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

REPLY BRIEF OF APPELLANT

LINDA McDERMOTT
Florida Bar No. 0102857
Special Assistant CCRC-S
McCLAIN & McDERMOTT, P.A.
141 N.E. 30th Street
Wilton Manors, FL 33334
(850)322-2172

CELESTE BACCHI
Florida Bar No. 0688983
Assistant CCRC-S
OFFICE OF THE CAPITAL
COLLATERAL REGIONAL COUNSEL
101 N.E. 3rd Ave., Suite 400
Fort Lauderdale, FL 33301
(954) 713-1284

COUNSEL FOR APPELLANT

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

Page

ARGUMENT IN REPLY

Mr. Rimmer would note that the State's statement of the case and facts is riddled with several misstatements and inaccuracies of the testimony, including overstating witnesses' testimony.

For example, the State contended that the trial attorney wrote the letter to Detective Lewis because "he wanted to show Detective Lewis not all defense counsel make racist remarks." (Answer Brief at 10, herinafter "AB at ____"). Actually, trial counsel's explanation of what happened to Det. Lewis was not that a defense attorney made a racist remark, but that when Det. Lewis went to interview a witness at the scene of a crime, racist remarks were made by the witnesses. See 2SPC-R. 1873. Trial counsel later testified that he wanted Det. Lewis to know that "not all of us . . . get painted with the same brush" (Id.). However, the testimony makes clear that trial counsel was not referring to the defense bar, but to Caucasians.

As to the State's assertion that trial counsel testified that an eyewitness expert's testimony would be worthless in a case where the composite sketch "looked exactly like Rimmer" there is no cite accompanying the statement. See AB at 10. And, there is no testimony from trial counsel stating that the composite "looked exactly like Rimmer". [1]

Likewise, the State's assertion that Dr. Brigham testified "that there are factors in this case supporting the reliability of the eyewitness identifications, **that the amount of corroborating evidence in this case makes the identifications reliable**", (AB at 10-11)(emphasis added), is patently false. Dr. Brigham specifically stated that while the amount of or lack of corroborating evidence might play a part in whether he was called to testify in a case, it would be meaningless and inappropriate for him to testify about non-eyewitness aspects of a case (2SPCR- 1790). Thus, he did not testify in this regard.

ARGUMENT I

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

A. EXCLUSION OF WITNESSES

The State is incorrect in its assertion that this claim is not preserved for appeal. The exclusion of witnesses issue initially arose on the State's Motion for Discovery, wherein the State asked for a showing of the "relevancy" of witnesses Davis, Moore, Rosario, and Parker (SPC-R. 1817-9). Mr. Rimmer objected to the discovery motion. Thereafter, at both a hearing on the motion and in a court-ordered written

[1] Mr. Rimmer has always contended that there are several important differences between his appearance in 1998 and the composite sketch – the most glaring being the difference in the facial hair described by the witness and the lack of eyeglasses.

response, over defense objection, Mr. Rimmer provided detailed explanations of the relevancy for each challenged witness, and objected to the State's attempt to strike the witnesses from the evidentiary hearing (See SPC-R. 1829-32; 1836-75; 2SPC-R. 880-921). The court subsequently entered an order granting the State's request:

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

(SPC-R. 1991) (emphasis added).

The State claims that the language of the order indicates that the striking of the witnesses was "preliminary," and that Mr. Rimmer was therefore required to raise the issue again in order for the claim to be preserved for appeal (AB at 23). To justify this position, the State relies upon Armstrong v. State, 642 So. 2d 730, 740 (Fla. 1994) and Richardson v. State, 437 So. 2d 1091, 1094 (Fla. 1983). However, the State's argument is not supported either by the record or the cases cited.

First, the language of the order clearly indicated that the court's ruling to strike the witnesses was final, *unless* Mr. Rimmer was able to present new, additional justification for calling the witnesses which he had not already raised. The court's order did not require Mr. Rimmer to raise the issue again; rather, it simply provided that the court would be open to further reconsideration of Mr. Rimmer's objection to the motion to strike *if* he provided additional "sufficient relevancy" other than the relevancy argument that had already been presented (SPC-R. 1991). Mr. Rimmer was not required to do more than he already had done – which was respond to the court's order requiring a showing of relevancy, and object to the State's motions.

The State presents no support for the claim that Mr. Rimmer was obligated to raise the issue again (AB at 23). Rather, the cases the State does cite – Armstrong and Richardson – are not on point. For example, in Armstrong, the defendant maintained on appeal that the trial court erred in failing to grant his pretrial request for an MRI test. 642 So. 2d at 739. This Court found that Armstrong's claim was procedurally barred because "[t]he trial judge **reserved ruling** on this issue and **apparently never issued a ruling**." Id. at 740 (emphasis added). In this case there was a clear ruling from the court (SPC-R 1991).

The State's reliance upon Richardson v. State is similarly misguided. In Richardson, the defendant argued on appeal that the trial court erred by denying his motion to strike a witness. 437 So. 2d at 1094. In denying Richardson's claim, this Court noted "the absence of a timely objection" and the fact that "appellant did not pursue his motion to strike even though the judge **did not rule on the motion**. Under these circumstances, appellant has not preserved the issue for appeal." Id. (emphasis added). In contrast, in Mr. Rimmer's case it was the

State, not Mr. Rimmer, who filed the motion to strike – a motion which was explicitly granted following a hearing, and over Mr. Rimmer's objection (SPC-R. 1991). This was sufficient to preserve the issue for appeal. See Steinhorst v. State, 412 So. 2d 332, 338 (Fla. 1982); Castor v. State, 365 So. 2d 701, 703 (Fla. 1978) (a contemporaneous objection alleging specific grounds for the objection is sufficient to preserve the claim for appeal).

The State next argues that the trial court did not err in striking the witnesses because the witnesses' testimony would not have been relevant to Mr. Rimmer's claims (AB at 23, 24). However, the record and the caselaw support Mr. Rimmer's contention that the striking of the witnesses was a denial of due process. As Mr. Rimmer previously argued, the circuit court abused its discretion by failing to follow the procedure established in Lewis v. State, 656 So. 2d 1248, 1249 (Fla. 1994), which required the court to determine whether the State met its burden to show good cause for the requested discovery. The State's sole argument in support of the "good cause" requirement was that it "questioned the propriety" of calling the witnesses for the hearing because, in the State's view, it was "not apparent how [the witnesses] have any relevant information" and thus a showing of "relevancy" was necessary (PC-R. 1817-19).

At the discovery hearing, the circuit court made no inquiry whatsoever into what, under the Lewis factors, would support the State's Motion for Discovery and obligate Mr. Rimmer to proffer the relevancy of his witnesses. This process was not sufficient to meet the requirements of Lewis, and the trial court abused its discretion by granting the State's deficient discovery motion.
Moreover, Mr. Rimmer *did* establish the relevancy of the stricken witnesses. While a trial court may have broad discretion in determining a witness's relevancy, it was clear from the proceedings below that the court had no understanding of the nature and purpose of the postconviction process.

Mr. Rimmer was granted a hearing on ineffective assistance of trial counsel and a claim that the State engaged in a Brady violation by withholding information regarding other suspects in the case. Specifically, Mr. Rimmer alleged that trial counsel failed to elicit testimony from the eyewitnesses which would have exposed that the State's case against Mr. Rimmer was seriously flawed. These witnesses were relevant to establishing trial counsel's errors, because they would all be able to testify to information which was unreasonably not brought out at trial (SPC-R. 1829-32, 1867-8, 1872-3). Moreover, Mr. Rimmer alleged that trial counsel should have enlisted the assistance of an eyewitness identification expert to demonstrate the serious deficiencies in the witnesses' identifications. Therefore, it was necessary to question them regarding their identifications in ways that trial counsel did not.

Similarly, it was also crucial for the eyewitnesses to testify in order for Mr. Rimmer to establish the validity of his Brady claim.

Trial counsel's strategy was misidentification, and the eyewitness identifications were the only thing linking Mr. Rimmer to the scene of the crime. Thus, as Mr. Rimmer argued below, it was necessary for him 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 (SPC-R. 1820-24, 1838-75). It was also necessary for the eyewitnesses to testify regarding how evidence of other suspects – evidence which they were never presented with at the time of trial – would have affected their identifications of Mr. Rimmer.

In short, it was necessary for Mr. Rimmer to show the materiality of **what was not presented or done** in order to meet the prejudice requirements necessary for relief.

The State, like the circuit court, incorrectly maintains that the focus of an evidentiary hearing is "on counsel, what he had, what he did with what he had, and how Rimmer was prejudiced by counsel's actions or the State's withholding of material evidence." (AB at 25-26). This is simply a misrepresentation of what the defense is permitted – indeed, obligated – to demonstrate in order to obtain collateral relief. How trial counsel failed to use information that was available to him when questioning the eyewitnesses is relevant to proving ineffectiveness. Similarly, how the information regarding other suspects would have affected the eyewitnesses' testimony is also relevant to proving materiality of the alleged Brady material.

Mr. Rimmer properly established the relevancy of the excluded witnesses to his claims for postconviction relief, and the court erred in striking the witnesses. The cases cited by the State do not provide adequate support for its position that the witnesses here were properly excluded. For example, in Hardwick v. State, 521 So. 2d 1071, 1073 (Fla. 1987), the defendant's witness was excluded as unreliable and irrelevant after a proffer established that the witness had fabricated his testimony. Such was not the case here. Moreover, in Parker v. State, 3 So. 3d 974, 983 (Fla. 2009), the exclusion of witnesses was upheld by this Court due to the extremely narrow nature of the remand. In contrast, in Mr. Rimmer's case, the question of trial counsel's ineffectiveness encompassed not only the propriety of counsel's decision not to hire an eyewitness expert, but also whether counsel was deficient in failing to use readily available evidence during his questioning and impeachment of the eyewitnesses. Additionally, as Mr. Rimmer has shown, the eyewitnesses were necessary to prove the materiality of the Brady evidence withheld by the State. Mr. Rimmer's right to due process of law was violated when the circuit court abused its discretion and precluded him from calling clearly relevant witnesses in support of his claims for postconviction relief. See Johnson v. Singletary, 647 So. 2d 106, 111-12 (Fla. 1994); see also Taylor v. Singletary, 122 F.3d 1390 (11th Cir. 1997) (refusal to permit defendant to present witnesses in support of claims violated his Sixth Amendment right to compulsory process).

B. DENIAL OF REQUESTS FOR PUBLIC RECORDS

The State maintains that the circuit court's denial of public records requests was proper because Mr. Rimmer did not make a showing of sufficient relevancy pursuant to Fla. R. Crim. Pro. 3.852(g) (AB at 27). The State also claims that even if the court's relevancy determination was in error, the denial of records was acceptable because the court also found that the request was overly broad and unduly burdensome (AB at 30).

Interestingly, the circuit court and the State accuse Mr. Rimmer of simply claiming "relevancy" without meeting the requirements of 3.852(g) (AB at 29, 30). Yet neither the court nor the State bother to articulate what they believe would establish relevancy (SPC-R. 1736, 1740-72). Fla. R. Crim. Pro. 3.852(g)(3)(C) requires a defendant show that the "additional public records sought are relevant to the subject matter of a proceeding under rule 3.850 or rule 3.851, **or** appear reasonably calculated to lead to the discovery of admissible evidence".

Contrary to the State's assertion, Mr. Rimmer articulated how the records sought were relevant to his claims for postconviction relief. Pursuant to the circuit court's order, he submitted a detailed description of each of the 34 persons listed and how they related to his collateral litigation (SPC-R. 805-13). Nothing in Fla. R. Crim. Pro. 3.852(g) mandates that a defendant make a representation like Mr. Rimmer made before obtaining records, and the circuit court erred both in requiring that Mr. Rimmer make such a showing, and then denying his request once the demanded relevancy had been clearly shown.

Mr. Rimmer was not engaging in a "fishing expedition," as the State claims. Rather, the 34 individuals for whom he requested records were individuals who were directly involved in his investigation and prosecution. Their names were obtained from records received by the very agencies (Broward Sheriff's Office and the State Attorney's Office) upon whom he subsequently filed his 3.852(g) demands. If these individuals were relevant enough to those agencies to be part of their investigation and prosecution of Mr. Rimmer, how could they not now be relevant to Mr. Rimmer's collateral investigation and litigation? Thus, when Mr. Rimmer demonstrated that the records he requested were utilized in his investigation, prosecution, and conviction, that was sufficient to meet the requirements of the Rule. To require that Mr. Rimmer make a further relevancy showing than what he provided to the circuit court would be to thwart the due process protections afforded him by this Court under the rules governing public records production in capital postconviction.

The circuit court and the State also erroneously ignored the fact that Mr. Rimmer may show *either* relevancy, *or* that the records are reasonably calculated to lead to the discovery of admissible evidence (AB at 30; see also PCR 2891-2923, 2926-37). Mr. Rimmer demonstrated both. As Mr. Rimmer argued below, it is impossible for him to guarantee that impeachment and/or other admissible evidence

would be contained within requested records. That is why the Rule simply requires a showing of "reasonableness." It is reasonable to presume that criminal investigation records relating to persons involved in the arrest, prosecution, and conviction of Mr. Rimmer could lead to admissible evidence – including impeachment information, evidence of deals with police, and/or possible Brady evidence.

Similarly, the circuit court's finding that Mr. Rimmer's request was "overly broad and unduly burdensome" is completely unsupported either by the record or the Rule (PC-R. 2926-37). Once again, the court simply made a conclusory statement that the request violated this portion of the Rule, but provided no explanation. As the record below demonstrates, however, the requests were limited in scope and in accordance with the Rule. Mr. Rimmer asked for information on 34 persons, out of over 100 which were provided to him by the State and law enforcement agencies. There was not a single person on the list who was not a key part of the investigation and prosecution of Mr. Rimmer. With the exception of Broward Sheriff's Office (BSO), no agency even objected to how searching for records on these persons would be so burdensome as to violate the Rule. Moreover, even when BSO explained how it would be able to conduct a search and produce at least some of the requested records, the court still refused to order BSO to engage in even that limited production (see id.). The circuit court and the State's interpretation of the standards that must be met in order to obtain records under 3.852(g) is contrary to the spirit of the rule and this Court's caselaw.

Indeed, the cases the State cites in support of its position – Moore v. State, 820 So. 2d 199, 204 (Fla. 2002) and Glock v. Moore, 776 So. 2d 243, 253 (Fla. 2001) – do not involve 3.852(g) at all (AB at 31). Rather, they address the validity of public records demands made pursuant to 3.852(h), which regulates the production of public records under warrant. In the context of 3.852(h), asking for "all" records, without specific or limiting information, is improper. See Moore, 820 So. 2d at 204; see also Sims v. State, 753 So. 2d 66, 70 (Fla. 2000). The same cannot be said for requests made under 3.852(g). Once a defendant has met the requirements of 3.852(g)(3), an agency must produce the additional public records requested. See 3.852(g)(3). This is in keeping with both the letter and spirit of 3.852, which requires agencies to turn over "all" public records which relate to investigation and/or prosecution of the underlying capital case. See, e.g., 3.852(e)(1)-(5). By finding that Mr. Rimmer did not meet the requirements of 3.852(g), the circuit court imposed a burden on Mr. Rimmer that Florida's public records process does not require, thereby violating his right to due process.

C. VIOLATION OF MR. RIMMER'S DUE PROCESS RIGHT TO A FAIR AND COMPLETE TRANSCRIPT OF THE UNDERLYING PROCEEDINGS

The State's position is that this claim is unpreserved for review because Mr. Rimmer allegedly failed to direct the trial court to a specific section of the transcript which was missing (AB at 33). The State also argues that Mr. Rimmer failed to establish how any missing

statements or argument precludes effective appellate review (Id.). However, Mr. Rimmer did specifically refer to the portions of the record he alleged were inaccurate and incomplete (SPC-R. 2371-5; 2383-7). Following the lower court's orders partially granting his request for transcript correction, he filed notices to the court regarding his concerns about the validity of the transcripts (SPC-R. 2388-90). Finally, Mr. Rimmer also specifically pointed to the errors which occurred on May 10, 2005, when a court reporter had to be replaced mid-hearing (SPC-R. 2371, 2383; see also SPC-R. 2531-53 (Defendant's written closing arguments). Mr. Rimmer has sufficiently presented the deficiencies in the transcript to both the lower court and this Court.

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.

Initially, Mr. Rimmer would note that the State, like the circuit court addressed his arguments in a piecemeal fashion, rather than the correct analysis that considers the total picture of the errors and lack of investigation that plagued trial counsel's representation of Mr. Rimmer. See Kyles v. Whitley, 514 U.S. 419 (1995).

As the State acknowledges, trial counsel's representation is only reasonable to the extent that the investigation of Mr. Rimmer's case was reasonable. 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."). See AB at 37. Thus, the fact that trial counsel failed to consult with an eyewitness identification expert, obtain or review Mr. Rimmer's Department of Corrections' or employment records must be considered when analyzing his claim. As to the issue of trial counsel's failure to introduce evidence that Mr. Rimmer suffered from an astigmatism and previously suffered from optic ulcers, the State argues that the circuit court did not mean anything when it dismissed the evidence because it did not "conclusively" prove that Mr. Rimmer was not wearing contact lenses at the time of the crimes (AB at 37-8). However, Mr. Rimmer did not read too much into the circuit court's choice of words, the court made clear that it was rejecting the evidence because it did not "conclusively" prove that Mr. Rimmer could not have worn contact at the time of the crimes (2SPC-R. 929). The court used an incorrect standard in analyzing the issue and the State cannot correct that problem by arguing that when the court used the word "conclusively", the court really did not mean conclusively.

Furthermore, the State relies heavily on trial counsel's post-hoc rationalizations as to why he would not have used Mr. Rimmer's DOC medical records (AB at 39). However, the State completely ignores the fact that trial counsel admitted that he made his decision prior

to even reviewing the records (2SPC-R. 611). Thus, because trial counsel failed to review the records, he cannot claim any strategy in deciding not to use them. See Strickland v. Washington, 466 U.S. 668, 690-1 (1984); Henry v. State, 862 So. 2d 679, 685 (Fla. 2003).

The State also ignores the information contained in the DOC records that was not available or presented from Mr. Rimmer's March, 1998, eye examination, i.e., that there were medical reasons that Mr. Rimmer did not wear contacts. See 2SPC-R. 242. The State also ignores the fact that the records could have been identified as medical records. Likewise, trial counsel never presented the information that under Florida law a prescription was necessary in order for an individual to obtain contacts. See 2SPC-R. 243. This fact was readily available in 1999 and the jury could have learned that Mr. Rimmer had no such prescription from his 1998 eye examination.

Finally, the State never addresses the fact that numerous lay witnesses were available who could have testified (some even did testify as to other matters), that Mr. Rimmer always wore eyeglasses (2SPC-R. 45; 99; 254), other than to suggest that it was enough to use expert witnesses to discuss Mr. Rimmer's eyesight (AB at 40). But, again, trial counsel never elicited any information from the experts about the impossibility of Mr. Rimmer wearing contact lenses. And, the State seems to suggest that it was one or the other – an expert or lay testimony. But this is simply not the case. Mr. Rimmer could have presented both experts and lay witnesses to establish all of the information surrounding his vision history and fact that he did not wear contacts.

The State also argues that trial counsel was not deficient in failing to present rebuttal evidence to Officer Kelley's testimony, specifically as to the issue about Mr. Rimmer wearing contacts, and because Officer Kelley was "effectively cross-examined" (AB at 40). First, the State ignores the evidence that a qualified expert could have 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). Mr. Rimmer's expert testified 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.). Thus, it was irrelevant whether or not Officer Kelley was impeached on other matters. Trial counsel failed to present evidence that the comparison of Officer Kelley to Mr. Rimmer was totally irrelevant and inaccurate.

Indeed, at trial, the State presented testimony and argued that Officer Kelley was able to see much detail without the use of his corrective lenses and therefore Mr. Rimmer would have also been able to commit the crimes without wearing his glasses. Trial counsel failed to disprove this testimony or implication, though that evidence was readily available.

Likewise, the State argues that it was not necessary to rebut the issue of whether Mr. Rimmer wore contact lenses, since the State never presented any testimony that he was. As a majority of this Court noted on direct appeal in reviewing the issues: "There was no

testimony in this case as to whether appellant wears contact lenses." Rimmer v. State, 825 So. 2d 304, 322, fn. 13 (Fla. 2002). The State suggested that Mr. Rimmer could have worn contacts, thus, trial counsel should have addressed the issue by presenting expert and lay testimony to the contrary.

The State also argues that Mr. Rimmer cannot establish prejudice because of the overwhelming evidence of guilt (AB at 40-1). The State points to the flawed eyewitness identifications and the fact that Mr. Rimmer was in possession of the stolen items when he was arrested. However, prejudice is not to be analyzed as a "sufficiency of evidence test." See Kyles v. Whitley, 514 U.S. 419, 434 (1995). Rather, Mr. Rimmer must only 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. Strickland v. Washington, 466 U.S. 668, 694 (1984).

There was absolutely no evidence linking Mr. Rimmer to the scene of the crimes, other than the severely flawed eyewitness identifications.[2] Also, Mr. Rimmer presented an alibi for the day of the crimes. As Justice Pariente wrote in her dissent on direct appeal, which was joined by two other justices:

> Certainly, there was an abundance of evidence that linked Rimmer to the crime in that he possessed the stolen goods. **However, there was no physical evidence that linked him to the scene. Moreover, a third man involved with the crimes was never found**.
>
> Although Rimmer was identified by two eyewitnesses, not only were there flaws with the procedures used, but I point out that both eyewitnesses identified the shooter as being five feet, ten inches tall and not wearing glasses, whereas Rimmer is six feet, two inches tall and is legally blind without his glasses. Furthermore, there was a discrepancy about Rimmer's weight.

Rimmer v. State, 825 So. 2d at 339 (Pariente, J., concurring in part, dissenting in part)(emphasis added).

The State also argues that trial counsel was not deficient in failing to consult with an eyewitness identification expert (AB at 41-4). In arguing the issue, the State essentially restates the circuit court's order. But, the State, like the circuit court, ignores the fact that the various police reports, statements, depositions and trial testimony reflect that trial counsel did not challenge the numerous, critical inconsistencies made by the eyewitnesses. See Def. Exs. 9, 10, 11, 12 and 13. Likewise, trial counsel was unaware of other facts that reduce the reliability of the identifications, like the fact that Davis was shown 50 photos prior to her compiling the composite sketch – arguably the most

[2] At trial, the witnesses testified that the shooter, (who was identified as Mr. Rimmer), had touched shelves, doors and the cars. However none of Mr. Rimmer's fingerprints were identified at the scene and 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).

crucial fact to demonstrate her suggestibility. Thus, although the State is correct in asserting that the Davis and Moore provided detailed descriptions of the shooter (AB at 42, fn. 20), the State cannot explain the significant inconsistencies between the detailed descriptions and Mr. Rimmer's actual physical characteristics.

And, the State argues that because the sketch ultimately led law enforcement to Mr. Rimmer, that any errors or inaccuracies in the descriptions are cured (AB at 42, fn. 20). However, that is simply not the case. The question before the circuit court and this Court is not whether the right person was arrested or convicted, but whether counsel's performance was deficient in litigating the identification issues, including Mr. Rimmer's defense of misidentification.

Moreover, again the State attempts to argue that trial counsel was not deficient because of the corroborating evidence that was introduced against Mr. Rimmer (AB at 42). But, any corroborating evidence did not place Mr. Rimmer at the crime scene. In fact, the evidence at the crime scene, including the eyewitness identifications, points to someone other than Mr. Rimmer committing the crimes. Therefore, the conclusory argument that trial counsel was not deficient for failing to consult with an eyewitness identification expert because of "corroborative" evidence is not legally sufficient to defeat Mr. Rimmer's claims. Indeed, because trial counsel did not even consider consulting with an expert and did not do so, his post-hoc rationalizations which were adopted by the circuit court and the State are entitled to no deference.

The State ignores much of Dr. Brigham's testimony regarding the flaws in the identification procedure and the value that the information and testimony could have had during the motion to suppress and trial. Instead the State again repeats the inaccurate misstatement that Dr. Brigham somehow conceded that there was so much corroborative evidence in this case that supported the identifications (AB at 43). The State's comment is patently false. Dr. Brigham specifically testified that while the amount of or lack of corroborating evidence might play a part in whether he was called to testify in a case, it would be meaningless and inappropriate for him to testify about non-eyewitness aspects of a case (2SPC-R. 1790).

As to Mr. Rimmer's claim regarding the other suspects that were being investigated in this case, the State prefers to re-characterize Mr. Rimmer's claim, and apparently then not have to admit that there were other suspects in this case (AB at 44).[3] For example, Mr. Rimmer's complaint that trial counsel failed to follow-up or investigate any other suspects or even present this information to the jury, the State argues that trial counsel did not want to impeach fingerprint examiner Bucknor because she assisted the defense (AB at 44). However,

[3]The State refers to this issue as: "Questioning Officers Lewis and Howard and fingerprint examiner Deidre Bucknor" (AB at 44).

the point of Mr. Rimmer's claim was not that Bucknor was not impeached, but that despite her testimony that she identified numerous fingerprints at the crime scene that did not match Mr. Rimmer or Parker, trial counsel failed to ask her about the other suspects listed in the fingerprint report or the instruction that she not compare the unknown prints to some of those other suspects. Thus, Mr. Rimmer agrees with the State – Bucknor's analysis supported Mr. Rimmer's defense and it was not necessary to impeach her about the analysis. But, it was necessary to elicit additional information and perhaps conduct an investigation into the other suspects in the case – the only reference to which came in Bucknor's report.

The State argues that the circuit court was correct in crediting trial counsel's testimony that he did not know what use it would have been to present the information about the other suspects to the jury (AB 45-6). However, since trial was unaware of any of the information about the other suspects, it certainly cannot be said that he had any reasonable strategy in failing to investigate or present the evidence he did have. This is not simply a disagreement with trial counsel as to how to cross-examine the State's witnesses, the issue presents a disagreement as to whether the jury was entitled to know that in a case of mistaken identity there were other suspects whose fingerprints were obtained and booking photos were obtained and placed into line-ups.

In addition to the other suspects, there was also information concerning leads that was useful to Mr. Rimmer's defense. At the evidentiary hearing, trial counsel attempted to dismiss the leads and information by suggesting that it was unimportant. The State presents trial counsel's post-hoc rationalizations to attempt to defeat Mr. Rimmer's claim (AB at 47-8). But, again, trial counsel did not investigate the issue. Thus, his testimony that it was unimportant carries little weight. In actuality, trial counsel could have shown that several significant leads were ignored by law enforcement. The leads would have fit with trial counsel's defense strategy of misidentification.

As to the allegations concerning trial counsel's mishandling of witness Johanne Rimmer, the State fails to address the incorrect standard the circuit court used in addressing Mr. Rimmer's claim, instead adopting that standard in arguing the claim. See AB at 50. The court indicated that rehabilitating Mrs. Rimmer would not have "chang[ed] the result of the guilt phase" (2SPC-R. 929). Of course it was not Mr. Rimmer's burden to show that the outcome of the guilt phase would have been different had trial counsel rehabilitated Mrs. Rimmer. Mr. Rimmer was required, based on all of the evidence, to show that trial counsel deficiencies undermined confidence in the outcome of the trial.[4]

[4]The State again argues that in light of the evidence presented, Mr. Rimmer cannot meet the "chang[ed] the outcome burden." However, as to the evidence presented at trial, it is important to note that the only evidence linking Mr. Rimmer to the actual crime scene and being the shooter was two severely flawed eyewitness identifications, while there was much evidence to suggest someone other than Mr.

Rimmer was the shooter.

Also, trial counsel made clear that he either did not obtain Mr. Rimmer's employment records and if he did, he did not review them. Thus, any alleged strategy must be considered in light of trial counsel's failure to investigate and prepare. Trial counsel's strategy is only reasonable to the extent that his investigation was reasonable. 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.").

Thus, the State's suggestion that trial counsel had a reasoned trial strategy for not presenting accurate evidence of Mr. Rimmer's financial situation (AB at 49-50), is limited by the fact that he did not even review the employment records. And, if the information the State elicited from Mrs. Rimmer was irrelevant, as the State and trial counsel contend (AB at 49, fn. 23), then why did trial counsel not assert an objection to it? The State wanted the jury to hear that 1) Mr. Rimmmer did not make much money; 2) Mr. Rimmer needed money; and 3) that Mr. Rimmer was arrested with a large sum of unexplained cash on his person. The State made the information important. Had trial counsel corrected the inaccurate information presented by the State, he could have addressed and diminished the evidence so that it was no use to the State in advancing its theory of the case.

Mr. Rimmer contends that trial counsel was ineffective in failing to object to the questioning of Mrs. Rimmer and her communications with Mr. Rimmer based on marital privilege. Trial counsel had no strategic reason for failing to object (2SPC-R. 607). Had trial counsel objected the State would not have been allowed to elicit the information. Trial counsel's failure to object combined with all of the other deficiencies and errors was prejudicial.

Trial counsel's performance was deficient. Due to trial counsel's errors Mr. Rimmer was prejudiced. Relief is warranted.

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.

Again, the State attempts to re-characterize and divide Mr. Rimmer's claim in order not to address the total picture of the errors that occurred at the penalty phase. For example, the State attempts to argue that because trial counsel's caseload was not excessive, he was not ineffective (AB at 61). First, the record is clear – the efforts made in investigating for Mr. Rimmer's penalty phase began several months after he was arrested and charged with capital murder. The State argues that it does not matter that Mr. Rimmer's penalty phase was seriously delayed and only began weeks before it commenced (AB at 62, fn. 27). However, under the law the limited time in which the penalty phase investigation occurred is undoubtedly germane to the issue of trial counsel's performance. See ABA Guidelines for the

Appointment and Performance of Counsel in Death Penalty Cases 11.8.3 (1989).

In addition, trial counsel specifically informed the trial court that at the time he was preparing for Mr. Rimmer's penalty phase he was involved with at least two other capital cases as well as other complicated litigation (R. 1729-32). Though the State would rather rely on trial counsel's evidentiary hearing testimony, that testimony is not supported by the trial record.

In addition to the State's attempt to suggest that the timing of the penalty phase investigation did not matter, the State also argues that the obligations for investigation and preparing mitigation fell on Mr. Rimmer, his family and the mental expert's shoulders. See AB at 64, 65. This is not the law. Recently, the United States Supreme Court again stated:

"It is unquestioned that under the prevailing professional norms at the time of Porter's trial, counsel had 'an obligation to conduct a thorough investigation of the defendant's background.'" Porter v. McCollum, 130 S.Ct. 447, 452 (2009), *quoting* Williams v. Taylor, 529 U.S. 362, 396 (2000); see also Wiggins v. Smith, 539 U.S. 510, 524 (2003)("[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.'")(emphasis in original)(citations omitted).

Likewise, this Court has also repeatedly stated that in reviewing the deficient performance prong of an ineffective assistance of counsel claim: "[w]e begin with the premise that "an attorney's obligation to investigate and prepare for the penalty portion of a capital case cannot be overstated because this is an integral part of a capital case." Hurst v. State, 18 So. 3d 975 (Fla. 2009), *quoting* State v. Pearce, 994 So. 2d 1094, 1102 (Fla. 2008); Parker v. State, 3 So. 2d 974 (Fla. 2009); State v. Riechmann, 777 So. 2d 342, 350 (Fla. 2000). Thus, it was neither Mr. Rimmer and his family nor the mental health expert's responsibility to discover mitigating evidence – it was trial counsel's.

The State suggests that trial counsel's investigation was thorough because Mr. Rimmer presented only cumulative evidence to the evidence presented at the penalty phase (AB at 62, 70). The State's characterization is refuted by the record.

The State does concede that the evidence of the horrendous physical and emotional abuse and neglect suffered by Mr. Rimmer was not previously presented, but the State excuses trial counsel's ignorance because "he was not told of the abuse by anyone." (AB at 62, 65). First, the State's assertion is false. Mr. Rimmer specifically told Dr. Jacobson, his mental health expert about his background. Dr. Jacobson included a synopsis of the interview in her report and provided that report to trial counsel. The report stated:

> 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). Thus, to suggest that trial counsel was not on notice of the severe abuse and deprivation Mr. Rimmer suffered as a child is ludicrous.[5] Moreover, the only witness trial counsel even interviewed that would have possessed the information about Mr. Rimmer's childhood and pre-adolescence was Mr. Rimmer's father – the person who was the abuser. Trial counsel did not speak to either of Mr. Rimmer's siblings[6] or relatives that were in Ohio at the time he lived with his father. The State's reliance on Marshall v. State, 854 So. 2d 1235 (Fla. 2003), and Stewart v. State, 801 So. 2d 59 (Fla. 2001), is misplaced. See AB at 68-69. In both of those cases, this Court found that trial counsel was not deficient in failing to uncover mitigating evidence of physical abuse. However, in Marshall, this Court specifically noted that Marshall denied being abuse to his trial counsel, and two experts. 854 So. 2d at 1248. Likewise, in Stewart, this Court noted that trial counsel spoke to numerous witnesses, including the defendant, the defendant's step-sisters and father and no one mentioned any indication about abuse. 801 So. 2d at 67. However, that is not the case here. Here, trial counsel was not only aware of the violence between Mr. Rimmer's parents, but Mr. Rimmer also specifically outlined much about his past to his mental health expert.

---

[5]The State attempts to cast the information about Mr. Rimmer's childhood as simply "physical abuse", and even goes so far as to suggest that since Mr. Rimmer characterized it as "punishment" it was not that big of a deal (AB at 71). In Porter, the Supreme Court noted that the excuse that Porter described the abuse in his home as "over-discipline[]" was an unacceptable failure on trial counsel's part to further investigate the issue. See 130 S.Ct. at 453.

And, of course, there was much more to Mr. Rimmer's nightmarish childhood than simply "punishment". As the evidentiary hearing record reflects, Mr. Rimmer and his brothers were used as pawns by a mentally ill father who ignored, neglected and severely beat them on a daily basis. Though the State tries to minimize this mitigation, there is no doubt that this is the "kind of troubled history" the United States Supreme Court "ha[s] declared relevant to assessing a defendant's moral culpability." Porter, 130 S.Ct. at 454, *quoting* Wiggins v. Smith, 539 U.S. 510, 535 (2003). As the Supreme Court recognized in Porter, to "discount to irrelevance" such an abusive childhood is unreasonable. Id.

[6]The State defends trial counsel's limited investigation and failure to speak to Mr. Rimmer's brothers because trial counsel was "aware" of Mr. Rimmer's brother, O'Dell, but did not want to have him testify because he had been convicted of murder (AB at 81). But, trial counsel did not have to present O'Dell Rimmer's testimony to the jury. Rather, all he had to do to conduct a thorough investigation was speak to him, or have his mental health expert speak to him. Had he done so he would have obtained much useful mitigation that he could have then determined how to present to the jury. Because trial counsel failed to even speak to him, he cannot be said to have made a reasonable strategic decision.

Though the State did not have the benefit of Porter at the time its brief was filed, the United States Supreme Court has now made abundantly clear that Porter's reference to a mental health expert that his father had "over-discipline[d]" him was enough notice for trial counsel to investigate the issue of childhood abuse. 130 S.Ct. at 453. And it would be deemed unreasonable in light of such a remark to fail to investigate further. Id. Thus, trial counsel's failure to investigate Mr. Rimmer's nightmarish childhood, in light of what Mr. Rimmer, himself, reported, was undoubtedly deficient.

Furthermore, the mitigation evidence trial counsel did present at trial was in no way reflective of a thorough investigation. Trial counsel failed to obtain or review Mr. Rimmer's mental health records which contained numerous contacts with mental health professionals and continuing, serious mental health problems that Mr. Rimmer was experiencing.[7] The State repeatedly insists that Mr. Rimmer denied previous mental health treatment (AB at 75). However, during Dr. Jacobsen's penalty phase testimony she stated that Mr. Rimmer had told her that: "[h]e told me he had never seen a mental health professional before except when he was in the Appalachian Correctional Institute." (R. 1910-5). Thus, the State's assertion to the contrary is false.

Likewise, the State's assertion that Mr. Rimmer's previous mental health records do not show any treatment or that he was diagnosed with a mental illness is also false (AB at 77). In fact, the records describe Mr. Rimmer's "psychiatric difficulties" and that they have existed for many years (2SPC-R. 1662). The records reflect that Mr. Rimmer requested psychological assistance as far back as 1988 and was placed in different group therapies (2SPC-R. 1663-5). In 1991, when Mr. Rimmer was 23 years old, he reported that he was experiencing "nightmarish visualizations" and he admitted that these problems were ongoing since he was a child; he again requested psychological

---

[7] The State argues that the fact that trial counsel retained a mental health expert in and of itself was sufficient (AB at 73). However, the State's argument defies logic. Here, the State retained a mental health expert, yet provided that expert with no background or collateral materials. This was so, despite the fact that Mr. Rimmer specifically told the expert that he had received mental health treatment in the past. The cross-examination by the State at Mr. Rimmer's penalty phase focused on the lack of corroborative evidence to support the expert's opinion. See R. 1910-5. Due to the lack of corroboration, the State impugned Dr. Jacobsen's opinion, calling it nothing more than mental mumbo-jumbo. Likewise, the trial court completely disregarded the mental health testimony:

> 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**.

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

assistance (2SPC-R. 1666). The following year, he again reported disturbing "dreams" and was feeling sick to his stomach. The reports are consistent and at one point, in 1992, Mr. Rimmer is declared a psychological emergency (2SPC-R. 1667). The jury had no idea that Mr. Rimmer did in fact experience disturbing psychological symptoms for many years. The jury also had no idea that Mr. Rimmer was volunteering several evenings a week at Stuart Weiss' automobile repair shop in order to learn the trade. Or, the Mr. Rimmer still visited his highschool girlfriend's mother on a regular basis to check on her and see if she needed anything. The picture that trial counsel presented for the jury was seriously inaccurate and incomplete.

Since, as the State, points out, it was trial counsel's strategy to humanize Mr. Rimmer (AB at 65), there was a plethora of evidence, that was in no way cumulative to that which was presented at the penalty phase, that trial counsel simply failed to discover because he did not conduct a thorough investigation.

The State argues that the evidence presented at Mr. Rimmer's evidentiary hearing did not result in any prejudice to Mr. Rimmer (AB at 63, 71-2, 80). Indeed, the State maintains that the evidence was simply cumulative of that which was presented at the penalty phase (AB at 63). However, the mitigation that the jury heard, which was far from unanimous in its 9 - 3 recommendation for death, just scratched the surface of Mr. Rimmer's background and mental health.

In arguing the lack of prejudice, the State primarily focuses on Mr. Rimmer's abusive childhood, and the statutory mitigator that at the time of the crimes Mr. Rimmer suffered from an extreme mental or emotional disturbance. See AB at 71-2, 74. The State discounts this evidence again suggesting that the abuse was "hidden" from trial counsel and the mental health testimony was simply "modified" (AB at 79).

However, the State's argument is not supported by the record. First, it is important to note that the trial court at sentencing did not find that the State had established an aggravator that had been presented to the jury. Also, on direct appeal, this Court struck an aggravator. Thus, the already divided jury as to Mr. Rimmer's sentence heard two improper aggravating circumstances.

In addition, the trial court completely ignored the mental health testimony because there was no historical evidence of prior treatment or psychological problems. It is now known that evidence existed at the time of Mr. Rimmer's penalty phase that showed longstanding psychological symptoms and treatment.

Based on the psychological evidence introduced at Mr. Rimmer's evidentiary hearing, a statutory mental health mitigator has now been established as well as much non-statutory mental health mitigation. Also, the information about Mr. Rimmer's childhood and early

adolescence was completely unknown to the jury. The evidence establishes severe physical and emotional abuse and neglect of Mr. Rimmer by his own father. As the United States Supreme Court recently stated in Porter, this is the "kind of troubled history" that has been "declared relevant to assessing a defendant's moral culpability." Porter, 130 S.Ct. at 454, *quoting* Wiggins v. Smith, 539 U.S. 510, 535 (2003). As the Supreme Court recognized in Porter, to "discount to irrelevance" such an abusive childhood is unreasonable. Id.

Likewise, the additional information about Mr. Rimmer's relationships with colleagues, friends and his family is evidence that was unknown to the jury, yet completely consistent with trial counsel's strategy of "humanizing" Mr. Rimmer.

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

ARGUMENT IV

THE CIRCUIT COURT ERRED IN DENYING MR. RIMMER'S CLAIM THAT HE 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.

Initially, the State argues that Mr. Rimmer has waived his ineffective assistance of counsel claim as to the undisclosed reports and evidence of the investigation of other suspects (AB at 86). However, in the argument concerning ineffective assistance of counsel, Mr. Rimmer specifically argued that trial counsel should have investigated the information about other suspects. Thus, Mr. Rimmer did not, as the State suggests, make a conclusory argument as to the ineffectiveness of trial counsel.

The State begins to address Mr. Rimmer's argument by suggesting that due diligence is required in establishing a Brady claim (AB at 87-88). However, this is simply not the case. Under the United States Supreme Court law, there is no diligence requirement for a defendant to establish a Brady claim. See Banks v. Drehtke, 540 U.S. 668, 695-6 (2004). The Supreme Court stated: "A rule thus declaring "prosecutor may hide, defendant must seek," is not tenable in a system constitutionally bound to accord defendants due process." 540 U.S. at 696. Thus, the State is incorrect in suggesting that a diligence requirement exists.

Here, trial counsel made clear that he did not have the undisclosed records from the Florida Department of Law Enforcement (2SPC-R. 1840), the Palm Beach Sheriff's Office (2SPC-R. 1846-7), and the Plantation Police Department (2SPC-R. 1857). See Def. Exs. 43, 44, 45, 46. Thus, contrary to the State's argument, there was suppression of the various documents and much of the information contained within. However, the State attempts to argue that the documents are not material to Mr. Rimmer's case (AB at 89-91).

However, trial counsel and the State's characterization of the exhibits is inaccurate. The various reports demonstrated that there were many other individuals who were considered "other suspects" and were involved in the chain of custody of the weapon used in the crimes. None of the other suspects were linked to Mr. Rimmer.

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). Special Agent Bart 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.).

This evidence, the other suspects, fingerprints and additional line-ups, was not known to trial counsel. However, certainly such evidence was exactly the type of evidence that would have assisted trial counsel in advancing his defense theory of misidentification.

Likewise, the evidence concerning the weapon used in the crimes and the robbery homicide that occurred in Plantaion, just days before the crime at issue, would have been information that trial counsel could have used in Mr. Rimmer's defense.

While the State again attempts to minimize the impact of the evidence by arguing the strength of the "undisputed" eyewitness identifications, the record does not support such a characterization. Indeed, Davis chose someone else from the photo lineup before being told who Moore chose and choosing Mr. Rimmer's photo.

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 the outcome of Mr. Rimmer's convictions and sentences. Relief is warranted.

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.

The State argues that Mr. Rimmer's claim is conclusory (AB at 92, fn 43.). However, a review of Mr. Rimmer's argument demonstrates that he made specific allegations about the misconduct that occurred in his case. See IB at 95-7.

The State also argues that Mr. Rimmer cannot prove prejudice because this Court found no fundamental error on direct appeal. However, the standards of assessing an error on direct appeal and an ineffective assistance of counsel claim are not the same. Additionally, the prejudice of an ineffective assistance of counsel claim must be considered cumulatively. 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 State argues that the letter written to Det. Lewis does not prove a conflict of interest when considered in the context of the reasons given for writing the letter and trial counsel's "vigorous" challenge to the State's case at trial (AB at 98).

However, Mr. Rimmer has proven that at the time the letter was written, trial counsel was actively representing Mr. Rimmer in his capital trial proceedings. See, e.g., *ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, 10.10.1 and 10.11. Further, trial counsel specifically testified that he felt sympathetic toward Det. Lewis due to reasons not even related to Mr. Rimmer's case. 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. Relief is warranted.

CONCLUSION

Based upon the foregoing argument, reasoning, citation to legal authority and the record, Mr. Rimmer requests relief.

CERTIFICATION OF TYPE SIZE AND STYLE

This is to certify that the Initial Brief of Appellant has been reproduced in a 12 point Courier type, a font that is not proportionately spaced.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Reply Brief of Appellant has been furnished by U.S Mail to Leslie Campbell, Assistant Attorney General, Office of the Attorney General, 1515 N. Flagler Drive, 9th Floor, West Palm Beach, Florida 33401, this 28th day of December, 2009.

Respectfully submitted,

LINDA McDERMOTT
Florida Bar No. 0102857
McClain & McDermott, P.A.
141 N.E. 30th St.
Wilton Manors, Florida 33334
(850) 322-2171

CELESTE BACCHI
Florida Bar No. 0688983
Assistant CCRC-S
OFFICE OF THE CAPITAL
COLLATERAL REGIONAL COUNSEL
101 N.E. 3rd Ave., Suite 400
Fort Lauderdale, FL 33301
(954) 713-1284

Attorneys for Appellant