree murder, but before his penalty phase proceedings commenced, trial counsel penned a letter to the City of Wilton Manors on behalf of the lead detective, Anthony Lewis (see Def. Ex. 47). Trial counsel commended Det. Lewis on his hard work and congratulated him on his victory in court against Mr. Rimmer (Id.). Mr. Rimmer was unaware of the letter (2SPC-R. 652).

4. Mitigation.

a. Trial Counsel's Investigation.

Initially, Ken Malnik was appointed as penalty phase counsel for Mr. Rimmer (2SPC-R. 432). Mr. Malnik withdrew less than two months before trial without having conducted any investigation, collecting records or retaining a mental health expert (2SPC-R. 432-3).

After Malnick withdrew, on December 1, 1998, Hale Schantz was appointed as penalty phase counsel (2SPC-R. 436). Schantz recalled attempting to contact some of Mr. Rimmer's family members, friends and employers (2SPC-R. 438-9). While Schantz conceded that it was his obligation to obtain background records and that they could be important in a penalty phase investigation (2SPC-R. 443, 452-3), he did not recall requesting or reviewing any background records, including school records, employment records or prison records (2SPC-R. 441; 443; 447-8; 450).

Schantz testified that Mr. Rimmer provided him with

individuals who had information about his background (2SCP-R. 453-4; Def. Ex. 21 & 22). While Schantz did not interview all of the individuals provided by Mr. Rimmer, or look for anyone else (2SPC-R. 476), he did interview Mr. Rimmer's father, mother, wife and children, Henry Morris and two employees at John Knox Village (2SPC-R. 456; 460; 461; 462; 467; 468; 469).

Schantz' wanted to show the jury that Mr. Rimmer was a great dad (2SPC-R. 479-80). And, that Mr. Rimmer had had a rough upbringing (Id.). Had Schantz had other information about Mr. Rimmer's childhood, or the fact that he was a great dad, he would have presented it to the jury (2SPC-R. 481).

As to mental health mitigation, Schantz filed a motion on December 16, 1998, requesting an expert be appointed (2SPC-R. 484). Dr. Martha Jacobson was appointed on December 31, 1998 (2SPC-R. 485). Schantz wanted Dr. Jacobson to determine whether Mr. Rimmer had any significant mental illness (2SPC-R. 484). But, Schantz gave Dr. Jacobson no background materials (2SPC-R. 143). Schantz would have presented Mr. Rimmer's abusive childhood or other non-statutory mitigation through Dr. Jacobson if that information had been obtained (2SPC-R. 586-7).

Finally, Schantz conceded that he had no reason for his failure to object to the trial prosecutor's improper arguments to the jury (2SPC-R. 505).

b. Background and Social History Information Presented at the Evidentiary Hearing.

At the evidentiary hearing, Mr. Rimmer's mother, Lilly Rimmer, explained that she married Mr. Rimmer's father because she was pregnant with their son, Louis Odell (2SPC-R. 15; 103). She did not want to marry him and was never happy about the situation (Id.; 108). Jeanette Rimmer, Mr. Rimmer's aunt by marriage, testified that there were problems between Robert's mother and father even before they were married (2SPC-R. 103). Louis Rimmer was unfaithful and spent money on prostitutes (2SPC-R. 104). Despite the problems, the Rimmer's had three sons – Louis Odell, Robert and Raymond (2SPC-R. 12). Lilly Rimmer believed that though she tried to be a good mother, she was unable to because of her own unhappiness (2SPC-R. 18). Jeanette Rimmer concurred and explained that there was a lot of fear and anger in the house but, "there wasn't love." (2SPC-R. 105).

Lilly Rimmer also confirmed that, while married, she and her husband argued frequently – two to three times a week (2SPC-R. 15-6; 195-6). Oftentimes the arguments would result in physical violence (Id.). Louis Odell and Robert would try to intervene in the arguments and comfort their mother after the arguments (2SPC-R. 17). However, Louis Odell testified that when he and Robert intervened, his father would then "whoop" them, though not in front of their mother (2SPC-R. 197).

Lilly Rimmer described her husband as a "present, non-existent father" (2SPC-R. 16). She explained that her husband did not care for or spend time with his children (Id.). Jeanette Rimmer confirmed that Louis Rimmer was not nurturing and lacked

parenting skills (2SPC-R. 112). He got angry with his children over minor things, or nothing at all (2SPC-R. 17; 125). During these times he would yell at them and make them feel bad (Id.).

Lilly Rimmer left her husband and took her children after an incident in which she and her husband were physically fighting and her eldest son brought a knife out and threatened his father (2SPC-R. 19; 196-7). Her husband pushed her son down a flight of stairs (Id.). Robert witnessed this incident (2SPC-R. 20). Lilly Rimmer did not tell her husband that she was leaving or where she was going (Id.). Nor did she tell her children until they were on the road (Id.). Her children were relieved to be away from the volatile situation of their home life (2SPC-R. 22). Louis Odell described that he and his brothers were happy to leave their father because their mother was nice and calm when their dad was not around (2SPC-R. 199).

Though Louis Rimmer did not seem very concerned about the loss of his children (2SPC-R. 114), a few months later, he found Lilly and the children and asked that the children be allowed to accompany him to Ohio during their holiday break (2SPC-R. 23-4). Though the children did not want to go, she allowed her husband to take them (Id.; 3218). The Rimmer children were scared and nervous about their father beating them (2SPC-R. 201).

A few weeks later, Louis Rimmer refused to return the children to their mother (2SPC-R. 25). He told them that their mother would not be back (2SPC-R. 120).

Jeanette Rimmer testified that while in their father's

custody, her nephews, Robert Rimmer and his brothers, were fearful of their father due to the fact that he beat them (2SPC-R. 106; 111; 121). Several times a week, even daily, Mr. Rimmer's father would beat his children with a razor strap, belts, extension cords, his hands and other implements for seemingly no reason (2SPC-R. 108; 120; 122; 125; 202). Louis Odell confirmed that the beatings were over small things or nothing at all – their dad was moody (2SPC-R. 202).

Their father also left the children unsupervised. Jeanette Rimmer tried to check on her nephews after work since she knew that their father was not home (2SPC-R. 116). She attempted to make sure her nephews had food to eat and completed their homework (2SPC-R. 117; 204). She found the boys unsupervised, without any toys or things to occupy their time (2SPC-R. 118). The children were also not allowed to leave the house (2SPC-R. 123; 203). Robert and his brothers were unhappy (2SPC-R. 201).

At some point, Robert's father began a relationship with a woman who had children of her own (2SPC-R. 124). His neglect and anger toward his own children grew. Louis Rimmer's family confronted him and urged him to seek psychological help (2SPC-R. 126). Louis Rimmer later reported that he was told he was depressed and needed medication (Id.).

In 1980, Lilly Rimmer moved to Florida and a few months later, her husband sent the children to live with her (2SPC-R. 28). Lilly's children, including Robert, were distant and confused (2SPC-R. 29). She noticed that the children had scars

and welts on their bodies as though they had been badly beaten (2SPC-R. 30). Her children confirmed that their father had beaten them, sometimes extremely badly (Id.). They also confided that their father had kept them in the house for long periods of time often without food (Id.; see also 2SPC-R. 124). Though the children were happy to be with their mother, Louis Odell explained that they were still afraid that their dad may come back for them (2SPC-R. 207).

Lilly Rimmer felt her sons needed counseling and attempted to get them some through school, but was never able to (2SPC-R. 32). She also noticed that her eldest son, Louis Odell, started to get in trouble. He had a temper that he could not control (2SPC-R. 35-6). Robert spent much of his time with his older brother and started to emulate his behaviors (2SPC-R. 209). He, too, began to skip school and get in trouble (2SPC-R. 39; 209). The State eventually removed placed him in a group home because Lilly's parenting skills were ineffective (Id.).

Robert Rimmer did not graduate, but did earn his GED (2SPC-R. 40). He also started working at sixteen (2SPC-R. 41). He worked for John Knox Village, a retirement home, for several years where he was promoted and earned a scholarship to continue his vocational training (SPC-R. 1879-80). Mr. Rimmer's supervisor testified that Mr. Rimmer was an excellent employee who went above and beyond the call of duty (2SPC-R. 95).

While working at John Knox Village and going to school, Mr. Rimmer met Stewart Weiss, the owner of an auto repair shop (2SPC-

R. 83), and George Wellington, one of the employees of the shop. At the time of Mr. Rimmer's arrest, he voluntarily worked at Weiss' repair shop two or three times a week in order to learn more about auto repair (2SPC-R. 84). Weiss described Mr. Rimmer as an honest, trustworthy volunteer employee who was eager to learn (2SPC-R. 85). Indeed, Wellington trained Mr. Rimmer and also felt that Mr. Rimmer was trustworthy (2SPC-R. 252-3).

Everyone who knew Mr. Rimmer knew him to be a concerned and caring father who spent time with his children (2SPC-R. 42; 66; 69; 80; 86; 97; 253). They also knew him to be active in his church (2SPC-R. 45; 66), and a responsible employee (2SPC-R. 72). Erlene Jennings knew Mr. Rimmer when he was in high school because he used to date her daughter (2SPC-R. 64). Even after Mr. Rimmer and her daughter stopped dating he continued to visit Ms. Jennings two or three times a week (Id.). Ms. Jennings stated that Mr. Rimmer was like a son to her (2SPC-R. 65).

c. Mental Health Mitigation Presented at the Evidentiary Hearing.

Mr. Rimmer presented evidence about his mental health. Dr. Martha Jacobson evaluated Mr. Rimmer just a few weeks before his capital trial commenced (2SPC-R. 144). Mr. Rimmer's penalty phase trial attorney spoke to her briefly about the circumstances of the crime and the fact that Mr. Rimmer had children (2SPC-R. 140-1). However, trial counsel did not provide any background information to Dr. Jacobson (2SPC-R. 143). Trial counsel also provided no collateral sources of information to Dr. Jacobson (2SPC-R. 145). Thus, Dr. Jacobson's opinion at trial was based

entirely on Mr. Rimmer's self report and the results of psychological testing. Though Mr. Rimmer provided some information about his chaotic and abusive childhood, which was contained in her report, she was not asked about this information in her testimony (2SPC-R. 151). Dr. Jacobson testified that she had no conference with the trial attorney in regards to mitigation (2SPC-R. 153). Likewise, at trial, she believed that Mr. Rimmer committed the offense while under an extreme mental or emotional disturbance, but the jury never heard this information (2SPC-R. 154). She also believed that Mr. Rimmer was suffering from psychosis at the time of the crime which impaired his capacity to appreciate the criminality of his conduct, but the jury never heard this information either (2SPC-R. 155).

After meeting with Mr. Rimmer in postconviction, Dr. Jacobson confirmed her previous diagnosis of schizo-affective disorder which is a major mental health disorder (2SPC-R. 159). Mr. Rimmer suffered from a paranoid and delusional thought process (Id.). She opined that Mr. Rimmer's condition is chronic (2SPC-R. 161). However, in postconviction, Dr. Jacobson conducted testing that ruled out the diagnosis of psychopath (2SPC-R. 162). The background materials provided in postconviction confirmed Dr. Jacobson's findings (2SPC-R. 166-7). She specifically noted that Mr. Rimmer's mental health records showed symptoms of his illness including nightmare visualizations and hallucinations and paranoia (2SPC-R. 167). The records independently corroborated her diagnosis and opinions and showed

his prior direct contact with mental health professionals (2SPC-R. 168). Dr. Jacobson also learned additional information about Mr. Rimmer's childhood, including information about the abuse and neglect and the fact that Mr. Rimmer's brother also had been prescribed with an anti-psychotic medication – information she considered mitigating (2SPC-R. 169-70). She conceded that, at trial, she did not provide an adequate description of the type of dysfunction experienced by Mr. Rimmer (2SPC-R. 170).

Dr. Faye Sultan also evaluated Mr. Rimmer in postconviction. Initially, after interviewing him, Dr. Sultan noticed Mr. Rimmer's paranoid thinking and though distortion (2SPC-R. 273-4). She suspected that he had suffered mental damage from his traumatic childhood experiences (2SPC-R. 274). Dr. Sultan also reviewed records, including Mr. Rimmer's previous mental health records from the late 1980s and early 1990s; she believed these records to be the most important background records about Mr. Rimmer (2SPC-R. 283). Dr. Sultan explained that the records showed that Mr. Rimmer suffered from longstanding disturbing psychological symptoms (2SPC-R. 286).

Dr. Sultan also interviewed several people who knew Mr. Rimmer, including Lilly Rimmer, Jeanette Rimmer, Louis Odell Rimmer, Arlene Jennings and Andrea Brown. Dr. Sultan described the collateral information:

> Those people helped fill in pieces of information that were crucial to me in formulating my opinion about the life Robert Rimmer had led, the psychological damage that had been done to him and the way he functioned psychologically as a young adult leading up to the time of the offense.

> They flushed out the picture, then provided a depth of understanding to me that I couldn't have had if I didn't have these conversations.

(2SPC-R. 309).

Indeed, through those interviews, Dr. Sultan confirmed what Mr. Rimmer's mother believed which was that when her children were returned to her in Florida she was ill equipt "to deal with the damage that had been done to her children in the time that they had been separated from her" (2SPC-R. 293). Lilly Rimmer was quite overwhelmed by her sons problems and unable to control their behavior (2SPC-R. 290). Due to her sons' problems, as well as Lilly's own financial situation, it was impossible for her to be a stable parent for her children (2SPC-R. 291).

Dr. Sultan also described that witnesses had reported Mr. Rimmer's peculiar thinking and that he seemed to overreact to things (2SPC-R. 297; 308). Erlene Jennings reported that Mr. Rimmer could not let go of his suspiciousness or fears and at times could not disengage from situations (2SPC-R. 298). And, Mr. Rimmer's first girlfriend, Andrea Brown, broke up with him because she believed he was mentally unstable. Brown described Mr. Rimmer's bizarre behavior and reactions (2SPC-R. 308).

Mr. Rimmer's brother, Louis Odell, described himself as "more than just a bad influence [on Robert]. He was an active antagonist" for his brother, Robert (2SPC-R. 303). He forced his Robert to smoke marijuana, skip school and assist him in his criminal endeavors (Id.). Robert Rimmer's dependence on his brother began when they were children, being shuffled from parent

to parent without notice or explanation (2SPC-R. 304). Dr. Sultan also learned that Louis Odell had previously exhibited psychotic symptoms and been prescribed anti-psychotropic medications (2SPC-R. 306).

Dr. Sultan also explained that the abuse suffered by Mr. Rimmer included "multiple layers" that were "extremely damaging" (2SPC-R. 296; 305).

Dr. Sultan diagnosed Mr. Rimmer with a paranoid personality disorder though she believed in the past that he would have been classified as having a more acute psychotic disorder (2SPC-R. 314). Dr. Sultan explained that Mr. Rimmer's condition effects his day-to-day functioning (2SPC-R. 315). Mr. Rimmer's "psychiatric disorder greatly impairs his ability to reason rationally and calmly" and "his though process is characterized by suspiciousness and fear" (2SPC-R. 316).

Dr. Sultan concluded that based on her evaluation, Mr. Rimmer would have met the criteria for the statutory mental health mitigator that at the time of the offense was under the influence of an extreme mental or emotional disturbance (Id.). Dr. Sultan also opined that at the time of the offense Mr. Rimmer's capacity to appreciate the criminality of his conduct was impaired (2SPC-R. 317).

Likewise, Dr. Sultan identified numerous non-statutory mitigators: Mr. Rimmer has been mentally ill throughout his adolescence and adulthood which interfered with his ability to function; he was the victim of severe physical abuse; he was the

victim of severe emotional abuse and neglect[20]; at the time of the offense Mr. Rimmer was attempting to "pull his life together" – he was working hard at his relationship with his children (2SPC-R. 319).

SUMMARY OF ARGUMENT

Mr. Rimmer's trial counsel was woefully deficient at both his guilt and penalty phases. Trial counsel's deficient performance deprived the jury from hearing critical exculpatory evidence and mitigation. The evidence presented by Mr. Rimmer in postconviction undermines confidence in the outcome of the case.

In addition, Mr. Rimmer was deprived of his right to due process at trial and in postconviction. At trial, the State failed to disclose material, exculpatory evidence concerning other suspects and leads. The evidence was important to demonstrate the weakness of the prosecution's case and to advance Mr. Rimmer's defense.

During his postconviction proceedings, Mr. Rimmer was denied due process in obtaining and presenting evidence to support his claims. The proceedings in the circuit court were neither full nor fair. Relief is warranted.

[20] Dr. Sultan stated that the abuse and neglect Mr. Rimmer suffered: "would have a profound impact on his functioning in the world and his ability to trust people, to formulate relationships, on his ability to struggle with what probably is genetic propensity toward mental illness" (2SPC-R. 318).

ARGUMENT

ARGUMENT I
MR. RIMMER WAS DENIED DUE PROCESS THROUGHOUT HIS POSTCONVICTION PROCEEDINGS. THE PROCEEDINGS BELOW WERE NEITHER FULL NOR FAIR.

A. THE CIRCUIT COURT ERRED IN REFUSING TO PERMIT MR. RIMMER TO PRESENT MATERIAL WITNESSES IN SUPPORT IF HIS 3.851 CLAIMS

The circuit court granted an evidentiary hearing on six claims in Mr. Rimmer's 3.851 motion, including, *inter alia,* his claim of ineffective assistance of guilt phase counsel and Brady violations. The right to due process in postconviction includes the right to a full and fair evidentiary hearing during the 3.851 process. See Roberts v. State, 840 So. 2d 962, 971 (Fla. 2002). The circuit court erred by refusing to allow Mr. Rimmer to present witnesses at the evidentiary hearing.

Prior to the evidentiary hearing, the State filed a Motion for Discovery (SPC-R. 1817-9). In its motion, the State "question[ed] the propriety of compelling the appearance and testimony of certain witnesses for this collateral proceeding," (Id. at 1818). The State made no showing of the need for discovery under Lewis, but instead asked the defense for a showing of relevancy (Id.). At both a hearing on the motion and in a court-ordered written response, over defense objection, Mr. Rimmer provided detailed explanations of the relevancy for each challenged witness (See SPC-R. 1829-32; 1836-75; 2SPC-R. 880-921). The State subsequently filed a Motion to Strike Witnesses (SPC-R. 1833-75). In its Order on the State's Motions, the

circuit court ultimately found "insufficient relevancy to any claim for relief to permit the calling" of Davis, Moore, Rosario, or Parker (SPC-R. 1990-1). The circuit court erred in so ruling.

First, as postconviction counsel argued in the proceedings below, Fla. R. Crim. Pro. 3.851 does not provide for automatic discovery. Lewis v. State, 656 So. 2d 1248, 1250 (Fla. 1994). Under Lewis, the circuit court was required to determine that the State met their burden to show good cause for why discovery should be granted. Id. at 1249. Instead, as to Davis, Moore, and Rosario, the State's sole argument in support of the "good cause" requirement in its Motion for Discovery was that it "question[ed] the propriety" of calling them for the hearing (PC-R. 1817-9). As to all witnesses, the State demanded a showing of "relevancy," and claimed that it was "not apparent how [the witnesses] have any relevant information" (Id.). At the discovery hearing, the State made no further showing, and the circuit court made no inquiry whatsoever into what, under the Lewis factors, would establish that Mr. Rimmer was obligated to proffer the relevancy of his witnesses. This process was not sufficient to meet the requirements of Lewis, and the State's Motion for Discovery should have been denied.

Moreover, Mr. Rimmer is not required to make a showing of relevancy **before** calling witnesses. The proper time to make an objection as to the relevance of testimony is at the time the testimony is offered. As explained by Charles Ehrhardt in Florida Evidence (2008 Edition) § 104.5, pre-trial determinations

on the admissibility of evidence are typically reserved for evidence that will be highly prejudicial to the moving party. Id. There was no showing below, nor did the circuit court find, that the witnesses would in any way be highly prejudicial to the State (See PC-R. 1817-9, 1820-4, 1829-32, 1833-75; 2SPC-R. 880-921).

Additionally, pursuant to Fla. Stat. § 90.104(a), "a proper objection must state the specific reason for excluding the evidence," and "**[an] objection that evidence is incompetent, irrelevant, and immaterial is not a specific objection.**" Fla. Stat. § 104.2.24 (emphasis added). In the proceedings below, the State made no argument for the exclusion of these witnesses other than relevancy (PC-R. Id.). Such a cursory objection, without more, does not meet the requirements for witness exclusion, and the circuit court should have permitted the witnesses to testify. See Tampa Elec. Co. v Charles, 67 So. 572, 573 (Fla. 1915)("'Where the grounds of objection interposed to proffered evidence were the same was immaterial, irrelevant and not pertinent to any issue made in the pleading, such grounds of objection are properly overruled, unless the evidence so objected is palpably prejudicial, improper and inadmissible for any purpose'")(quoting Brown v. Bowie, 50 So. 637 (Fla. 1909)).

However, assuming that Mr. Rimmer was properly compelled to proffer the relevancy of material witnesses before the hearing (which Mr. Rimmer maintains he was not), he submits that he did establish their relevancy to his 3.851 claims, and the circuit court erred when it prohibited those witnesses from testifying.

The circuit court granted an evidentiary hearing on Mr. Rimmer's claims of ineffective assistance of counsel and Brady error, among others (SPC-R. 1815-6). Within each of these claims were allegations which directly related to the surviving eyewitnesses and Kevin Parker. For example, in the ineffective assistance of guilt phase counsel claim, Mr. Rimmer alleged that trial counsel unreasonably failed to present evidence in support of Mr. Rimmer's misidentification defense, including failure to investigate other suspects and failure to request and consult with an eyewitness expert (SPC-R. 489-92). Similarly, in his Brady claim, Mr. Rimmer alleged that the State failed to turn over material information on the investigation of other suspects, thereby prejudicing Mr. Rimmer's misidentification defense and calling the veracity of the eyewitness identifications into question (SPC-R. 516-25).

As a showing of the relevancy of the surviving eyewitnesses, collateral counsel argued that it was necessary to bring out inconsistencies in their statements and testimony about the crime and the identification process which was not brought out at trial (SPC-R. 1820-24, 1838-75). Such information was directly relevant to Mr. Rimmer's claims, as it is incumbent upon the defense to show the materiality of **what was not presented or done** in order to meet the prejudice requirements necessary for relief. However, it was clear that the circuit court did not have the proper understanding of what the defense could and should present in support of its claims. For example, during the discovery

hearing, the court dismissed the notion that the witnesses were necessary to bring out evidence that was not presented at trial:

> But Ms. McDermott, [the hearing] is not to recreate the inconsistencies now. . . .You have to take the trial and what happened as it happened, not create new evidence by way of taking new testimony of these victims. . . .You have to go based on the testimony they gave, what Mr. Garfield had available, the statements that they had already given. It's not to conduct a new trial, it's not to conduct new depositions to find new things now.

(2SPC-R. 908-9).

The Court's position is in error, and demonstrates a serious lack of understanding regarding the nature of the postconviction process. If it were true that Mr. Rimmer could **only** "take the trial and what happened as it happened," then there would be no avenue for him to pursue collateral relief whatsoever. Rather, in order to meet his burden in postconviction, Mr. Rimmer is permitted to present evidence that was available and not brought out at trial; he is permitted to demonstrate what trial counsel could and should have done with the information he had available to him; and he is permitted to show that evidence he should have been given was material to his defense, and that prejudice resulted from such information being withheld.

Regarding his guilt phase ineffective assistance claim, Mr. Rimmer specifically alleged that Davis, Moore, Rosario, and Parker would all be able to testify to information which was unreasonably not brought out at trial or in the record below (SPC-R. 1829-32, 1867-8, 1872-3). Also, as to the eyewitnesses, it was necessary to question them regarding their identifications

in ways that trial counsel did not do in order to demonstrate trial counsel's ineffectiveness for not getting an eyewitness identification expert.

It was also imperative that the eyewitnesses testify regarding the withheld Brady material. Trial counsel's strategy was misidentification, and the eyewitness identifications were the only thing linking Mr. Rimmer to the scene of the crime. Thus, Mr. Rimmer wanted to demonstrate that the information on other suspects should have been made part of the defense through effective cross-examination of the eyewitnesses, and by attacking the State's investigation as a whole. Likewise, the eyewitnesses needed to testify as to how the information on other suspects would have affected their identifications.

The trial court erred in finding the eyewitnesses and co-defendant Parker irrelevant, as relevancy was well-established. "Relevant evidence is evidence tending to prove or disprove a material fact," Fla. Stat. § 90.401, and evidence that is relevant is admissible. See Fla. Stat. § 90.402; see also Stephens v. State, 787 So. 2d 749 (Fla. 2001) (relevant evidence has a logical tendency to prove or disprove a fact of consequence to the outcome of the case). Mr. Rimmer's right to due process of law was violated when the circuit court precluded him from calling relevant witnesses to his claim. See Johnson v. Singletary, 647 So. 2d 106, 111-112 (Fla. 1994).[21]

[21] The circuit court's refusal to permit Mr. Rimmer to present witnesses in support of those claims also violated his Sixth Amendment right to compulsory process. Taylor v.

B. THE CIRCUIT COURT ERRED BY REFUSING TO GRANT MR. RIMMER ACCESS TO PUBLIC RECORDS

In the proceedings below, the circuit court denied Mr. Rimmer's motions for additional public records on numerous witnesses from his investigation (SPC-R. 1735-46; 2408-9).

Specifically, the circuit court erred by granting the objections of Broward County Sheriff's Office (BSO) and the Florida Department of Law Enforcement (FDLE) that Mr. Rimmer had not established the relevancy of 34 individuals listed in his 3.852(g) demand for additional public records (SPC-R. 1740, 1743). Despite the fact that Mr. Rimmer submitted a detailed description of each person listed and how they related to his case (SPC-R. 805-13), the circuit court refused to grant his public records demand, finding that he did not establish relevancy.

However, these individuals were all found in materials submitted by the State, trial attorneys, and/or police in this case, and were selected from over one hundred named persons found in the materials received by Mr. Rimmer during public records production. With the exception of the victims, all were either key witnesses to the crime and its aftermath, were part of the police investigation, and/or testified at Mr. Rimmer's trial. Thus, Mr. Rimmer's request for information on those individuals fully comported with the requirements of Fla. R. Crim. Pro.

Singletary, 122 F.3d 1390 (11th Cir. 1997); see also B.E. v. State, 564 So. 2d 566 (Fla. 3d DCA 1990).

3.852(g). This rule states that a person or agency shall be ordered by the court to produce additional public records if the court determines that, *inter alia*, "The additional public records sought are **relevant to the subject matter of a proceeding under Rule 3.851, *or* appear reasonably calculated to lead to the discovery of admissible evidence**." 3.852(g)(3)(C)(emphasis added). Mr. Rimmer met both standards under the Rule. The court's finding that he did not establish relevancy was in error.

Black's Law Dictionary defines "relevant" in the following manner: "*adj.* Logically connected and tending to prove or disprove a matter in issue; pertinent." Black's Law Dictionary, 7th ed. (2005). Similarly, the Merriam-Webster Dictionary defines "relevant" as "having significant and demonstrable bearing on the matter at hand; . . . affording evidence tending to prove or disprove the matter at issue or under discussion." Merriam-Webster Dictionary, 2008 ed. The individuals listed in Mr. Rimmer's 3.852(g) demands to BSO and FDLE were **directly involved** in his investigation and prosecution. As a result, the relevancy of records relating to them is clear. They were relevant and pertinent to the proceedings at the time of investigation and trial, and as such remained relevant and pertinent to Mr. Rimmer's postconviction defense.

Because these individuals were relevant to Mr. Rimmer's investigation and trial, it was likely that records on these individuals would "lead to the discovery of admissible evidence." Fla. R. Crim. Pro. 3.852(g)(3)(C). It is impossible for Mr.

Rimmer – or any other postconviction defendant – to guarantee that impeachment and/or other admissible evidence would be revealed in the records requested. However, it is reasonable to presume that criminal investigation records could potentially lead to impeachment information, evidence of deals with police, as well as other pertinent information relevant to Mr. Rimmer's postconviction litigation. By finding that Mr. Rimmer did not do enough to establish relevancy, the circuit court imposed a burden on Mr. Rimmer that 3.852 does not require, thereby violating his right to due process in his postconviction litigation.

C. THE CIRCUIT COURT VIOLATED MR. RIMMER'S RIGHT TO DUE PROCESS BY FAILING TO ENSURE THE PRODUCTION OF A COMPLETE AND ACCURATE RECORD

Following the 3.851 evidentiary hearing, counsel for Mr. Rimmer filed two motions seeking to correct and supplement the transcripts from the hearing (SPC-R. 2371-5; 2383-7). These motions were granted to the extent that the circuit court ordered the court reporters to review their tapes from the hearing and "provide a correct and accurate transcript, if necessary" (SPC-R. 2380). The court reporters submitted corrected transcripts and/or affidavits as to the accuracy of the transcripts. However, counsel for Mr. Rimmer maintained that the record is incomplete. Specifically, counsel avers that there was argument and sidebar discussion which was not transcribed, and therefore is nowhere to be found in the record on appeal to this Court.

Because of deficiencies in the court reporter's performance, the record from Mr. Rimmer's evidentiary hearing is not complete

or reliable.

Mr. Rimmer has a constitutional right to a complete transcript and accurate record on appeal. Griffin v. Illinois, 351 U.S. 12 (1956); Entsminger v. Iowa, 386 U.S. 748 (1967). In a capital case, the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution demand a verbatim, reliable transcript of all proceedings. Parker v. Dugger, 499 U.S. 932 (1991). Likewise, Florida's appellate rules require the chief circuit judge "to monitor the preparation of the **complete** record for timely filing in the Supreme Court." Fla. R. App. P. 9.142(a)(1)(emphasis added).

The right to a complete record is meaningless unless it contains an accurate, complete, and reliable transcript. The rights to appeal and meaningful access to the courts are negated by an incomplete transcript because both counsel and this Court cannot fully review the proceedings below. See Evitts v. Lucey; Hardy v. United States, 375 U.S. 277 (1964).

The circuit court's failure to protect Mr. Rimmer's due process rights by ensuring the production of a complete, accurate record mandates relief. See Griffin v. Illinois, 351 U.S. 12, 19 (1956).

D. CONCLUSION

Mr. Rimmer requests that this Court relinquish jurisdiction to the circuit court and allow him to obtain the public records to which he is entitled, present the additional evidence to support his claims that he was precluded from presenting and

correct the transcripts.

ARGUMENT II

THE CIRCUIT COURT ERRED IN DENYING MR. RIMMER'S CLAIM THAT HE WAS DENIED AN ADEQUATE ADVERSARIAL TESTING AT THE GUILT PHASE OF HIS TRIAL, IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION. TRIAL COUNSEL FAILED TO ADEQUATELY INVESTIGATE AND PREPARE MR. RIMMER'S DEFENSE AND TO ADEQUATELY CHALLENGE THE STATE'S CASE. AS A RESULT, THE CONVICTIONS ARE UNRELIABLE.

Due to trial counsel's complete failure to use available evidence, failure to investigate, failure to challenge the State's case, and to make proper objections and argument, Mr. Rimmer's trial counsel rendered ineffective assistance of counsel. Strickland v. Washington, 466 U.S. 668 (1984).

A. TRIAL COUNSEL WAS INEFFECTIVE

At trial and again at the evidentiary hearing, trial counsel stated that his theory of defense was misidentification (R. 130; 2SPC-R. 608). However, trial counsel was willing to concede that Mr. Rimmer was in possession of the stolen property after the robbery-homicide occurred, but that he had nothing to do with the robbery or homicides (2SPC-R. 603). Trial counsel had a plethora of evidence at his disposal to advance his theory and challenge the prosecution's case, but he failed to use it.

1. Misidentification.

The only evidence the jury heard that linked Mr. Rimmer to being present at the Audio Logic store on May 2, 1998, was the identifications of Kimberly Davis Burke and Joe Moore. Thus, the appearance of Mr. Rimmer and identification procedures became a feature at Mr. Rimmer's capital trial. There was additional

evidence readily available to trial counsel to support his theory of defense that he failed to use.

a. Mr. Rimmer's vision records and lay testimony.

At trial, trial counsel presented evidence that Mr. Rimmer wore glasses all of the time because he was "legally blind without correction (R. 1322-3; see also 1344-5). The State attempted to rebut the critical testimony with testimony that Mr. Rimmer had not been wearing eyeglasses at the time of his previous arrest in March, 1998 and in May, 1998 (R. 1395; 1403).

Trial counsel failed to investigate or present the evidence contained in Mr. Rimmer's Department of Corrections' (DOC), medical files which would have corroborated the expert testimony about Mr. Rimmer's eyesight and explained why Mr. Rimmer did not wear contact lenses. The DOC records contain information about an astigmatism and optic ulcers suffered by Mr. Rimmer which prevented him from wearing contact lenses.[22] Indeed, at the evidentiary hearing, Dr. Gerald Tepler testified that patients do not want to wear contacts after suffering from corneal ulcers (2SPC-R. 242).

Dr. Tepler also testified that Florida law requires a prescription for contact lenses, yet he saw no indication in Mr. Rimmer's vision records that he ever obtained a prescription after he suffered from the corneal ulcers (2SPC-R. 243).

[22] None of the eyewitnesses to the crime described the gunman as wearing glasses. Mr. Rimmer is severely near-sighted, needs glasses to see properly, and has worn glasses throughout his adult life.

In addition, trial counsel could have presented testimony from Mr. Rimmer's family, friends and co-workers that Mr. Rimmer always wore glasses (2SPC-R. 45; 99; 254).

The circuit court concluded that trial counsel was not deficient in failing to present the evidence contained in the medical records because it was not "conclusively" proven that he could not have worn contact lenses during the period of time it took to commit the crimes (SPC-R. 2411). However, the circuit court overlooked: 1) that it is not Mr. Rimmer's burden, to show that he "conclusively" could not have worn contacts; and 2) that Mr. Rimmer did not have a prescription for contact lenses.

Furthermore, as to the records of Mr. Rimmer's treatment for a serious eye condition, the circuit court focused, as did trial counsel, on the fact that those records were from DOC and trial counsel did not want the jury to know that Mr. Rimmer had been in prison (see SPC-R. 2411). However, had trial counsel even considered the use of the records, he could have moved to preclude the State from asking any questions about where the records originated from. The records could have correctly been identified as Mr. Rimmer's treatment records. Trial counsel failed to make such a motion, thus, his post-hac rationalization for why he did not obtain an expert or use the records should not be given any deference or credit.[23]

In addition, the circuit court failed to consider that trial

[23] Trial counsel admitted that he made his decision prior to even reviewing the records (2SPC-R. 611).

counsel could have presented lay testimony from numerous witnesses about the fact that Mr. Rimmer did not wear contact lenses. This evidence independently and combined with the expert evidence was critical due to the defense that was advanced at trial, i.e., that Mr. Rimmer could not have been one of the perpetrators because none of the perpetrators wore eyeglasses.

b. Rebutting Officer Kelley's testimony.

As to the comparison that was made at trial by the State of Ofc. Kelley's vision and Mr. Rimmer's vision, at the evidentiary hearing, Dr. Tepler testified that it was "very inaccurate to assess [Mr. Rimmer's] vision based on . . . another person's report of blur. That's why you can't rely on a numerical assessment." (2SPC-R. 246). Dr. Tepler stated that making a comparison based upon the numerical assessment leads to an inaccurate conclusion of another's vision because there are many other factors that effect an individual's vision (Id.).

Testimony similar to Dr. Tepler's was readily available at the time of Mr. Rimmer's trial. Trial counsel did nothing to rebut or address the misleading and inaccurate testimony and demonstration that the jury heard and saw.

c. An eyewitness identification expert.

A key element of the prosecution's case was the testimony of three eyewitnesses to the crimes, only two of whom identified Mr. Rimmer as the gunman. However, there were problems with the witnesses' identifications. Of primary concern were photo lineup identifications which, trial counsel argued, were conducted in an

unacceptably suggestive manner. Trial counsel attempted to have these identifications excluded (R. 2176-8). A suppression hearing was held on December 8, 1998, after which the defense's motion was denied. Thus, at trial, two eyewitnesses, Davis and Moore, identified Mr. Rimmer as the gunman. Their testimony was the only evidence that linked Mr. Rimmer to the crime scene.

Due to the nature of the State's evidence, which relied heavily upon eyewitness testimony to support its prosecution of Mr. Rimmer, it was absolutely imperative that trial counsel request the assistance of an expert in eyewitness identifications. This was not an uncommon defense practice at that time. See, e.g., McMullen v. State, 714 So. 2d 368 (Fla. 1998); Rogers v. State, 511 So. 2d 526 (Fla. 1987).

In Florida, trial courts have discretion to admit expert testimony regarding eyewitness identification. McMullen, 714 So. 2d at 372. Expert testimony of this nature should be admitted if it will assist the jury in understanding the evidence or in determining a fact in issue. See FL Evid. Code Sec. 90.702, F.S. (2002); Angrand v. Key, 657 So. 2d 1146, 1148 (Fla. 1995). Courts have been willing to consider the presentation of expert testimony on the vagaries of eyewitness identifications where the State's case hinges on such testimony, Rogers; yet in this case, trial counsel failed to even petition the Court for an expert to support Mr. Rimmer's misidentification defense.

At the evidentiary hearing Dr. John Brigham testified about the eyewitness identifications in Mr. Rimmer's case. Initially,

Dr. Brigham set forth some of the basic facts concerning eyewitness identifications: there is a 50% error rate associated with eyewitness identifications (2SPC-R. 364). Indeed eyewitness mistakes have a serious impact on wrongful convictions – more so than any other factor (Id.). Despite the facts known about the fallibility of eyewitness identifications, the general public is unaware of the likelihood that eyewitnesses are wrong in their identifications (2SPC-R. 361). And, instead jurors tend to credit eyewitness identifications almost all of the time (Id.). However, when experts, such as Dr. Brigham testify, jurors become more cautious about eyewitness identifications (2SPC-R. 376).

Dr. Brigham also explained that eyewitness identification is based on the process of memory (2SPC-R. 365-6). Thus, he outlined the stages of memory: 1) the acquisition stage where factors such as opportunity to observe, stress, cross racial identification, weapon focus, the age, condition and expectation of the eyewitness all play a part in the acquisition of the memory of the perpetrator; 2) the retention stage where length of retention (before retrieval) and what happens during that time can impact the ultimate stage of 3) retrieval (2SPC-R. 366-77). During the retention stage what an eyewitness sees and hears can alter the actual memory of the perpetrator and transfer can occur (2SPC-R. 369-70). Thus, eyewitnesses who discuss the memory of a perpetrator, view mug books and are exposed to media coverage can alter the true memory of the perpetrator (Id.). Eyewitnesses do not realize that transfer is occurring, but instead the factors

described tend to reinforce a wrongful identification (2SPC-R. 370). When transfer occurs the confidence of an eyewitness' increases and the witness seems to become more certain about his description and perception of the circumstances surrounding the original event change (2SPC-R. 372-3).

Likewise, at the retrieval stage, what an eyewitness sees and hears is critical in discussing the correctness of an identification (2SPC-R. 375). Line-ups and identifications are often advertently or inadvertently suggestive and can become valueless (Id.).

Dr. Brigham also outlined some of the specific factors that could have effected the identifications by Davis and Moore. As to Davis, Dr. Brigham noted that the situation was tremendously stressful – she, her daughter and her boyfriend were all in danger[24]; a weapon was present which likely caused weapon focus; the circumstances of the crime caused her to be distracted by multiple perpetrators and movement; the time she had to observe was limited; the perpetrator had a hat pulled down over his face, past his eyes (2SPC-R. 380-1). Likewise, Moore had even less opportunity to observe as he was laying face-down on the ground, and still the other factors effecting Davis were present for Moore (2SPC-R. 388).

Davis and Moore spoke to each other about the descriptions of the perpetrators (2SPC-R. 384). Two days past, before Davis

[24] Davis testified at trial that she was scared (R. 807).

was asked to assist with a composite sketch, and before assisting with it she was exposed to more than fifty photos from a mug book (2SPC-R. 382-3). Rather than create a composite for Moore, he was simply shown Davis' which can cause a blending of memory or transference (2SPC-R. 389).

At the photo line-up, Davis and Moore were instructed to approach the photos as if the perpetrator was included in them, i.e., like a multiple choice test (2SPC-R. 385, 389). And, Davis choose someone other than Mr. Rimmer as her first choice, which demonstrates the weakness of her memory (2SPC-R. 385). At some point she was told that Moore had chosen Mr. Rimmer's photo which only reinforced her later identifications (Id.).

Dr. Brigham opined that Davis and Moore's line-up and in court identifications were meaningless, because they had the expectation to choose Mr. Rimmer (2SPC-R. 386-7; 390-1).

At the evidentiary hearing, trial counsel testified that he did not consult with an eyewitness identification expert (2SPC-R. 395). Trial counsel attempted to minimize the need to consult an expert stating that the information used by experts was common sense (2SPC-R. 397). However, trial counsel could not identify more than two of the factors involved in determining the accuracy of an identification (2SPC-R. 695-704).[25]

The circuit court found that trial counsel's performance was

[25] Trial counsel admitted that he did not know that Davis was shown 50 photos prior to her compiling the composite sketch – arguably the most crucial fact to demonstrate her suggestibility.

not deficient because "[t]rial counsel continually challenged the identification of the Defendant prior to and during trial." (SPC-R. 2413).[26] However, a review of the various police reports, statements, depositions and trial testimony reflects that trial counsel did not challenge the numerous, critical inconsistencies made by the eyewitnesses. See Def. Exs. 9, 10, 11, 12 and 13.

2. Investigation of other suspects and leads.

At trial, Deidre Bucknor testified that out of the 209 identifiable prints lifted in the investigation, not a single print lifted from the scene of the crime matched Mr. Rimmer (R. 1140-8). The only latent prints that matched his were found on the stereo equipment several days after the robbery-homicides.

Bucknor's report contained a listing of those individuals whose fingerprints were checked against the latent prints found at the scene (Def. Ex. 38). In this report, several people were listed in addition to Parker and Mr. Rimmer (Id.).

A deposition of Bucknor was scheduled by counsel for Parker on January 7, 1999, and was attended by Mr. Rimmer's trial counsel. During the deposition, she stated that she was

[26] While the circuit court stated that "[c]onsidering the quantity of corroborative evidence, that the Defendant committed the crimes, it is unlikely that a different result would have been reached because of the testimony of an expert witness in the field of eyewitness identification." (SPC-R. 2413), the circuit court did not identify the "corroborative" evidence. There was absolutely no corroborative evidence that Mr. Rimmer was at the scene of the crimes. In fact, the evidence at the scene included fingerprints that could not be identified to anyone related to the store or arrested for these crimes. Also, Mr. Rimmer presented an alibi for the day of the crimes.

specifically told not to run the fingerprints of the other suspects listed on the report:

> Q: Were you asked to compare the known prints of anyone else to the fingerprint cards, the latents that were lifted, besides Mr. Rimmer and Mr. Parker?
>
> * * *
>
> A: Looking at page one I did St. Louis. I found him to be negative. So he was the only other suspect that I searched.
>
> Q: You refer to him as a suspect. Why do you refer to him as a suspect?
>
> A: That's what they called him.
>
> * * *
>
> Q: Was there anybody else that you were asked to compare to what Detective Lewis had indicated was a suspect in the case?
>
> A: Just the victims.
>
> Q: Did you ever do any fingerprint examination on a Bernard Gilbert?
>
> A: I was told not to.
>
> Q: By who?
>
> A: Detective Lewis.
>
> Q: Do you know the reason why?
>
> A: No.
>
> Q: The same as it relates to Greg Broughton?
>
> A: Right, I was told not to.
>
> Q: Do you have any idea why or what that's all about?
>
> A: No.

(Def. Ex. 40). Bucknor's deposition was not transcribed by the time she testified at trial (2SPC-R. 620).

At trial, counsel never questioned Bucknor, Det. Lewis or Det. Howard about the other suspects or why Bucknor was told not to compare their prints to those at the scene.

Likewise, trial counsel failed to conduct any further investigation or present any evidence regarding the other suspects identified by law enforcement.

Also, trial counsel failed to demonstrate that the State failed to follow-up on other leads and suspects in the case. On

May 2, 1998, after a BOLO was issued describing the vehicle in which the perpetrators left the crime scene, an individual reported seeing a vehicle matching the description in the area where the crimes occurred, being driven by a black male (Def. Ex. 42). Another black male was in the passenger seat (Id.). Officer Trephan received the report and observed the vehicle, parked in Wilton Manors, himself (Id.). The vehicle was suspect because it matched the description of the vehicle used in the crimes: A faded purple Ford Probe with tinted windows and "mag" wheels (Id.). Officer Trephan did no follow-up on the report.

Not only was the lead itself valuable to the defense, but also the impeachment of the entire police investigation would have been helpful to the defense. Certainly, a suspicious vehicle matching the description of that used in a recent crime and being driven by two black males, just as the BOLO indicated, and in Wilton Manors, should have been investigated.

Officer Schenck from WMPD also failed to follow a lead when a Ford Probe was reported being seen driven by a black male with another black male passenger, shortly after the BOLO was issued (Def. Ex. 41). No investigation was conducted into this lead. As with the lead provided to Officer Trephan, the information would have illustrated the failure of law enforcement to adequately investigate. Also, the mere fact that at least two other Ford Probes matching the description of the vehicle used in the crimes would have decreased the inculpatory evidence of Mr. Rimmer's owning a similar car.

3. Rehabilitating Witnesses.

Throughout the trial, counsel attempted to show that Mr. Rimmer was not involved with the robbery-homicides that occurred at Audio Logic. During the defense's case, Johanne Rimmer, Mr. Rimmer's wife, explained Mr. Rimmer's alibi. She testified that Mr. Rimmer was fishing with his son during the time of the offenses (R. 1355).

During the cross-examination of Mrs. Rimmer, the prosecutor questioned her about how much Mr. Rimmer earned at his job:

> Q: And he would bring home about a hundred, hundred and twenty dollars every two weeks, correct?
> A: No. No.
> Q: What was his net pay he would bring home?
> A: After they deducted insurance and everything, probably close to three.
> Q: Are you saying close to like three hundred dollars, is that what you're saying?
> A: After they take out insurance and stuff.
> Q: Would you see the pay stubs from John Knox Village?
> A: Not all the time, no.
> Q: Well I just removed this organizer out of what is evidence as State's 90. Do you recognize that piece of paper right there, don't you, that I just took out of the folder?
> A: No.
> Q: Do you recognize that as being an earning statement from John Knox Village of Florida?
> A: I don't know.
> Q: I'm sorry?
> A: That's not how I see his paychecks, no. It's an orange paper.
> A: Well, the orange ones, isn't that the way they were back in 1997?
> A: Yes.
> Q: You recognize these orange ones?
> A: Yes.
> Q: They say John Knox Village of Florida. Net payment of this one, period ending 8-30-97 is $158.78 on this one?
> A: Yes.
> Q: And 8-16-97 is $134.05?
> A: Yes.
> Q: And here is another one, November 8th of 1997,

$113.59?
A: Yes.

* * *

Q: Did the defendant, the defendant wasn't one who carried a lot of cash on him, correct?
A: No.

(R. 1368-9).

And, during closing argument, the State argued that Mr. Rimmer was found with a large amount of money on him the night he was arrested (R. 1489-90; 1531-46).

However, before trial, Mr. Rimmer explained to his defense counsel that the reason he had so much money on him the night he was arrested was due to the fact that he had cashed out some of his annual leave hours from work. However, though trial counsel obtained Mr. Rimmer's employment records which verified that Mr. Rimmer received an annual leave payout of $2,286.26 in late April and early May, 1998, (see Def. Ex. 20), trial counsel failed to present this evidence to the jury.

Furthermore, Mr. Rimmer's employment records showed that he earned more money than was presented during the cross-examination of Mrs. Rimmer. At the time of Mr. Rimmer's arrest, he was taking home about $600.00 every two weeks. See Def. Ex. 20.

Had trial counsel reviewed Mr. Rimmer's employment records, he would have been in a better position to rebut the allegations made by the State that Mr. Rimmer had a financial motive to rob Audio Logic. This evidence would have bolstered the defense's theory of misidentification because Mr. Rimmer would have no financial motive for committing these crimes. It would also explain why Mr. Rimmer had such a large sum of money on him when

he was arrested, and would refute the State's implication that the money on Mr. Rimmer was a result of the Audio Logic robbery.

The circuit court determined that trial counsel's excuse for failing to use the information, i.e., that it was his strategy to concede that Mr. Rimmer was in possession of the stolen property (2SPC-R. 603), was "reasoned trial strategy" (SPC-R. 2411).

The circuit court's order is not supported by the evidence. It was the State's theory that Mr. Rimmer was in desperate need of money and therefore he committed the robberies. The State's theory also supported aggravating circumstances, if the jury believed it. However, trial counsel could have rebutted the State's theory and the aggravating factors by showing the jury that Mr. Rimmer possessed a large quantity of money when he was arrested because he had recently been paid over $2000.00 for unused annual leave (Def. Ex. 20). Therefore, if trial counsel had any strategy in failing to present the evidence of how Mr. Rimmer came into possession of the large amount of money it was not reasonable.

In addition, the evidence was necessary to rehabilitate Mrs. Rimmer's credibility. Mrs. Rimmer was the only witness to provide an alibi for her husband and also testified that she was in possession of the Ford Probe on the day of the crimes. If the jury believed her, Mr. Rimmer could not be convicted. Indeed, trial counsel was armed with evidence that would have supported Mrs. Rimmer's testimony (see Def. Ex. 20). Yet, trial counsel simply allowed the State's attack of Mrs. Rimmer's credibility to

go unrebutted.

4. Objections based on Marital Privilege.

At trial, the State questioned Mr. Rimmer's wife about communications she had had with her husband pertaining to the case. Trial counsel failed to object for no strategic reason (2SPC-R. 607). Trial counsel's failure to object was deficient.

5. Waiver of Speedy Trial.

In addition to trial counsel's failure to investigate, prepare and present his case, he also failed to protect Mr. Rimmer's constitutional rights. For example, trial counsel waived Mr. Rimmer's right to a speedy trial without having received the complete discovery in the case. In Mr. Rimmer's case, the original indictment was filed against on May 28, 1998, and subsequently re-filed on July 10, 1998 (R. 2112-6). Initial discovery was received in June, 1998. On July 16, 1998, the Court set Mr. Rimmer's case for trial status, at which time trial counsel requested a defense continuance.

There was no strategic reason why trial counsel should have taken a defense continuance. At the evidentiary hearing trial counsel claimed that he wanted to have enough time to prepare for the case, and the circuit court credited his testimony (SPC-R. 2410). However, the circuit court failed to consider that because the State had not met its obligations of providing complete discovery, trial counsel should have forced the State to request the continuance

Under the law "[a] defendant should not have to choose

between the right to a speedy trial and the right to discovery within sufficient time to adequately prepare for trial." Vega v. State, 778 So. 2d 505, 506 (Fla. 3rd DCA 2001).

Thus, it was neither "well considered" or "realistic" for trial counsel to simply waive speedy trial and allowing the State to shirk its obligations.

B. CONCLUSION

Had trial counsel effectively represented Mr. Rimmer, he could have shown that it was impossible for Mr. Rimmer to be the individual who committed the crimes at issue and that the State's theory was flawed. The eyewitness identifications were seriously flawed and inconsistent, there was no physical evidence placing Mr. Rimmer at the crime scene and Mr. Rimmer had an alibi for the time of the crimes. He also could have shown that the State failed to fully investigate the case and simply rushed to judgment in prosecuting Mr. Rimmer. The fact that there were other suspects who were not fully investigated combined with the evidence that fingerprints were found at the scene in key areas that did not match Mr. Rimmer or any of the victims would have been powerful evidence to establish reasonable doubt. Mr. Rimmer is entitled to relief.

ARGUMENT III

THE CIRCUIT COURT ERRED IN DENYING MR. RIMMER'S CLAIM THAT HE WAS DENIED AN ADEQUATE ADVERSARIAL TESTING AT THE SENTENCING PHASE OF HIS TRIAL, IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION. TRIAL COUNSEL FAILED TO ADEQUATELY INVESTIGATE AND PREPARE MITIGATING EVIDENCE AND TO ADEQUATELY CHALLENGE THE STATE'S CASE. AS A RESULT, THE DEATH SENTENCES ARE UNRELIABLE.

A. Introduction

In Strickland v. Washington, the United States Supreme Court held that counsel has "a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process." 466 U.S. 668, 688 (1984)(citation omitted). Beyond the guilt-innocence stage, defense counsel must discharge very significant constitutional responsibilities at the sentencing phase of a capital trial.

The United States Supreme Court has made clear that trial counsel has an absolute obligation to investigate mitigation: "[I]nvestigations into mitigating evidence 'should comprise efforts to discover *all reasonably available* mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor.'" Wiggins v. Smith, 539 U.S. 510, 524 (2003)(emphasis in original)(citations omitted).

As the United States Supreme Court has done, this Court has also recognized that trial counsel has an absolute duty to conduct an adequate and reasonable investigation of available mitigation and evidence which negates aggravation. Parker v. State, __ So. 2d ___ (Fla. January 22, 2009); slip. op. at 22; State v. Riechmann, 777 So. 2d 342, 350 (Fla. 2000), quoting Rose v. State, 675 So. 2d 567, 571 (Fla. 1996).

The United States Supreme Court has also held that in order for counsel's inadequate performance to constitute a Sixth Amendment violation, petitioner must show that counsel's failures prejudiced his defense. Strickland v. Washington, 466 U.S. 668,

692 (1984). In Strickland, the Supreme Court made clear that, to establish prejudice, a "defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." 466 U.S. at 694. Thus, “[i]n assessing prejudice, [a reviewing court] reweigh[s] the evidence in aggravation against the totality of available mitigating evidence.” Wiggins, 539 U.S. at 534.

B. MR. RIMMER’S PENALTY PHASE COUNSEL’S PERFORMANCE WAS DEFICIENT.

1. The penalty phase investigation.

Almost three months after Mr. Rimmer had been arrested for the double homicide at the Audio Logic, Ken Malnick was appointed as penalty phase counsel (2SPC-R. 432). Malnick withdrew almost four months later without having conducted any investigation into mitigation, other than speaking to Mr. Rimmer (2SPC-R. 433-4). Thus, from the outset and for over seven months the penalty phase investigation in Mr. Rimmer’s case was non-existent.

Hale Schantz was appointed to replace Malnik on December 1, 1998. On December 16, 1998, Schantz requested the appointment of a mental health expert (R. 2191). On December 31, 1998, the trial court appointed Dr. Martha Jacobson to evaluate Mr. Rimmer. Dr. Jacobson met with Mr. Rimmer on January 7 and 11, 1999 (2SPC-R. 144). In 1999, she did not receive any background records or collateral information about Mr. Rimmer (2SPC-R.

145).[27] Thus, her 1999 report and testimony was based entirely on Mr. Rimmer's self-report and some psychological testing.

Schantz' communications with Dr. Jacobson were very limited: they had a brief telephone conversation on January 5, 1999, wherein Schantz told her a few facts about the crime (2SPC-R. 140). Once Dr. Jacobson issued her report, the two never had a conference about possible mitigation or her testimony (2SPC-R. 153; R. 1931).

Prior to his investigation, Mr. Rimmer provided Schantz information about his immediate family and how to contact them (see Def. Ex. 21), and a list of 24 potential mitigation witnesses, several of whom he had listed contact information. See Def. Ex. 22. The list included friends, individuals from his work, school, church and his children's teachers. Id.

Between January 8 - 15, 1999, Schantz spoke to Mr. Rimmer's father, mother, wife and children, two individuals from Mr. Rimmer's place of employment and one friend.[28] Schantz did not speak to any other relatives or any of the other 22 individuals on Mr. Rimmer's list (2SPC-R. 457, 476).

Schantz did not obtain or review any background records, including school records, employment records or prison records (SPC-R. 441, 443, 447, 451).

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[27] Trial counsel provided Dr. Jacobson the grand jury indictment, two police reports detailing the incident, and the arrest affidavit (2SPC-R. 143).

[28] Melodie Fritzinger and Henry Morris were included on Mr. Rimmer's list. See Def. Ex. 22.

The witness interviews occurring the week of January 8 - 15, 1999, and limited contact with Dr. Jacobson reflects the extent of Schantz' penalty phase investigation. Indeed, contrary to Schantz recollection at the evidentiary hearing, after the jury returned its verdict January 28, 1999, Schantz told the court:

> Right now I have currently scheduled for another death penalty case that I was appointed on . . . I believe that will be scheduled for February 16th, with Mr. Magrino. So from now until that hearing I will be devoting a tremendous amount of effort on that case.
>
> * * *
>
> Frankly, Judge, I have another Spencer Hearing. While I did not do the trial, but I have been appointed to do a Spencer Hearing.

(R. 1729-32).[29]

Mr. Rimmer's penalty phase was held on February 25, 1999. At the penalty phase, Schantz presented the testimony of Mr. Rimmer's father, wife, daughter, two employers, a friend and Dr. Jacobson. Schantz did not ask Dr. Jacobson about her opinion of the statutory mental health mitigators or any non-statutory mitigation. Schantz did not object to the prosecutor's inflammatory argument or argue that legally the jury should not be instructed on the pecuniary gain and committed to avoid arrest aggravators.

2. The circuit court's order.

The circuit court failed to fully address the deficient

[29] The circuit court relied on Schantz' inaccurate statement about his caseload while he represented Mr. Rimmer in finding that "there is no basis for relief on the excessive caseload portion of this claim." (SPC-R. 2415). Either the circuit court did not read the record on appeal or simply ignored it.

performance aspect of Mr. Rimmer's claim. The circuit court did not address trial counsel's conduct in preparing and communicating with his expert, failing to either obtain or review background records, or investigating and preparing nonstatutory mitigation. The court also ignored the fact that trial counsel had no strategic reason for failing to object to invalid aggravating factors and improper prosecutorial argument. Indeed, the court only cursorily addressed a few of the issues Mr. Rimmer raised.

As to the circuit court's assessment that trial counsel's performance was not deficient as to the childhood abuse, the court stated: "According to Mr. Schantz, there was no indication from anyone that his client had been physically abused as a child." (SPC-R. 2419). Thus, the court held: "[c]ounsel can not (sic) be considered ineffective for failing to present testimony on matters that were concealed from him." (Id.).

Dr. Jacobson's report, submitted on January 20, 1999, after trial counsel concluded his penalty phase investigation, specifically stated as a forensic finding that "Mr. Rimmer's personal history indicates the presence of early childhood abuse and family dysfunction." Dr. Jacobson went on to explain:

> The defendant describes his childhood as chaotic and dysfunctional. He states that his parents frequently engaged in physical fights. There is some confusion of times, but apparently the defendant's mother took the children and left Ohio. The father at some point, went to North Carolina, took the children, and would not let them return. Mr. Rimmer reports that his father used the children to get back at his former wife. He also criticized her and attempted to alienate her sons from her. According

> to the defendant, his father was "backwards, didn't really care about us and wanted us only to spite mom." He describes his father as spending all his money on himself, his girlfriend, or her children, while he and his brothers "went hungry." He recalls Christmas holidays, in which he and his siblings had no gifts, while his father spent money on others. He also recalls being told to wear the same clothes, including undergarments, three or four days in a row. **His father used corporal punishment, using a belt or switch, and would often punch the children or slap them on the head**."

(Def. Ex. 2)(emphasis added). The record clearly indicates that Mr. Rimmer, himself, provided information and details about the physical and emotional abuse suffered at the hands of his father. Thus, the record conclusively refutes the circuit court's findings and conclusions.

Trial counsel's failure to be aware of the background information in Dr. Jacobson's report was deficient. Indeed, trial counsel testified at the evidentiary hearing that he would have presented evidence of an abusive childhood if he had been aware of it because it would have been helpful (2SPC-R. 587).[30]

Furthermore, trial counsel's failure to interview witnesses was deficient. The circuit court limited its review of trial counsel's performance to whether or not it was deficient for failing to present the testimony of Louis Odell Rimmer and Sabrina Irving (SPC-R. 2419). The court relied on trial counsel's testimony that he made a strategic decision not to present the testimony of Louis Odell (Id.). However, trial

[30] Trial counsel also testified that he believed he could have presented non-statutory mitigating evidence through Dr. Jacobson (2SPC-R. 587). Yet, he did not do this.

counsel never even spoke to Louis Odell or obtained any records about him. The circuit court erred in crediting trial counsel's "strategic decision" because, legally, trial counsel cannot be found to have made a strategic decision when he failed to fully investigate. Strickland v. Washington, 466 U.S. 668, 690-1 (1984); Henry v. State, 862 So. 2d 679, 685 (Fla. 2003)("A reasonable strategic decision is based on informed judgement."). Trial counsel was deficient in failing to know what Louis Odell had to offer or considering how to present information without having him testify.

3. Trial counsel's obligations under the law.

The circuit court's order failed to address the ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases (1989), which clearly set forth the obligations counsel for a capital defendant must meet in order to be considered effective. In Mr. Rimmer's case it is clear that counsel did not fulfill those obligations. Also, the circuit court failed to acknowledge any legal standard for deficient performance, including the most recent United States Supreme Court cases. See See Rompilla v. Beard, 125 S.Ct. 2456 (2005); Wiggins v. Smith, 539 U.S. 510 (2003); and Williams v. Taylor, 529 U.S. 362 (2000).

Recently, in Parker v. State, __ So. 2d __ (January 22, 2009), in reviewing a claim of ineffective assistance of counsel at the penalty phase, much like the United States Supreme Court has for many years, this Court referred to the ABA Guidelines for

the Appointment and Performance of Counsel in Death Penalty Cases to assess the performance of counsel. Initially, this Court noted that "investigations into mitigating evidence 'should comprise efforts to discover all reasonably available mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor.'" Parker, __ So. 2d at __, citing ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 11.4.1(C), at 93 (1989).[31] This Court went on to hold:

> Among the topics that counsel should consider presenting in mitigation are the defendant's medical history, educational history, employment and training history, family and social history, prior adult and juvenile correctional experience, and religious and cultural influences. While trial counsel presented a "bare bones" rendition of some of these areas, it was not enough to establish mitigation even though there was a wealth of witnesses who were never interviewed and documents that were sought that could have fleshed out an established the mitigating circumstances.

Parker, __ So. 2d at __.

In Mr. Rimmer's case, counsel did little more than speak to a few witnesses and arrange for a mental health evaluation. He admittedly either failed to obtain any background records, or if they were obtained, he did not review them or provide them to his mental health expert (2SPC-R. 441, 443, 447, 451). Thus, he failed to even consider developing mitigation about Mr. Rimmer's educational, medical and mental health history.

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[31] In order to comply with this standard, counsel is obliged to begin investigating **both** phases of a capital case from the beginning. See id. at 11.8.3(A). This includes requesting all necessary experts as soon as possible. See Commentary on Guideline 11.4.1(C). This did not occur in Mr. Rimmer's case.

Trial counsel's investigation into Mr. Rimmer's employment and training was limited to interviewing two individuals from Mr. Rimmer's place of employment. Trial counsel failed to contact Stewart Weiss, an individual with whom Mr. Rimmer worked for on a volunteer basis a few days a week at the time of the offenses. Weiss' name and contact information were provided on the list of potential witnesses prepared by Mr. Rimmer (Def. Ex. 22).[32]

Trial counsel's investigation into Mr. Rimmer's family and social history was also limited to speaking to Mr. Rimmer's parents and wife (2SPC-R. 476; 480). Trial counsel failed to speak to Mr. Rimmer's siblings, aunts and uncles or any family friends (Id.). Though trial counsel traveled to Ohio, where Mr. Rimmer was born and lived for nearly all of his adolescent years, he spoke to no one other than Mr. Rimmer's father. And, even when Mr. Rimmer, himself, provided background history about his childhood, trial counsel failed to pursue the information (see Def. Ex. 2).

As to Mr. Rimmer's religious and cultural experiences, trial counsel spoke to one witness who briefly testified about Mr. Rimmer's involvement in his church (R. 1881-6). However, the list of potential witnesses contained several names as well as contact information for individuals who knew and spent time with Mr. Rimmer at church and outside of church, including his pastor's wife, family friends and classmates (Def. Ex. 22).

[32] When interviewed, Weiss provided George Wellington's name as a person with whom Mr. Rimmer had worked and became friends.

Finally, though trial counsel requested the assistance of a mental health expert, he failed to provide her any background information about Mr. Rimmer, including his prior mental health treatment from the Department of Corrections (2SPC-R. 143). He also failed to provide her with any collateral information or follow-up on the background information provided by Mr. Rimmer (2SPC-R. 153).[33] Trial counsel did not discuss potential statutory and non-statutory mitigating factors with Dr. Jacobson (Id.).[34]

In Orme v. State, this Court reviewed penalty phase counsel's performance, noting that "[i]n this case, there was substantial mental mitigation available to trial counsel." 896 So. 2d 725, 733 (2005). At issue, in Orme, was a document that indicated that Orme had been diagnosed with bi-polar disorder, yet trial counsel failed to follow-up on this diagnosis, including conducting corroborative interviews with Orme's family and friends. A similar situation occurred in Mr. Rimmer's case.

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[33] Mr. Rimmer told Dr. Jacobson about his dysfunctional and chaotic upbringing, including the fact that his father severely physically and emotionally abused and neglected him, (see Def. Ex. 2), and that he had been previously treated for mental health problems while incarcerated (R. 1912). Under Wiggins, when examining trial counsel's investigation, a reviewing court "must consider not only the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further." 539 U.S. at 527.

[34] Under the ABA Guidelines, a mental health professional should be part of the defense team on a capital case, and should play an integral role in determining the strategy and direction that will be taken. See ABA Guideline 8.1

Mr. Rimmer had been previously been diagnosed with a severe mental disorder and treated, before the crimes ever occurred. And, as in Mr. Rimmer's case, "[t]he medical experts [who] testified at the postconviction hearing [about] corroborating data from family, friends" that supported his mental health diagnosis. Id. This Court went on to find: "Also important in this analysis is the fact that [trial counsel] did not inform his trial experts that Orme had been diagnosed with bipolar disorder and the fact that he did not provide the experts with the **prison medical records** that would have shown the medications prescribed to Orme indicating such a diagnosis." Id. (emphasis added).

Thus, even though trial counsel in Orme presented the testimony of a mental health expert to his capital sentencing jury, his failure to obtain accurate information about his client's mental health and treatment and corroborative evidence of such was found to be deficient. Trial counsel in Mr. Rimmer's case was similarly deficient in failing to obtain critical mental health information for his expert and to present that information to the jury.

Finally, trial counsel failed to object to improper aggravating factors[35] and prosecutorial argument[36]. Trial counsel

[35] Counsel failed to object to the jury being instructed on the pecuniary gain aggravator and committed for the purpose of avoiding or preventing lawful arrest. Under the law, it is legally inconsistent for a jury to consider both aggravators.

[36] During the penalty phase, the prosecutor made several improper comments. These comments include: 1) describing the shootings as "vicious and brutal executions"; 2) describing the mental health expert's opinion as "legal mumbo-jumbo"; 3)

also allowed the State and the trial court to shift the burden to Mr. Rimmer to prove that the mitigation outweighed the aggravation. Trial counsel had no strategic reason for failing to object to the improper arguments and aggravator (2SPC-R. 505).

C. Prejudice

In Wiggins v. Smith, the United States Supreme Court reiterated that in assessing prejudice, a reviewing court must: "reweigh the evidence in aggravation against the totality of available mitigating evidence." 539 U.S. 510, 534 (2003).

At Mr. Rimmer's penalty phase, trial counsel presented a few witnesses for mitigation purposes: Mr. Rimmer's father, Louis, told the jury that he and his wife had fought often when Robert was young (R. 1870). The couple divorced when Robert was nine, and the children remained with their father (R. 1868). However, a few years later, Mrs. Rimmer took her children to North Carolina without permission or any notice (R. 1868-9). She told her children that their father had died (R. 1869). A few months later, Louis Rimmer found his children and took them back to Ohio (R. 1870). Louis Rimmer told the jury that his son was a good

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asserting that the prison system is filled with individuals like appellant who suffer from antisocial personality disorders; 4) telling the jury to do its job and return the "morally" correct death sentence; 5) reciting the victim-impact evidence, followed by a statement advising the jury that while Florida no longer paroles inmates, it does release prisoners through a conditional release program; and 6) during the *Spencer* hearing, describing Mr. Rimmer as a "worthless piece of fecal matter . . . whose death should come prior to natural causes." On direct appeal, this Court held that "some of these comments may have been improper", but that trial counsel failed to object to them. Rimmer v. State, 825 So. 2d 304, 325 (Fla. 2002).

student and a loveable son (R. 1871). Eventually, Louis Rimmer sent his children to live with their mother in Florida (R. 1872).

The jury also learned that Mr. Rimmer had four children, one of whom was not his biological child, but that he had raised since she was an infant (R. 1873; 1936-7). Mr. Rimmer spent time with his children; he took them to the park or fishing, and often helped with their homework (R. 1939; 1942-3). He also joined the PTA at their school (R. 1939). Mr. Rimmer was also a good friend and community member according to Henry Morris (R. 1881-6). He attended church and worked with kids in gangs (R. 1882-3).

The manager and supervisor at Mr. Rimmer's place of employment described his work at John Knox Village, which was a retirement community for seniors (R. 1876). They both agreed that he was an excellent employee (R. 1877; 1880). He interacted well with the residents (R. 1877). Mr. Rimmer's supervisor told the jury that Mr. Rimmer had received a few promotions and a scholarship to attend school in the evenings (R. 1879-80).

Dr. Martha Jacobson testified before the jury that Mr. Rimmer suffered from a schizophrenic disorder with some mood disorder and depression (R. 1904).[37] Dr. Jacobson believed that Mr. Rimmer's condition was chronic (R. 1901). She formed her

[37] Dr. Jacobson told the jury that "[t]here seems to be a strong genetic component to schizophrenia." (R. 1901). Dr. Jacobson mentioned that if an individual was diagnosed with schizophrenia there was a significant increase in the likelihood of a sibling being diagnosed with schizophrenia (Id.). However, there was no evidence that Mr. Rimmer's siblings being diagnosed or treated for schizophrenia presented to the jury or judge.

conclusion based on some psychological testing and an interview with Mr. Rimmer (R. 1893-4). The results of Mr. Rimmer's testing demonstrated a bizarre thought process, paranoia and mania (R. 1896-7; 1899). She explained that the results showed that Mr. Rimmer was not in touch with reality and hallucinated (R. 1898).

On cross examination, the State elicited that Dr. Jacobson had no evidence of Mr. Rimmer having mental problems in the past (R. 1910-1). And, though Dr. Jacobson informed the jury that Mr. Rimmer told her that he had seen a mental health professional while previously incarcerated, she admitted that she was never provided records to confirm that (R. 1914-5). The State asked:

> Q: Now, with respect to the information that you had about Defendant Rimmer, and this major mental disorder that you are of the opinion that he suffers from, prior to your evaluation of the defendant, was there any evidence of the defendant's mental problems?
> A: I did not have any evidence of that.
> Q: You had no evidence that the defendant ever reported this major mental disorder to a counselor?
> A: Correct.
> Q: You had no evidence that the defendant ever reported this major mental disorder to a social worker, correct?
> A: Correct.
> Q: You had no evidence that the defendant ever reported this mental problem to a licensed clinical social worker, correct?
> A: Yes.
> Q: You had no evidence that the defendant ever reported this mental problem to a mental health counselor, correct?
> A: Yes.
> Q: You had no evidence that the defendant ever reported this mental problem to a therapist, correct?
> A: Yes.
> Q: You had no evidence that the defendant ever reported this problem to a psychotherapist; is that correct?
> A: Yes.
> Q: You had no evidence that the defendant ever reported this problem to a marriage and family therapist, correct?

A: I had no evidence, correct.

Q: You had no evidence that the defendant ever reported this to a psychiatrist, correct?

A: Correct.

Q: You had no evidence that the defendant ever reported this to a psychologist, correct?

A: Correct.

Q: Wouldn't the absence of, lack of all of this evidence lead one to believe that this heretofore undiagnosed mental disorder that the defendant suffers from is only in a mild form?

A: Not to me, sir.

* * *

A: I asked Mr. Rimmer if he had ever seen a mental health professional before.

Q: And that's all you did?

A: When he, he told me he had never seen a mental health professional before except when he was in the Appalachian Correctional Institute.

Q: And you never did any follow-up anywhere to see if he had been seen by anybody else?

A: No, sir.

Q: Didn't you think it would be important for these folks to know if in fact he had been seen or treated at some other place for this mental problem?

* * *

Q: Ma'am, you did not even attempt to locate that information, did you, other than speaking to the defendant?

A: That's correct, Mr. Magrino.

Q: Now, you mentioned Appalachian Correctional Institute. You knew that the defendant had served prison sentences in the past, correct?

A: That's correct, he gave me that information.

Q: Did you review any of the defendant's prison records to see if he had reported any mental problem to any of the social workers at the prison?

A: No, I did not.

Q: Did you review any prison records to see if the defendant had reported any mental problems to his classification officers in the prison?

A: No.

Q: Did you review any prison records to see if the defendant had reported this mental problem to any prison psychiatrist or prison psychologists?

A: No.

(R. 1910-5).

Also, during the State's closing argument, the State referred to Dr. Jacobson's testimony as "mental mumbo-jumbo" (R.

1951). And, the State emphasized that there was no factual basis to support Dr. Jacobson's opinions (Id.). The State argued:

> If you all want to give any credence of testimony to her, go right ahead. I can't stop you. But I submit to you, based upon the answers that she gave during cross-examination, she did what she was paid to do. She gave you a non-opinion on some mental mumbo-jumbo, with no factual basis to support it. And without her even taking the time to do any investigation with respect to the defendant's background.

(R. 1951). The State argued that Mr. Rimmer simply had anti-social personality disorder (R. 1959).

The jury that recommended death sentences for Mr. Rimmer, by votes of 9 - 3, was instructed to consider 7 aggravating factors, however the trial court found only 6: 1) previous conviction of a felony and under sentence of imprisonment; 2) previous conviction of a violent felony; 3) during the course of a robbery or kidnapping; 4) committed for pecuniary gain; 5) committed for the purpose of avoiding or preventing a lawful arrest; 6) heinous, atrocious and cruel (HAC); 7) cold, calculated and premeditated manner (CCP) (R. 2383-99).

A Spencer hearing was held in March, 1999. Dr. Walczak testified Dr. Jacobson's diagnosis (R. 2011), and also told the trial court that Mr. Rimmer suffered an abusive childhood (R. 2013). Like Dr. Jacobson, Dr. Walczak had not reviewed any background materials (R. 2034; 2037).

Lilly Rimmer, Mr. Rimmer's mother, explained that she had taken her children from their father but she presented a somewhat different picture of Louis Rimmer, telling the trial court that he was not involved with his children and refused to let her have

contact with them (R. 2049-51).

The trial court imposed the death penalty finding six of the aggravating factors had been established (R. 2386-92).[38] As to mitigation, the trial court found no statutory mitigation had been established (R. 2393-4).

As to non-statutory mitigation, the trial court found some had been established but assigned it very little weight. (See R. 2394-7). Specifically, as to mental health mitigation, the trial court found:

> Both experts stated that the Defendant, now age 31, has a mental disorder, however, **there was no documented history of mental illness. Considering the number of contacts this defendant has had with the criminal justice system, through attorneys, inmate classifications and reviews, the absence of any history of mental illness was of probative value**.
>
> * * *
>
> Both doctors testified that the Defendant has a psychotic disorder characterized by distorted thinking and perceptions. **From the evidence presented, the Court is not persuaded that the Defendant has a major mental illness**.

(R. 2396-7)(emphasis added).

On direct appeal, this Court held that the evidence did not support the HAC aggravator. However, this Court found that the error was harmless and characterized the mitigation presented by Mr. Rimmer as "minimal" Rimmer v. State, 825 So. 2d at 329.

During Mr. Rimmer's postconviction proceedings he presented a detailed history of his background and social history. The mitigation presented at Mr. Rimmer's postconviction evidentiary

[38] The trial court did not find that the State had established pecuniary gain, though the jury was instructed to consider this aggaravtor (R. 2389-90).

hearing was both qualitatively and quantitatively different than the mitigation presented at trial.

Robert Rimmer's life began when he was born to a unhappy and despondent mother who had only married his father because she was pregnant with Robert's older brother, Louis Odell (2SPC-R. 108; 14; 103). Jeanette Rimmer, Mr. Rimmer's aunt by marriage, testified that there were problems between Robert's mother and father even before they were married (2SPC-R. 103). Louis Rimmer was unfaithful and spent money on prostitutes (2SPC-R. 104). Despite the problems, the Rimmer's had three sons – Louis Odell, Robert and Raymond (2SPC-R. 12). Lilly Rimmer believed that though she tried to be a good mother, she was unable to because of her own unhappiness (2SPC-R. 18). Jeanette Rimmer concurred and explained that there was a lot of fear and anger in the house but, "there wasn't love." (2SPC-R. 105).

Lilly Rimmer also confirmed that, while married, she and her husband argued frequently – two to three times a week (2SPC-R. 15-6; 195-6). Oftentimes the arguments would result in physical violence (Id.). In their tender years, Louis Odell and Robert would try to intervene in the arguments and comfort their mother (2SPC-R. 15). However, Louis Odell testified that when he and Robert intervened, his father would then "whoop" them, though not in front of their mother (2SPC-R. 197)

Lilly Rimmer described her husband as a "present, non-existent father" (2SPC-R. 16). She explained that her husband neither cared for nor spent any time with his children (Id.).

Jeanette Rimmer confirmed that Louis Rimmer was not nurturing and lacked parenting skills (2SPC-R. 112). He got angry with his children over minor things, or nothing at all (2SPC-R. 17; 125). He would yell at them and make them feel bad (Id.).

Lilly Rimmer left her husband and took her children after an incident in which she and her husband were fighting and her eldest son wielded a knife and threatened his father (2SPC-R. 193036; 196-7). Her husband responded by pushing her son down a flight of stairs (SPC-R. Id.). Robert witnessed this incident (2SPC-R. 20). Lilly did not tell her husband that she was leaving or where she was going (Id.). She took the children to North Carolina and enrolled them in school (2SPC-R. 21; 198). Her children were relieved to be away from the volatile situation (2SPC-R. 22). Louis Odell described that he and Robert were happy to leave their father because their mother was nice and calm when their dad was not around (2SPC-R. 199).

Though Louis Rimmer did not seem concerned about the loss of his children (2SPC-R. 114), a few months later, he found them and asked that they be allowed to accompany him to Ohio during their holiday break (2SPC-R. 23-4). Though the children did not want to go, Lilly allowed her husband to take them (Id.; 201). The Rimmer children were scared and nervous about their father beating them (2SPC-R. 201).

A few weeks later, Louis Rimmer refused to return the children (2SPC-R. 25), and told them that their mother would not be back (2SPC-R. 120). Due to financial constraints, it took

Lilly over a year to get back to Ohio (2SPC-R. 26). But, her husband refused to allow her to see or speak to the children (Id.). Years later, Lilly learned that Louis had told them that she did not want or love them anymore (2SPC-R. 26-7).

Jeanette Rimmer testified that while in their father's custody, her nephews were fearful of their father due to the fact that he beat them (2SPC-R. 106; 111; 121). Several times a week, even daily, Mr. Rimmer's father would beat his children with a razor strap, belts, extension cords, his hands and other implements for seemingly no reason (2SPC-R. 108; 120; 122; 125; 202). Louis Odell confirmed that the beatings were over small things or nothing – their dad was moody (2SPC-R. 202).[39]

Their father also left the children unsupervised. Jeanette Rimmer tried to check on her nephews after work (2SPC-R. 116). She attempted to make sure her nephews had food to eat and completed their homework (2SPC-R. 117; 204). Louis Odell was sure that if not for his aunt, he and his brothers would not have eaten (2SPC-R. 204). She found the boys unsupervised, without any toys or things to occupy their time (2SPC-R. 118). The children were also not allowed to leave the house (2SPC-R. 123; 203). Robert and his brothers were unhappy (2SPC-R. 201).

At some point, Robert's father began a relationship with another woman who had children of her own (2SPC-R. 124). His neglect and anger toward his own children grew. According to

[39] Dr. Sultan characterized Louis' beatings as: "he punished the children for simply behaving as children" (2SPC-R. 300).

Jeannete Rimmer, Louis Rimmer's family confronted him about his behavior and urged him to seek psychological help (2SPC-R. 126). Louis Rimmer later reported that he was told he was depressed and needed medication (Id.).

In 1980, Lilly Rimmer moved to Florida and a few months later, her husband sent the children to live with her (2SPC-R. 28). Lilly's children, including Robert who was just a teenager, were distant and confused (2SPC-R. 29). She noticed that the children had scars and welts on their bodies as though they had been badly beaten (2SPC-R. 30). Her children confirmed that their father had beaten them, sometimes extremely badly (Id.). They also confided that their father had kept them in the house for long periods of time often without food (Id.; see also 2SPC-R. 124). Though the children were happy to be with their mother, Louis Odell explained that they were still afraid that their dad may come back for them (2SPC-R. 207).

Lilly Rimmer felt her sons needed counseling and attempted to get them some through school, but was never able to (2SPC-R. 32). She also noticed that Louis Odell, started to get in trouble. He had a temper that he could not control (2SPC-R. 35-6). Robert spent much of his time with his brother and started to emulate his behaviors (2SPC-R. 209). He, too, began to skip school and get in trouble (2SPC-R. 39; 209). The State eventually removed him from home and placed him in a group home because Lilly's parenting skills were ineffective (Id.).

Robert Rimmer did not graduate, but did earn his GED (2SPC-

R. 40). He also started working at sixteen (2SPC-R. 41). He worked for John Knox Village, a retirement home, for several years where he was promoted and earned a scholarship to continue his vocational training (SPC-R. 1879-80). Mr. Rimmer's supervisor testified that Mr. Rimmer was an excellent employee who went above and beyond the call of duty (2SPC-R. 94).

While working at John Knox Village and going to school, Mr. Rimmer met Stewart Weiss, the owner of an auto repair shop (2SPC-R. 83), and George Wellington, one of the employees of the shop. Mr. Rimmer came to Weiss' shop one day because he needed a part for his vehicle (Id.). Weiss said he could repair the vehicle, but Mr. Rimmer did not have the money (Id.). Weiss repaired the vehicle and told Mr. Rimmer to return the next day with the money (Id.). Mr. Rimmer did. From that day on, until his arrest, Mr. Rimmer voluntarily worked at Weiss' repair shop two or three times a week in order to learn more about auto repair (2SPC-R. 84). Weiss described Mr. Rimmer as an honest, trustworthy volunteer employee who was eager to learn (2SPC-R. 85). Indeed, Wellington trained Mr. Rimmer and also felt that Mr. Rimmer was trustworthy (2SPC-R. 252-3). Mr. Rimmer's goal was to own a repair shop of his own one day (2SPC-R. 98).

Everyone who knew Mr. Rimmer knew him to be a concerned and caring father who spent time with his children (2SPC-R. 42; 66; 69; 80; 86; 97; 253). They also knew him to be active in his church (2SPC-R. 45; 66), and a responsible employee (2SPC-R. 72). Erlene Jennings knew Mr. Rimmer when he was in high school

because he used to date her daughter (2SPC-R. 64). Even after Mr. Rimmer and her daughter stopped dating he continued to visit Jennings a few times a week (Id.). Jennings stated that Mr. Rimmer was like a son to her (2SPC-R. 65).

In addition, to the testimony about Mr. Rimmer's background and social history, he presented evidence about this mental health and functioning: After meeting with Mr. Rimmer in postconviction, Dr. Jacobson confirmed her previous diagnosis of schizo-affective disorder which is a major mental health disorder (2SPC-R. 159). Mr. Rimmer suffered from a paranoid and delusional thought process (Id.). Dr. Jacobson conducted additional testing that ruled out the diagnosis of psychopath (2SPC-R. 162). The background materials provided in postconviction confirmed Dr. Jacobson's findings (2SPC-R. 166-7).

She specifically noted that Mr. Rimmer's mental health records showed symptoms of his illness including nightmare visualizations and hallucinations and paranoia (2SPC-R. 167). The records independently corroborated her diagnosis and opinions and showed his prior contact with mental health professionals (Id.). Dr. Jacobson also learned additional information about Mr. Rimmer's childhood, including information about the abuse and neglect and the fact that Mr. Rimmer's brother also had been prescribed with an anti-psychotic medication – information she considered mitigating (2SPC-R. 169-70). She conceded that, at trial, she did not provide an adequate description of the type of dysfunction experienced by Mr. Rimmer (2SPC-R. 170).

Finally, Dr. Jacobson believed that Mr. Rimmer committed the offense while under an extreme mental or emotional disturbance (2SPC-R. 154). She also believed that Mr. Rimmer was suffering from psychosis at the time of the crime which impaired his capacity to appreciate the criminality of his conduct. The jury never heard this information (2SPC-R. 155).

Dr. Faye Sultan also evaluated Mr. Rimmer in postconviction. Initially, after interviewing him, Dr. Sultan noticed Mr. Rimmer's paranoid thinking and though distortion (2SPC-R. 273-4). She suspected that he had suffered mental damage from his traumatic childhood experiences (2SPC-R. 274). Dr. Sultan also reviewed records, including Mr. Rimmer's previous mental health records from the late 1980s and early 1990s; she believed these records to be the most important background records about Mr. Rimmer (2SPC-R. 281). The records disclosed a series of contacts with mental health professionals (2SPC-R. 282-3). The records also specifically contained information about Mr. Rimmer's description of nightmares, visualizations, hallucinations and paranoia (2SPC-R. 284-5). Overall, Dr. Sultan explained that the records showed that Mr. Rimmer suffered from longstanding disturbing psychological symptoms (2SPC-R. 286).

Dr. Sultan also interviewed several people who knew Mr. Rimmer, including his mother, Jeanette Rimmer, Louis Odell Rimmer, Arlene Jennings and Andrea Brown. Dr. Sultan described the collateral information:

> Those people helped fill in pieces of information that were crucial to me in formulating my opinion about the life

> Robert Rimmer had led, the psychological damage that had been done to him and the way he functioned psychologically as a young adult leading up to the time of the offense. They flushed out the picture, then provided a depth of understanding to me that I couldn't have had if I didn't have these conversations.

(SPC-R. 309).

Indeed, through those interviews, Dr. Sultan confirmed what Mr. Rimmer's mother believed which was that when her children were returned to her in Florida she was ill equipt "to deal with the damage that had been done to her children . . ." (2SPC-R. 293). Lilly Rimmer was quite overwhelmed by her sons problems and unable to control their behavior (2SPC-R. 294). Due to her sons' problems, as well as Lilly's own financial situation[40], it was impossible for her to be a stable parent for her children (2SPC-R. 291).

Dr. Sultan also described that witnesses had reported Mr. Rimmer's peculiar thinking and that he seemed to overreact to things (2SPC-R. 297; 308). Erlene Jennings reported that Mr. Rimmer could not let go of his suspiciousness or fears and at times could not disengage from situations (2SPC-R. 298). And, Mr. Rimmer's first girlfriend, Andrea Brown, broke up with him because she believed he was mentally unstable. Brown described Mr. Rimmer's bizarre behavior and reactions (2SPC-R. 308).

Mr. Rimmer's brother, Louis Odell, described himself as "more than just a bad influence [on Robert]. He was an active

[40] Due to Lilly Rimmer's financial struggles, she often moved her children from apartment to apartment which would cause them to be out of school for long periods of time (2SPC-R. 295).

antagonist" for him (2SPC-R. 303). He forced Robert to smoke marijuana, skip school and assist him in his criminal endeavors (Id.). Robert's dependence on his brother began when they were children, being shuffled from parent to parent without notice or explanation (2SPC-R. 304). Dr. Sultan also learned that Louis Odell had previously exhibited psychotic symptoms and been prescribed anti-psychotropic medications (2SPC-R. 306).

Dr. Sultan also explained the abuse suffered by Mr. Rimmer:

> There were multiple layers of abuse. There was abuse between the mother and father that the children had to witness which we know is terribly damaging to the children. There was the fact that the children were passed back and forth as ways of punishing – one parent punishing the other without any real regard for the children's well being, which is known to be highly traumatic for children. The children sometimes didn't know the whereabouts of the other parent which was terribly important abandonment issue for the children. There were not the psychological resources in either' parent's home to take care of the psychological trauma that the children had been through which further compounded the trauma and when the children arrived back at Mrs. Rimmer's home, she was unable to provide the supervision that they needed and it's clear, at that point, for to of the three of them, that became a time of real distress and disengagement from society basically.
>
> * * *
>
> What [Louis Odell] said is that Dad beat us all the time. Dad beat us with everything, extension cords, whatever he could get his hands on. It was from Louis Rimmer who administered the beatings that the children received and it didn't have a lot to do with whether they behaved badly or not, it simply had to do with the mood state of their father. Non-contingent upon punishment. What we are talking about is punishment that comes from a person with power, that doesn't have any relation to the way the victim is behaving is extremely damaging.

(2SPC-R. 296; 305).

Dr. Sultan diagnosed Mr. Rimmer with a paranoid personality disorder though she believed in the past that he would have been

classified as having a more acute psychotic disorder (2SPC-R. 314). "The essential feature of a paranoid personality disorder is a pervasive distrust and suspiciousness of other people, so that most of those people are always interpreted as – people are always out to harm you or injure you or insult you" (2SPC-R. 314-5). Dr. Sultan explained that Mr. Rimmer's condition effects his day-to-day functioning (2SPC-R. 315). Mr. Rimmer's "psychiatric disorder greatly impairs his ability to reason rationally and calmly" and "his thought process is characterized by suspiciousness and fear" (2SPC-R. 316).

Dr. Sultan concluded that based on her evaluation, Mr. Rimmer would have met the criteria for the statutory mental health mitigator that at the time of the offense he was under the influence of an extreme mental or emotional disturbance (2SPC-R. 316). Dr. Sultan also opined that at the time of the offense Mr. Rimmer's capacity to appreciate the criminality of his conduct was impaired (2SPC-R. 317).

Dr. Sultan identified numerous non-statutory mitigators: Mr. Rimmer has been mentally ill throughout his adolescence and adulthood which interfered with his ability to function; he was the victim of severe physical abuse; he was the victim of severe emotional abuse and neglect[41]; at the time of the offense Mr.

[41] Dr. Sultan stated that the abuse and neglect Mr. Rimmer suffered: "would have a profound impact on his functioning in the world and his ability to trust people, to formulate relationships, on his ability to struggle with what probably is genetic propensity toward mental illness" (2SPC-R. 318).

Rimmer was attempting to "pull his life together" – he was working hard at his relationship with his children (2SPC-R. 319).

The circuit court denied Mr. Rimmer's claim stating: "[t]he Court notes that the same non-statutory mitigators were presented to and considered by the trial court" and "[t]he 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 results would likely have been any different." (SPC-R. 2418).

As to the circuit court's determination that the same non-statutory mitigators were presented to the jury and the trial judge, a review of the record clearly demonstrates that that is simply not the case. While trial counsel presented a "bare bones" picture of Mr. Rimmer's background, the witnesses in postconviction "fleshed out" the background and added significant details constituting mitigation. See Parker v. State, ___ So. 2d ___ (Fla. January 22, 2009). Indeed, the jury never heard of the severe and constant physical and emotional abuse and neglect Mr. Rimmer suffered as a child. The mitigation presented in postconviction certainly could not be considered "minimal".

As to the mental health mitigation, both statutory and non-statutory, the court's order fails to consider the trial court's findings that no mental health mitigation had been established (see R. 2396-7).[42] The experts who testified in postconviction

[42] The trial court based its opinion in large part because

believed that: 1) at the time of the offenses Mr. Rimmer suffered from a severe mental or emotional disturbance; 2) at the time of the offenses Mr. Rimmer's capacity to appreciate the criminality of his crimes was impaired; 3) that Mr. Rimmer suffered from a major mental health disorder; 4) that symptoms of Mr. Rimmer's mental health disorder included hallucinations, visualizations, paranoia, though disturbance, and impairment of his ability to reason rationally and calmly; 5) that Mr. Rimmer's mental health disorder impacted his day-to-day functioning.

The experts opinions were corroborated by the background records and collateral information that demonstrate that Mr. Rimmer's mental health disorder is longstanding and was present before May 2, 1998. Thus, like in Parker, where at trial the State "criticized the testimony of the mental health expert because he relied almost entirely on Parker's self-reported history and did not corroborate this information by interviewing collateral sources" ___ So. 2d ___ (Fla. Jan. 22, 2009), here, the State argued that the jury and trial court should disregard the mental health mitigation because it was "mumbo-jumbo" and had no factual basis for support. And, the trial court did disregard the experts' testimony for these reasons. See (R. 2396-7).

Based on the statutory and non-statutory mitigation that has been established and the fact that the jury recommending death sentences for Mr. Rimmer heard two improper aggravating factors

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Mr. Rimmer had no previous contact with the mental health system, despite his contact with DOC (see R. 2396-7).

and improper argument, confidence in Mr. Rimmer's sentences of death has been undermined. Strickland, 466 U.S. at 694.

ARGUMENT IV

THE CIRCUIT COURT ERRED IN DENYING MR. RIMMER'S CLAIM THAT HE WAS WAS DEPRIVED OF HIS RIGHTS TO DUE PROCESS UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AS WELL AS HIS RIGHTS UNDER THE FIFTH, SIXTH, AND EIGHTH AMENDMENTS, BECAUSE THE STATE WITHHELD EVIDENCE WHICH WAS MATERIAL AND EXCULPATORY IN NATURE AND/OR PRESENTED MISLEADING EVIDENCE.

In order to prove a violation of Brady, a claimant must establish that the government possessed evidence that was suppressed, that the evidence was "exculpatory" or "impeachment" and that the evidence was "material." United States v. Bagley, 473 U.S. 667 (1985); Kyles v. Whitley, 514 U.S. 419 (1995); Strickler v. Greene, 527 U.S. 263 (1999). Evidence is "material" and a new trial or sentencing is warranted "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceedings would have been different. Kyles, 514 U.S. at 433-434; Hoffman v. State, 800 So. 2d 174 (Fla. 2001); Rogers v. State, 782 So. 2d 373 (Fla. 2001); Young v. State, 739 So. 2d 553 (Fla. 1999). To the extent that counsel was or should have been aware of this information, counsel was ineffective in failing to discover and utilize it.

A proper materiality analysis under Brady also must contemplate the cumulative effect of all suppressed information. Further, the materiality inquiry is not a "sufficiency of the evidence" test. Id. at 434. The burden of proof for establishing materiality is less than a preponderance. Williams v. Taylor, 120

S.Ct. 1495 (2000); Kyles, 514 U.S. at 434.

A. The Undisclosed Evidence

1. The FDLE reports.

Prior to his capital trial, Mr. Rimmer's trial attorney demanded discovery. On December 17, 1998, the State disclosed a 48 page Latent Fingerprint Report compiled by Deirdre Bucknor (Def. Ex. 38). This report listed which latent prints matched Mr. Rimmer and Parker. Only 24 prints matched Mr. Rimmer, and they were all found on stereo equipment seized several days after the crime at Mr. Rimmer's storage facility (Id.). Out of the 209 identifiable prints lifted in the investigation, none of the prints obtained at the crime scene matched Mr. Rimmer (Id.). In addition to Mr. Rimmer and Parker's names, several other individuals were listed on the latent print report as possibly matching the prints found at the scene of the crime and on stereo equipment taken from Audio Logic (Id.). However, several of these other individuals' fingerprints were not checked to determine if they matched any of the latent prints found.

On January 7, 1999, Bucknor was deposed by defense counsel for Parker (Def. Ex. 40). Trial counsel was present for the deposition. During her deposition, Bucknor stated that she was specifically told not to conduct a comparison of these suspects against latent prints lifted from the scene of the crime and the stereo equipment (Id.).

Trial counsel specifically requested information on these other suspects listed on the latent fingerprint report from law

enforcement (2SPC-R. 617). Trial counsel was told by law enforcement that they were unaware why those names were listed on the fingerprint report, and that they had no additional information on their identity, or how they became a part of the investigation (Id.).

However, these representations by the police to trial counsel are directly contradicted by reports commissioned by Wilton Manors Police Department ("WMPD") from the Florida Department of Law Enforcement ("FDLE"). See Def. Ex. 43. Both trial counsel and the trial prosecutor confirmed that the reports from FDLE were not disclosed (2SPC-R. 627; 771).

According to the FDLE reports, on May 13, 1998, WMPD requested the assistance of FDLE in investigating the crimes. In response to WMPD's request, an FDLE agent "went to the South Florida Investigative Support Center to obtain emergency Florida Drivers License photographs and make up photographic lineups based on those photographs (Def. Ex. 43). SA Ingram obtained drivers license photographs of the several subjects suspected of participating in the double homicide. . .on May 7, 1998." (Id.).

According to his report, SA Ingram obtained photographs of five suspects, including Mr. Rimmer and Parker, as well as three additional suspects who were included in the latent fingerprint report. Photographic lineups were prepared by FDLE and turned over to Det. Lewis "so that they could be viewed by the witnesses that viewed the homicides." (Id.).

A review of the FDLE files for this case shows that two

photographic lineups were prepared. One of these lineups contained 6 photographs, including those of additional suspects in the investigation (Id.).

2. Palm Beach County Sheriff's Office Investigation.

Trial counsel also testified that he did not receive documents pertaining to the weapon that was used to shoot the victims at Audio Logic (2SPC-R. 641; see Def. Exs. 44 and 45).

The undisclosed records revealed that the firearm used in the crimes had been stolen (Def. Ex. 45). An investigation showed that in 1997 and 1998, law enforcement was investigating a "chop-shop" where the co-conspirators were stealing vehicles, including corvettes and taking them apart to either sell or use the parts for repairs (Def. Ex. 45). Several individuals in this "chop-shop" ring were charged with crimes (Id.). Mr. Rimmer was not involved with this conspiracy and had nothing to do with the theft of the corvette in which the firearm was located (Id.).

3. The Plantation homicide.

Trial counsel also testified that he never received any information or documents related to a homicide that occurred in Plantation a few days before the crimes occurred at the Audio Logic. See Def. Ex. 46. The facts of the crimes were similar enough that that the Plantation Police requested cooperation from WMPD (Id.). WMPD provided photos of Mr. Rimmer, but the witnesses did not identify him as being involved (Id.). Ultimately, other individuals were arrested for the robbery-homicide (Id.). They had no connection to Mr. Rimmer.

4. Wilton Manors Police Department reports.

Though trial counsel testified that Officers Trephan and Schenk's May 2, 1998, reports were disclosed (Def. Exs. 41 and 42), they were not listed on the State's detailed discovery lists (Def. Ex. 48).

On May 2, 1998, after a BOLO was issued describing the vehicle in which the perpetrators left the crime scene, an individual reported seeing a vehicle matching the description in the area where the crimes occurred, being driven by a black male. Another black male was in the passenger seat (Def. Ex. 42). Officer Trephan received the report and observed the vehicle, parked in Wilton Manors, himself (Id.). The vehicle was suspect itself because it matched the description of the vehicle used in the crimes: A faded purple Ford Probe with tinted windows and "mag" wheels (Id.). Officer Trephan did no follow-up.

Officer Schenck from WMPD also failed to follow a lead when a Ford Probe was reported being seen driven by a black male with another black male passenger, shortly after the BOLO was issued. No investigation was conducted into this lead.

C. A Cumulative Review of the Undisclosed Evidence

In denying Mr. Rimmer's claim that his right to due process was violated by the State's withholding of critical, exculpatory information, the circuit court concluded that either trial counsel was aware of the information or it was not exculpatory (SPC-R. 2424-5). However, it is clear, that the Court erred in analyzing Mr. Rimmer's claim because no cumulative analysis was

conducted. See Kyles v. Whitley, 514 U.S. 419 (1995).

Also, in denying Mr. Rimmer's claim, the Court finds that the information did not "contain[] favorable evidence, or did not contain evidence that the defense already had." (SPC-R. 2425). The circuit court's conclusion is not supported by the record.

The Defense theory of the case was misidentification. A review of FDLE's files on the Audio Logic homicides, which include copies of the driver's licenses of each of the suspects, reveals that two of the three additional suspects in this case had similar physical characteristics to Mr. Rimmer. In addition, both were 6'0" or taller (Mr. Rimmer is 6'2").

Also, according to their driver's licenses, none of the additional suspects required corrective lenses in order to drive. None of the witnesses to the Audio Logic homicides described the gunman as wearing glasses. In contrast, Mr. Rimmer is severely near-sighted and must wear glasses in order to see properly. Mr. Rimmer's driver's license, which was obtained by both FDLE and WMPD, was "Class A" restricted, meaning that it would be illegal for him to operate a vehicle without his glasses.

As part of Mr. Rimmer's defense of misidentification, trial counsel filed a motion to suppress Davis and Moore's identifications.

The eyewitness identifications were the only pieces of evidence which tied Mr. Rimmer directly to the scene of the robbery, and as a result were crucial to the State's prosecution of Mr. Rimmer. The fact that the State suppressed information

directly relevant to identification violates Brady.

And, the failure of the State to turn over the reports on additional suspects in this case, as developed by FDLE and submitted to WMPD, directly impacted Mr. Rimmer's defense in two key ways: The suppressed evidence was relevant to the jury's assessment of the caliber of the investigation conducted by WMPD; and the suppressed evidence was relevant to the credibility of the State's eyewitnesses.

In this context, the proper focus of a Brady inquiry must evaluate the nature of the information withheld by the police considering the theory of the defense in this case, which was misidentification. Prior to trial, defense counsel specifically requested from the State and the police any and all information relating to any other possible suspects in the case. Det. Lewis affirmatively denied that any other suspects existed. In addition, WMPD did not turn over to defense counsel any of the reports prepared by FDLE, who was called in to assist on this case specifically to help locate and develop suspects. WMPD also failed to turn over a photo array prepared by FDLE which contained images of additional suspects in the case.

Of grave concern with respect to pre-trial identification procedures are efforts "to eliminate or minimize the risk of convicting the innocent." Macias v. State, 673 So. 2d 176, 179 (Fla. 4th DCA 1996). Therefore, the fact that the police, along with FDLE, were at one point actively investigating other potential suspects to the crime was information that would have

been of vital importance to Mr. Rimmer's defense theory of misidentification. Trial counsel should have been able to inquire as to State why these suspects were targeted in the first place, in order to fully investigate Mr. Rimmer's defense. Similarly, the jury should have been made aware of these other suspects so that they could properly determine whether the investigation was more likely to produce distorted evidence incriminating Mr. Rimmer, or accurate evidence as to the true identity of the gunman. See Kyles, 514 U.S. at 446. The acknowledged problems with the State's eyewitness identifications would have been compounded had the jury had the opportunity to evaluate those identifications in light of the other suspects.

Also included in some of those FDLE materials was information regarding confidential informants. See Def. Ex. 43. While trial counsel knew informants were used in the arrest of Parker, he did not receive any materials on these individuals. Withholding this information from trial counsel was a violation of Brady because the co-defendants were jointly tried.

As to the reports and information concerning the weapon used to shoot the victims (Def. Exs. 44 and 45), and the homicide that occurred in Plantation a few days before the Audio Logic offenses (Def. Ex. 46), although trial counsel had never had the benefit of seeing the records, he simply dismissed them as documents that he did not want or need (see 2SPC-R. 686-8; 690).

The importance of the documents regarding the weapon used in the Audio Logic offenses would have been to show that the firearm

used in the crimes did not originate with Mr. Rimmer. Further, none of the known co-conspirators were investigated for the crimes at issue, thus, again, trial counsel could have cast doubt on the efficacy of the State's investigation.

Furthermore, as to the Plantation Police records (Def. Ex. 46), even trial counsel admitted that conceivably he could have argued that the Plantation crime could be admitted as reverse Williams Rule evidence (2SPC-R. 690).[43] The fact that a similar crime had occurred a few days before the Audio Logic crimes should have been disclosed and presented to the jury.

Finally, though trial counsel testified that the leads following the BOLO were disclosed, there was favorable evidence contained in the suppressed reports. Had trial counsel been provided the evidence and used it, an entirely different picture of the prosecution's case could have been shown.

D. Conclusion

The information contained in the undisclosed reports would have made a difference in Mr. Rimmer's case in that it would have provided other people whom the police did not investigate and it would have shown the deficiencies of the investigation. Considering the jury's questions that involved the identifications by Davis and Moore (see R. 1616), there is no doubt that the undisclosed information undermines confidence in

[43] Obviously the crimes were similar enough that the Plantation Police sought information about the Audio Logic crimes and showed Mr. Rimmer's photo to eyewitnesses at the Plantation scene. See Def. 46.

the outcome of Mr. Rimmer's convictions and sentences.

ARGUMENT V

THE CIRCUIT COURT ERRED IN DENYING MR. RIMMER'S CLAIM OF PROSECUTORIAL MISCONDUCT AND ATTENDANT STRICKLAND ERROR, THEREBY VIOLATING HIS RIGHT TO DUE PROCESS UNDER THE FLORIDA AND UNITED STATES CONSTITUTIONS.

Mr. Rimmer alleged that trial counsel 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. Mr. Rimmer pled both that the prosecutor engaged in misconduct, **and also** that trial counsel was ineffective for failing to object and correct that misconduct (SPC-R. 510). The court denied relief on the claim, finding the claim to be procedurally barred and without merit (SPC-R. 2722).

However, Mr. Rimmer's claim mirrors others where this Court has found trial counsel ineffective for failing to raise proper objections to evidence or argument, to know the law, and to argue issues effectively. See, e.g., Puckett v. State, 641 So. 2d 933 (Fla. 2d DCA 1994); Garcia v. State, 622 So. 2d 1325 (1993).

Thus, this claim – based upon counsel's failure to timely and properly raise an issue – presents a distinct Sixth Amendment claim with a "separate identit[y]" and "reflecting different constitutional values" from the underlying claim which Mr. Rimmer asserts trial counsel ineffectively failed to preserve. Kimmelman v. Morrison, 477 U.S. 365, 375 (1986). The court erred when it completely ignored Mr. Rimmer's claim of ineffective assistance of counsel, and instead evaluated the claim solely on the issue of prosecutorial misconduct (SPC-R. 2722-23).

At trial, the only instance of prosecutorial misconduct which was objected to by trial counsel (albeit improperly) was the presentation of Ofc. Kelley's rebuttal testimony (R. 1387-90; 1404; 1407). The State presented Ofc. Kelley in rebuttal in an attempt to establish that because his eyesight was similar to Mr. Rimmer's, what he was able to see would, by analogy, apply to Mr. Rimmer. In effect, the State was attempting to present expert testimony through a lay witness, which is clearly improper. See Fla. R. Evid. §§ 90.701(1), 90.702. However, while trial counsel objected to the presentation of Ofc. Kelley's testimony in this regard as "not relevant," "improper. . .for lack of a better term," (R. 1404, 1406-7), he never objected on the basis of improper opinion testimony. Trial counsel's failure to apply the appropriate evidentiary rule and make a necessary objection was deficient performance which prejudiced Mr. Rimmer.

Similarly, trial counsel failed to object when the prosecutor made unsupported claims about the fear the victims experienced prior to their deaths (R. 1954-5). The prosecutor's statements about the suffering experienced by the victims was not a "fair comment upon the evidence" (R. 930), as there was no evidence in the record regarding how the victims felt before they were killed. Rather, the prosecutor's statements should have been objected to by trial counsel as "inject[ing] elements of emotion and fear into the jury's deliberations." Bertolotti v. State, 476 So. 2d 130, 133 (Fla. 1985).

Trial counsel should have objected when the prosecutor re-

enacted the crime during penalty phase closing argument by wielding the gun from the crime in front of the jury and pulling the trigger (R. 1955-6). Such an inflammatory display was found to be improper in Clark v. State, 553 So. 2d 240 (Fla. 3d DCA 1989). Like the condemned behavior in Clark, the actions of the prosecutor at Mr. Rimmer's trial "was theatrical and potentially dangerous," not to mention prejudicial to Mr. Rimmer. Id.

The prosecutor's presentation of victim impact testimony from Bradley Krause Sr. was also improper and should have been objected to or otherwise corrected by trial counsel. Mr. Krause's expressed desire to have Mr. Rimmer "sentence[d]. . .to the electric chair" was clearly a violation of § 921.171(7), which prohibit "[c]haracterizations and opinions about the crime, the defendant, and the appropriate sentence." Defense counsel should have known that such commentary was impermissible. See, e.g., Windom v. State, 656 So. 2d 432 (Fla. 1995).

Mr. Rimmer's claim of ineffective assistance in relation to prosecutorial misconduct was not procedurally barred; rather, it is a claim which was properly brought under Rule 3.851, as it could not have been raised on direct appeal. Blanco v. Wainwright, 507 So. 2d 1377, 1384 (1987). Relief is warranted.

ARGUMENT VI
MR. RIMMER'S SIXTH AMENDMENT RIGHT TO EFFECTIVE COUNSEL WAS VIOLATED DUE TO TRIAL COUNSEL'S CONFLICT OF INTEREST.

The right to effective assistance of counsel encompasses the right to conflict-free counsel. Hunter v. State, 817 So. 2d 786, 791 (Fla. 2002); Strickland v. Washington, 466 U.S. 668, 692 (1984). To demonstrate that counsel's conflict resulted in a violation of his Sixth Amendment rights, a defendant must establish that there was an actual conflict of interest and that the conflict adversely affected counsel's performance. See Hunter, 817 So. 2d at 791. Where, as here, "a conflict of interest actually affected the adequacy of [trial counsel's] representation," Mr. Rimmer "need not demonstrate prejudice in order to obtain relief." Cuyler v. Sullivan, 446 U.S. 335, 349-50 (1980).

In Mr. Rimmer's case, an actual conflict of interest existed due to inappropriate interactions between trial counsel and the lead police investigator, Det. Lewis. Det. Lewis conducted the improper eyewitness identification procedures and was a crucial witness for the State against Mr. Rimmer. On January 29, 1999, after Mr. Rimmer was convicted, **but before the penalty phase had begun,** trial counsel sent Det. Lewis a letter, which stated:

> Dear Detective Lewis,
>
> Please accept my congratulations for your role in the successful prosecution of Robert Rimmer and Kevin Parker for committing the double homicide and robberies that occurred on May 2, 1998 in the above-referenced matter.
>
> You demonstrated that hard work and diligence are ultimately rewarded. Hopefully the families of the victims and the community of Wilton Manors recognize you for your

> accomplishments in this case.
> Warmest Regards, Richard Garfield

Def. Ex. 47.

During the evidentiary hearing, counsel had various explanations for why he sent the letter. Trial counsel stated, "I just thought it would be a nice gesture. I felt like my role in the case was virtually over and that he was not going to have any role remaining in the case because this was after the conviction but before the penalty phase" (2SPC-R. 658).

One of the most basic duties of a lawyer is the requirement that he engage in zealous representation of his client. See Gideon v. Wainwright, 375 U.S. 335 (1963). Moreover, "when counsel is burdened by an actual conflict of interest. . .counsel breaches the duty of loyalty." 466 U.S. 668, 692 (1984).

Here, trial counsel abandoned his duties of advocacy and loyalty when he wrote the letter to Det. Lewis. Trial counsel testified that he wrote the letter because:

> I think what motivated me and really the only true reason – I mean, those other things I've told you certainly factored in, but the real reason was during a recess . . . I just happened to say, how are you guys doing on that case [an unrelated armed robbery]. . . [and] he says, well, let me tell you about that. I walked in there to interview the owner or to interview somebody and someone says to him I didn't know niggers were allowed in here. And here's a man trying to do his job, a law enforcement official trying to solve a case, and he has to put up with that abuse. It really made me angry and I just felt, and still feel, that there is nothing wrong with trying to show somebody that, . . . even if you don't agree with them you respect what he tried to do.

(2SPC-R. 657).

Trial counsel was ineffective for failing to properly challenge the State's case, including failure to zealously and effectively challenge the work of Det. Lewis. See Argument II. Counsel acknowledged that a main reason he wrote the letter was because of how "angry" he was about the story Det. Lewis told him during a break in his testimony (Id.). He also admitted that there was "[s]omething [about Det. Lewis which] motivated me to do this with Lewis that wasn't typical" (2SPC-R. 655). The fact that trial counsel felt and acted in an atypical way with Det. Lewis based upon an emotional response to him is an acknowledgment that trial counsel was conflicted between his duty to Mr. Rimmer and his feelings for the detective.

Additionally, trial counsel's reasoning that he "felt like my role in the case was virtually over" when he wrote the letter is simply not true. See, e.g., *ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, 10.10.1 and 10.11 (emphasizing the need for integration of the guilt and penalty phases); 10.14 (explaining the continuing duties of trial counsel even after conviction). There is no question but that trial counsel had a continuing duty to Mr. Rimmer through the completion of his capital trial.

The record and trial counsel's own testimony establish that an actual conflict of interest existed, such that Mr. Rimmer's Sixth Amendment right to effective counsel was violated. Relief is warranted.

CONCLUSION

Based upon the foregoing Appellant, ROBERT RIMMER, urges this Court to grant him relief.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Initial Brief of Appellant has been furnished by United States Mail, first class postage prepaid, to Leslie Campbell, Assistant Attorney General, Office of the Attorney General, 1515 N. Flagler Drive, 9th Floor, West Palm Beach, Florida 33401, on July 9 ___, 2009.

CERTIFICATION OF TYPE SIZE AND STYLE

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