IN THE SUPREME COURT OF FLORIDA

VICTOR MARCUS FARR,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

CASE NO. SC08-1406

ON APPEAL FROM THE CIRCUIT COURT
OF THE THIRD JUDICIAL CIRCUIT,
IN AND FOR COLUMBIA COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

BILL McCOLLUM
ATTORNEY GENERAL

THOMAS D. WINOKUR
ASSISTANT ATTORNEY GENERAL
FLORIDA BAR NO. 906336

OFFICE OF THE ATTORNEY GENERAL
PL-01, THE CAPITOL
TALLAHASSEE, FL 32399-1050
(850) 414-3300
(850) 922-6674

COUNSEL FOR APPELLEE

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PRELIMINARY STATEMENT

Appellant, VICTOR MARCUS FARR, was the defendant in the trial court; this brief will refer to Appellant as such, Defendant, or by proper name. Appellee, the State of Florida, was the prosecution below; the brief will refer to Appellee the prosecution or the State.

The record on appeal consists of 51 volumes, which will be referenced as "V," followed by the respective volume number designated in the Index to the Record on Appeal, followed by any appropriate page number. The first direct appeal record (Case No. 77,925), will be designated as "D1," followed by the Roman numeral corresponding to the respective record volume, followed by page number. The second direct appeal record (Case No. 82,894), will be designated as "D2," followed by the Roman numeral corresponding to the respective record volume, followed by page number. "IB" will designate Appellant's Initial Brief, followed by any appropriate page number.

All bold-type emphasis is supplied, and all other emphasis is contained within original quotations unless the contrary is indicated.

STATEMENT OF THE CASE AND FACTS

The facts of this case were set forth by this in Appellant's first direct appeal as follows:

> In December 1990, Farr attempted to kidnap and then shot and wounded two women outside a Lake City bar. He attempted to escape by forcibly taking a car in which a man and woman were sitting. The man fled, but Farr managed to crank the car and escape with the woman still inside. When he was pursued by officers later, Farr

deliberately accelerated the car into a tree, hoping to kill himself and his hostage. The woman was severely injured in the crash and died of her injuries soon thereafter. Farr was only slightly injured.

After indictment, Farr entered into an agreement with the State in which he pled guilty to all twelve counts of the indictment. As part of the agreement, Farr requested that the state attorney ask for the death penalty. He explained that he wanted to die. After determining that Farr was capable of knowingly and voluntarily entering the plea and that he understood its consequences, the trial court accepted the guilty plea. Farr then knowingly and voluntarily waived his right to a penalty phase jury, and the cause proceeded to sentencing.

At the time of sentencing the record contained a psychiatric report and presentence investigation report containing information about Farr's troubled childhood, numerous suicide attempts, the murder of his mother, psychological disorders resulting in hospitalization, sexual abuse suffered as a child, and his chronic alcoholism and drug abuse, among other matters. In imposing the death penalty, the court apparently was influenced by Farr's decision not to present a case in mitigation. The judge considered in mitigation only Farr's apparent intoxication at the time of the murder, which the court found not to be of mitigating value and ignored the mitigating evidence contained in the presentence report and the psychiatric report. In aggravation the trial court found that: (1) Farr had previously been convicted of another capital felony or of a felony involving the threat of violence to the person; (2) the homicide was committed while Farr was fleeing from the commission of a kidnapping, a robbery, two attempted kidnappings, and an attempted robbery; (3) the homicide was committed to disrupt or hinder the lawful exercise of a governmental function or the enforcement of laws; and (4) the homicide was especially heinous, atrocious, or cruel. Based on these findings, the trial court imposed the death sentence.

Farr v. State, 621 So.2d 1368, 1369 (Fla. 1993) (footnotes omitted) ("Farr I").

This Court vacated the death sentence, ruling that "the trial court failed to consider all of the available mitigating evidence." Id. at 1370.

This Court gave the following account of the resentencing proceedings on remand: "Farr forbade his attorney to present a case for mitigation on remand and ... Farr himself took the witness stand and systematically refuted, belied, or disclaimed virtually the entire case for mitigation that existed in the earlier appeal." Farr v. State, 656 So.2d 448, 449 (Fla. 1995) ("Farr II". This Court affirmed the death sentence on the following ground:

> [W]e find no error in the trial court's rejection of the case for mitigation. At the trial level, the defendant is entitled to control the overall objectives of counsel's argument. Here, Farr himself controverted the case for mitigation, which was his right. It is within the trial court's discretion to reject either opinion or factual evidence in mitigation where there is record support for the conclusion that it is untrustworthy. That being the case here, the trial court did not err.

Id. at 449-450.

On April 7, 1997, Farr filed his "Motion To Vacate Judgments Of Conviction And Sentence With Special Request For Leave To Amend" (V31 1-39). Following proceedings upon Farr's wish at the time to waive postconviction relief proceedings, dating through 1999, Farr sought to disqualify the former judge presiding over the case (V31 94-113, V32 34-46), who recused himself on his own motion in February, 2000

(V32 106). Thereafter, Appellant received new counsel due to conflict (V32 147-165). When Appellant finally filed his amended motion for postconviction relief in June 2005, he also filed a motion seeking to disqualify the successor judge, as well as the entire Third Judicial Circuit (V1 160-170), which the court granted (V4 16-18). This Court denied the State's petition to review that order (V4 94).

Appellant amended motion for postconviction relief asserted the following claims: 1) his guilty plea was invalid; 2) he was subjected to physical and psychological abuse while jailed; 3) he was denied effective assistance of counsel because his attorney failed to explore a defense of voluntary intoxication; 4) his counsel failed to investigate the circumstances of the crash he was involved in on the day of his offense; 5) the State of Florida violated the principles of Brady v. Maryland, 373 U.S. 83 (1963), by allegedly withholding potentially exculpatory evidence; 6) his counsel was ineffective for failing to investigate potentially mitigating evidence; 7) the prosecutor was improperly permitted to draft Farr's sentencing memorandum; 8) he did not receive a proper mental health assessment; 9) the prosecution and law enforcement had improper contact with him while his counsel was not present; 10) his counsel was ineffective for failing to object to alleged prosecutorial misconduct; and 11) his conviction was constitutionally infirm because of the cumulative effect of his counsel's errors.

The court held an evidentiary hearing on the motion from November 5 through November 8, 2007 (V24 - V 30), and denied all grounds for

relief by written order filed May 19, 2008 (V7 121-141). This appeal follows.

SUMMARY OF ARGUMENT

ISSUE I. The trial court's finding that Appellant's trial counsel was not deficient with respect to any of the claimed errors was supported by the record. Moreover, Appellant did not establish that he would have chosen not to plead guilty but for the alleged deficiencies of counsel. The record amply supports the trial court's conclusion that Appellant was determined to plead guilty to the charges, even in the face of counsel's advice not to enter the plea.

ISSUE II. The plea colloquy, as well as Appellant's letters leading up to the plea, reflect that Appellant's decision to plead guilty was perfectly voluntary, and not compelled by mistreatment in jail. Any such claim is directly contrary to Appellant's clearly expressed intent at the time. Moreover, the court explicitly rejected the testimony of Appellant's witnesses for this ground as incredible.

ISSUE III. Evidence of intoxication alone is not sufficient to support a voluntary intoxication defense. Counsel did not conceal the availability of this defense from Appellant and then persuade him to plead guilty; instead, counsel discussed this defense with Appellant, who pleaded guilty against counsel's advice Appellant cannot fault counsel for failing to "present" a voluntary intoxication defense when counsel informed him of that defense but Appellant refused even to follow counsel's advice not to plead guilty.

ISSUE IV. By insisting on pleading guilty and by confessing his guilt to the State, Appellant rendered any further investigation by counsel pointless. It is objectively unreasonable, given

Appellant's express directions to counsel, his unequivocal correspondence with the judge, the prosecutor, and his counsel, and his knowing and voluntarily entered guilty pleas, to suggest that Appellant would have chosen to go to trial had counsel secured a crash reconstruction expert, and the court did not err in so finding.

ISSUE V. The contention that the polygraph examination was exculpatory was speculative, which does not support a Brady claim. Moreover, polygraph examination results are not discoverable. Morever, the claim that the prosecutor's notes and letter to the police was exculpatory is likewise speculative, and also were not discoverable. Appellant proved not Brady violation.

ISSUE VI. Pursuant to Schriro v. Landrigan, 550 U.S. 465, 127 S.Ct. 1933 (2007), Appellant may not waive the presentation of mitigation then claim ineffective assistance of counsel for failing to investigate and present mitigation. Under the circumstances presented here, any mitigation that counsel could have offered would have been rejected by Appellant, and the court did not err in so finding.

ISSUE VII. The record supports the court's findings that the resentencing court independently weighed the aggravating and mitigating circumstances and did not delegate its responsibility regarding preparation of the sentencing order to the State. The fact that the court used the State's sentencing memorandum as a template for its order is not improper.

ISSUE VIII. The record support the court's ruling that counsel was not ineffective for choosing not to further investigate Appellant's psychiatric history.

ISSUE IX. The record support the court's ruling that the State did not engage in unethical conduct in its contact with Appellant. First, all contacts were initiated by Appellant himself. Second, none of the contacts, in particular those of the prosecutor that occurred after the resentencing and years after the guilty plea, induced the plea, the decision to waive a penalty phase jury, or to waive mitigation.

ISSUE X. As none of the prosecutor's actions complained of were improper, counsel was not ineffective for failing to object.

ISSUE XI. Judicial remarks during the course of proceedings that are critical or disapproving of, or even hostile to, counsel, the parties, or their cases, ordinarily do not support a bias or partiality challenge. An examination of the evidentiary hearing transcript reveals no impropriety on the part of the judge, certainly not arising to the level of a denial of Appellant's right to a fair hearing.

ARGUMENT

ISSUE I

DID THE TRIAL COURT ERR IN DENYING APPELLANT'S CLAIMS THAT HIS PLEA WAS INVOLUNTARY BECAUSE IT WAS INDUCED BY INEFFECTIVE ASSISTANCE OF COUNSEL? (Restated)

Standard of review

"In reviewing a defendant's postconviction motion alleging ineffective assistance of counsel, this Court defers to the factual findings of the trial court to the extent that the findings are supported by competent, substantial evidence, but reviews *de novo* the application of the law to those facts." Gore v. State, 846 So.2d 461, 468 (Fla. 2003). See also Stephens v. State, 748 So.2d 1028, 1031-32 (Fla. 1999). "So long as its decisions are supported by competent, substantial evidence, this Court will not substitute its judgment for that of the trial court on questions of fact and, likewise, on the credibility of the witnesses and the weight to be given to the evidence by the trial court." Cummings-El v. State, 863 So.2d 246, 250 (Fla. 2003)(citing Stephens).

MERITS

a. Standards for ineffective assistance claims

In order to show that a defendant received ineffective assistance of counsel:

> **First, the defendant must show that counsel's performance was deficient.** This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. **Second, the defendant must show that the deficient performance prejudiced the defense.**

> This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

Strickland v. Washington, 466 U.S. 668, 687 (1984). See also Jackson v. State, 452 So.2d 533 (Fla. 1984).

In establishing deficiency of performance (the first prong of this test), "the defendant must show that counsel's representation fell below an objective standard of reasonableness" based on "prevailing professional norms." Strickland, 466 U.S. at 688; Cherry v. State, 781 So.2d 1040, 1048 (Fla. 2000). the Strickland Court expanded upon the deficient-performance prong as follows:

> **Judicial scrutiny of counsel's performance must be highly deferential.** It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. **Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action "might be considered sound trial strategy."**

Strickland, 466 U.S. at 689 (citation omitted).

In establishing prejudice (the second prong of this test):

> the 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.

Strickland, 466 U.S. at 688; Jackson, 452 So.2d at 535.

When a claim of ineffective assistance relates to a guilty plea, the prejudice prong requires the defendant to "demonstrate 'a reasonable probability that, but for counsel's errors, the defendant would not have pleaded guilty and would have insisted on going to trial.'" Zakrzewski v. State, 866 So.2d 688, 694 (Fla. 2003), citing Hill v. Lockhart, 474 U.S. 52, 59 (1985). "[I]n determining whether a reasonable probability exists that the defendant would have insisted on going to trial, a court should consider the totality of the circumstances surrounding the plea, including such factors as whether a particular defense was likely to succeed at trial, the colloquy between the defendant and the trial court at the time of the plea, and the difference between the sentence imposed under the plea and the maximum possible sentence the defendant faced at a trial." Grosvenor v. State, 874 So.2d 1176, 1181-82 (Fla. 2004).

b. The court's general findings

Appellant claims in this issue that his guilty plea was induced by ineffective assistance of trial counsel, William Slaughter, naming six specific areas of ineffectiveness. The court below ruled that Appellant could not establish prejudice regarding any of the specific claims for the same reason:

> There was no evidence presented to the Court that Farr would insist on going to trial even today.

> In fact, all the evidence before the Court established that Farr's decision to plead guilty was a firmly held decision. Farr told Judge Agner that Judge Slaughter had tried to talk him out of pleading and that Farr insisted. (Plea transcript - April 2, 1991, page 6) Two and a half years later at the resentencing, Farr did everything he could to make sure that the death penalty was again imposed. (Resentencing transcript - December 8, 1993) As recently as August 7, 1997, Farr confirmed that he still desired to move forward and face the death penalty. (SX72 - letter August 7, 1997) Given the strength and the long-standing nature of Farr's commitment, it is just inconceivable to this Court that any of the errors complained of by the defense are likely to have affected Farr's desire to plead guilty.

(V7 125).

This ruling correctly applies the prejudice requirement of Hill and Grosvenor. This was not a defendant who was cajoled, or even persuaded, by defense counsel into entering a guilty plea. To the contrary, this was a defendant who insisted upon pleading guilty, who even told the judge during his plea colloquy at least three times that Mr. Slaughter had tried to talk him out of pleading guilty (D1 I 4, 6, 11). Appellant's strong, "long-standing commitment" to accepting responsibility for his guilt was amply demonstrated at the evidentiary hearing. The State introduced numerous exhibits detailing the extent to which Appellant asserted he did not want to contest the charges or to present mitigating evidence.

For example, in a handwritten letter from Appellant dated February 20, 1991 sent to Thomas Coleman, the assistant state attorney, Appellant clearly suggests that he had no desire to proceed with prolonged litigation, noting: "If we can write up the paper work for the Death sen [sic]. We can save the State some money of me fighting

in court. Because at the end of my trail [sic], I plain [sic] to tell the jury I've ask [sic] for the death sen. And I told everone [sic] I plained [sic] to kill. And meant to kill. And will again" (V8 10-12).

The State introduced another letter, dated April 25, 1991, that Appellant sent to Judge Agner (V8 2-6). In the letter, Appellant described the circumstances precipitating the crime, expressed his remorse, and requested that Judge Agner sentence him to death. Appellant closed the letter with the following: "Maybe this will in-lite [sic] you on why I've requested the death-sen [sic]. For I feel that by me coldly killing her; and knowing I was going to end her life. I feel it to be the only thing to fit the crime." Id.

Appellant indicated at his first sentencing hearing that he did not want to present any evidence to a jury during the penalty phase (D1 III 14). Appellant told the trial court that he was very clear in his instructions to Slaughter, and that "if [Slaughter] didn't carry out my wishes, ... I would request another lawyer" (D1 III 63).

Even long after Appellant entered his guilty plea, he continued to express his desire not to contest the charges and his sentence. The State introduced a letter dated December 7, 1993, the day before Appellant's resentencing hearing, drafted by Slaughter but intended to convey Appellant's sentiments, and signed by Appellant (V8 44-45). In the letter, Appellant states, "I again instructed you that you are not to do or say anything which would in anyway oppose the death penalty being given to me. You advised me that you would follow that request, but that you would not actively seek or request the death penalty for me."

The "totality of the circumstances surrounding the plea" do not reflect that Appellant would have altered his insistence upon pleading guilty if Mr. Slaughter had taken the steps Appellant claims he should have. Appellant's express directions to Slaughter as to how he wanted to proceed; his letters to Slaughter, Coleman, and Judge Agner; his plea colloquy wherein he expressed that he fully understood his rights; all support the ruling of the court below regarding the Strickland/Hill prejudice prong. This conclusion alone supports the ruling below, regardless of the individual claims of deficient performance of counsel that Appellant asserts.

Nonetheless, the court below rejected each of the specific claims of deficient performance Appellant asserted, which the State will now address in turn.

c. Specific claims

1. "Counsel's unreasonable neglect of Mr. Farr and his legal defense"

The court below addressed this specific claim as follows:

> Farr first complained that Judge Slaughter did not visit him enough. Judge Slaughter had visited Farr briefly just before his formal appointment, had written Farr twice and had at least one phone conversation in the first 60 days of his appointment. (SX42; Hearing transcript - pages 197, 221). The fact that Slaughter did not visit Farr more often is hardly surprising or unusual. Slaughter also had a copy of Hunt's initial interview, which provided the necessary background information. In the initial stages of a criminal prosecution, the attorney is mainly interested in gathering the State's discovery materials and reviewing the charging document. All defendants want to see their lawyers more often. However, a defendant's subjective desire for the comfort of a face-to-face meeting with his attorney simply does not rise to the level

> of a professional obligation. The Court finds no deficiency as to this subclaim.

(V7 125-26).

The court's conclusions are sound. Moreover, Appellant's suggestion of how Appellant's alleged neglect led to his desire to plead guilty is unreasonable. "Ignored by counsel, verbally abused and threatened by those sworn to protect him, and advised by jail personnel to bite the bullet and accept that he deserved the death penalty, Mr. Farr decided that his only option was to procure for himself a death sentence" (IB 11). The State urges this Court to reject the suggestion that Appellant emphatically refused to contest his guilt in this case for several years merely because counsel, who never advised Appellant to plead guilty, did not visit him enough during the initial stages of the prosecution.[1] The court did not err in rejecting this claim.

2. "Counsel's disregard for Mr. Farr's history of severe depression and suicide attempts"

The court below addressed this specific claim as follows:

> Second, Farr contended that Judge Slaughter disregarded Farr's mental history. This is simply not true. On January 28, 1991, Slaughter applied for the appointment of a doctor to examine Farr. This motion was granted on February 12, 1991, and on February 19, 1991, Dr.

[1]Appellant refers throughout his brief, including in this sub-issue, to the 1989 ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases. Without conceding that Mr. Slaughter's actions fell short of these guidelines, the State asserts that the ABA Guidelines do not establish a legally-recognized minimum for effective representation, of which failure to comply is proof *ipso facto* of a deprivation of a defendant's constitutional right to effective counsel.

> Mhatre interviewed Farr. (SX1) No deficiency was shown as to this point.

(V7 126).

The court's ruling is sound and supported by the record. Slaughter testified that he was aware of Appellant's mental-health history and previous suicide attempts (V25 255), and that he moved for and received the appointment of a mental-health expert (V26 317). In no way did Slaughter ignore Appellant's mental-health issues prior to Appellant's guilty plea. The court did not err in rejecting this claim.

3. "Counsel's unreasonable failure to pursue the viable defense of voluntary intoxication to the charges"

The court below addressed this specific claim as follows:

> Third, Farr claimed that Judge Slaughter unreasonably decided not to pursue a voluntary intoxication defense. Slaughter was well aware of the potential for a voluntary intoxication defense. He explained at the hearing why he was not in favor of utilizing this defense. More importantly, he indicated that he did discuss this option with Fan. (Hearing transcript - pages 249 - 253, 323, 365 - 367) In deciding to plead guilty, Farr - was aware of this option. The fact that they decided not to pursue this avenue was a reasonable strategic decision and was not error on Slaughter's part.

(V7 126).

The court's ruling is sound and supported by the record. Slaughter testified that in his experience at the time he "had never seen ... a voluntary intox defense work in this area" (V25 250). Moreover, in Slaughter's professional opinion, a voluntary intoxication defense would not prevail unless the defendant testified

(V25 250-53). The mere fact that Appellant was intoxicated, even highly intoxicated, would not have been sufficient for a viable voluntary intoxication defense. See Linehan v. State, 476 So. 2d 1262 (Fla. 1985)(in order to maintain a voluntary intoxication defense, "the defendant must come forward with evidence of intoxication at the time of the offense sufficient to establish that he was unable to form the intent necessary to commit the crime charged;" evidence of alcohol consumption prior to the commission of a crime does not establish voluntary intoxication).

More importantly, Appellant's argument ignores Slaughter's testimony that he informed Appellant of the availability of a voluntary intoxication defense. At the time Slaughter went over the plea form with Appellant, he informed him of the possibility of a voluntary intoxication defense (V25 250). Appellant was aware of the availability of that defense, but chose to enter a guilty plea regardless.

Grosvenor v. State does not support Appellant's argument. In Grosvenor, this Court rejected the requirement imposed by some courts that a movant must prove the viability of a potential defense in order to establish prejudice under Hill for counsel's failure to advise the movant of that defense. Instead, this Court held that Hill prejudice was based upon the credibility of the movant's assertion that he or she would have proceeded to trial if advised of the defense. While viability of the defense is relevant to this credibility determination, it is not determinative. Grosvenor, 874 So.2d at 1180-81.

Grosvenor does not demonstrate that the court erred. First, any claim that this Court was suggesting that the facts of that case supported a viable intoxication defense is erroneous. The whole point of Grosvenor was that the *lack* of viability of the defense did not necessarily preclude a finding of Hill prejudice. The decision almost presumes that the defense there was *not* viable. Thus, it is unhelpful to Appellant that the available facts showed that he was intoxicated like the defendant in Grosvenor.

More importantly, counsel in Grosvenor did *not* advise the defendant of the availability of the voluntary intoxication defense. Id. at 1178. The "credibility" of Appellant's current assertion that he would have gone to trial if properly advised of the availability of an intoxication defense is certainly affected by the fact that he *was* actually advised of that defense.[2]

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[2]Moreover, it should also be noted that the trial court in Grosvenor had *presumed* deficient performance and based its ruling strictly upon the prejudice prong, so this Court did not address deficiency. Id. at 1182. Justice Bell noted in concurrence that counsel cannot be deficient for choosing not to advise a defendant of a nonviable defense:

> I do not see how counsel's failure to advise a defendant of a nonviable defense could ever constitute deficient performance. In fact, a better argument could be made that distorting a defendant's sense of the strengths and weaknesses of his or her position by falsely raising his or her hopes of success could itself constitute deficient performance. Because the circuit court found that Grosvenor could not have presented a viable defense of voluntary intoxication, we could affirm the circuit court's denial of her claim on the ground that she failed to demonstrate that her counsel's performance was deficient.

Id. at 1185, n.4 (Bell, J., concurring in part and dissenting in part).

Accordingly, the court did not err in rejecting this claim.

4. "Counsel's failure to investigate the facts and circumstances of the case"

The court below addressed this specific claim as follows:

> Fourth, Farr claimed that Judge Slaughter did not adequately investigate the vehicle crash. The Court did consider the testimony of the accident reconstruction expert. However, in light of Farr's various written assertions that he had intentionally run into the tree and his insistence that his attorney not do any further investigation, it is difficult to fault Slaughter for not going out and obtaining an expert such as Mr. Buchner. As Slaughter freely acknowledged, had litigation continued on, there were many areas to be investigated. However, Farr insisted on resolving this matter before those matters could be pursued. No deficiency has been shown.

(V7 126-27).

The court's ruling is sound and supported by the record. See Stano v. State, 520 So.2d 278 (Fla. 1988)("By insisting on pleading guilty and by telling counsel that he had confessed freely and voluntarily, Stano rendered any further investigation pointless"). Appellant's suggestion that Slaughter would not have "allowed" him to plead guilty with further investigation ignores Appellant's admission to the offenses and his determination to plead guilty. The court did not err in rejecting this claim.

5. "Counsel's unreasonable stipulation to an inaccurate and false 'factual basis' for Mr. Farr's plea to the offenses charged"

Appellant contends that the prosecutor's proffered factual basis for the offenses were unsupported by the statements of the witnesses or police reports and should have garnered an objection from Mr. Slaughter, who instead "allowed his client to plead to unproven major felonies" (IB 19-22). The court below addressed this specific claim as follows:

> Fifth, Farr suggested that Judge Slaughter was ineffective for failing to investigate the statement of facts. This is fairly far-fetched, particularly in light of Farr's sworn testimony that the statement of facts was true. (Plea transcript - April 2, 1991, page 30) No deficiency was shown.

(V8 127).

The court's ruling is sound and supported by the record. First, Appellant erroneously suggests that an adequate factual basis for a plea requires the State to "prove" the charged offenses. "The sole purpose of the [requirement to establish a factual basis] is to determine the accuracy of the plea, thereby avoiding a mistake." Williams v. State, 316 So.2d 267, 271 (Fla. 1975). "The trial judge, under this provision, is to ensure that the facts of the case fit the offense with which the defendant is charged." Id. "Clearly, the purpose is to avoid a defendant's mistakenly entering a plea of guilty to the wrong offense." Id. at 272. See also Wright v. State, 376 So.2d 236, 238 (Fla. 1st DCA 1979):

> The function of the court under Rule 3.172(a) is not to pass on the sufficiency of the evidence to support a conviction, but rather to determine that a "factual basis" exists before accepting the plea. This means that the court makes inquiry as to the facts sufficient to satisfy

> itself that a prima facie basis exists for the charge against the defendant.

In short, the purpose of a factual basis is not to determine whether the "evidence" is sufficient to support guilt, as there is no "evidence" at the time of the plea. It is merely designed to determine whether the facts of which the defendant is accused and to which he admits, constitute the crimes to which he is pleading guilty. Here, the facts as set forth in the factual basis were sufficient to establish that the charged crimes had been committed, regardless of whether every detail was included in the witness statements and police reports.

Second, as Appellant acknowledges, Mr. Slaughter indicated at the plea hearing that the facts set forth in the factual basis were "consistent with [his] investigation" (D1 I 29-30). Regardless of whether the police reports and witness statements indicated every detail contained in the factual basis, Slaughter had no reason to object if he found the basis to be accurate based upon his own investigation.

Moreover, at the evidentiary hearing, Slaughter took issue with some of Appellant's claimed inaccuracies in the factual basis. For instance, Slaughter believed that Appellant was "playing word games" in attempting to distinguish between the police "following" Appellant and being "in pursuit" of Appellant (V25 265).

Finally, the record supports the court's conclusion that Appellant himself agreed with the factual basis at the plea hearing. At the conclusion of the reading of the factual basis, the following colloquy occurred:

> THE COURT: Mr. Farr, what is your response to what you have heard Mr. Coleman say?
> THE DEFENDANT: It's true.
> THE COURT: Witnesses could be brought by the State of Florida, who would present evidence substantially to the effect that he had in his narrative statement a few moments ago?
> THE DEFENDANT: Yes, sir.

(D1 I 30).

Appellant has failed to demonstrate that the court erred in finding that counsel was not ineffective for choosing not to object to the factual basis.

6. "Counsel's failure to protect Mr. Farr from physical and psychological abuse in jail prior to and during the time he agreed to plead guilty"

Appellant claimed in his motion that he was subjected to various forms of abuse by the jail staff prior to entering his plea. Appellant claimed that counsel performed deficiently for failing to take sufficient steps to stop this abuse, which deficiency induced the guilty plea. To support this claim, Appellant introduced at the evidentiary hearing the testimony of three inmates, Kenneth Texton, Leon Douglas, and Joel Heath, each of whom had been incarcerated with Appellant in the Columbia County Jail.[3]

The court addressed this claim as follows:

> Sixth, Farr indicated that Judge Slaughter was ineffective for not preventing abuse of Farr in jail. The defense did present three witnesses to suggest that Farr was intentionally targeted in the jail to make him plead guilty. The Court finds that these three witnesses were incredible. Their stories appear totally

[3]These witnesses' testimony will be addressed in greater detail in Issue II below.

> concocted and fabricated. Aside from that, it is a little hard to conceive what the attorney was supposed to do to control jail conduct. Slaughter did call a jail official known to Slaughter when Farr reported getting beaten up by guards and attempted to determine if the claim was bona fide. Lt. Maxwell indicated that there had been an incident, but it involved other inmates, not guards. When Slaughter confronted Farr with Lt. Maxwell's version, Farr essentially acknowledged his error. (Hearing transcript - page 234) There was no showing of a professional deficiency.

(V7 127-28).

Again, the ruling is sound and supported by the record. Slaughter testified that when he heard the allegation of the beating he telephoned the chief corrections officer, Maxwell, who told him that an investigation into the incident revealed that three inmates had beaten up Appellant and that the correctional officers had pulled the other inmates off, and that he believed Maxwell to be honest (V25 227). When Slaughter told Appellant what Maxwell had told him, Appellant responded, "well, I thought it was guards" (V25 233). Appellant has failed to demonstrate that the trial court's conclusion that Slaughter's conduct in this regard was not unprofessional was erroneous.

More importantly, Appellant ignores the court's specific finding that his witnesses were incredible. "This Court does not substitute its judgment for that of the trial court on issues of fact when competent, substantial evidence supports the circuit court's factual findings or on issues of witness credibility." Smith v. State, 931 So.2d 790, 803 (Fla. 2006). The court accepted Slaughter's

testimony and rejected the testimony of Appellant's witnesses. In short, the court did not err in rejecting this claim.

The court closed the order on this claim for relief with the following:

> In sum, Judge Slaughter did nothing unprofessional in his assistance to Farr as it related to the guilty plea. The plea was entered at Farr's insistence. Slaughter tried to talk him out of pleading, but Farr was determined. Regardless of any alleged deficiency, there was no showing that Farr would have insisted on going to trial had those matters been done. The guilty plea should not be vacated.

(V7 128). Appellant has failed to demonstrate that the court's conclusions were erroneous, and this Court should affirm its ruling rejecting this ground for relief.

ISSUE II

DID THE COURT ERR IN REJECTING APPELLANT'S CLAIM THAT HIS GUILTY PLEA WAS INVOLUNTARY BECAUSE IT RESULTED FROM PHYSICAL AND PSYCHOLOGICAL INTIMIDATION, ABUSE, STRESS AND DURESS? (Restated)

Standard of review

An order denying a postconviction motion to withdraw a plea as on the ground that it was coerced is reviewed for abuse of discretion, and the court is free to reject the defendant's claims of coercion. Padgett v. State, 780 So.2d 1021, 1022 (Fla. 4th Dist. 2001).

Merits

Appellant claimed in his motion that he was subjected to various forms of abuse by the jail staff prior to entering his plea, which demonstrates that his plea was entered under duress (V1 59-61). To support this claim, Appellant introduced at the evidentiary hearing the testimony of three inmates, Kenneth Texton, Leon Douglas, and Joel Heath, each of whom had been incarcerated with Appellant in the Columbia County Jail.

Texton testified that he had been incarcerated with Appellant in Columbia County Jail in 1991 (V27 561). Texton recalled one of the prison guards "staring" down Farr (V27 563). Texton also recalled an incident when corrections officers took Appellant away for at least two hours, and when he returned, Appellant told the other inmates that he had been beaten (V27 564). According to Texton's testimony, Appellant had bruises on his face and blood on his shirt (V27 567). Texton conceded that he never saw anyone beat Appellant (V27 572).

Douglas testified similarly. He noted that, one evening, Appellant was removed from the area of jail where he was being housed, and when he returned a few hours later he looked as though he had been beaten (V27 578). Douglas also testified that Appellant's disposition seemed to change after this incident (V27 579). Additionally, Douglas claimed that following this beating, Appellant expressed that he wanted the death penalty (V27 582-83). Appellant also expressed to Douglas that he was fearful of being abused over a long period of incarceration (V27 587). Douglas also claims that Appellant told him that he was pleased with the fact that Judge Agner accepted his guilty plea, because Farr wanted to be sentenced to death (V27 587-88).

Heath also testified that Appellant had been taken from a holding area and was returned the next day, looking as though he had been beaten (V28 670-71).

The court addressed this claim as follows:

> In his second claim, Farr claimed that his plea was involuntary and the result of coercion. His claim rested almost exclusively on the testimony of three inmates who testified in the hearing. As already indicated, the Court rejects their testimony as totally incredible. The likelihood of coercion having affected the plea is also belied by the history of this case as noted above. For about six and a half years, Farr has steadfastly maintained his desire to proceed forward with the agreed upon plea. It is inconceivable that whatever events happened in the jail in early 1991 are likely to have had that long-term effect. The Court has reviewed the plea transcript of April 2, 1991, and finds no basis to say that the plea was involuntary or the result of coercion. The request to vacate the plea on this basis is denied.

(V7 128-129).

In order to determine whether a plea was knowingly and voluntarily entered, the plea colloquy should be scrutinized to assess whether the defendant "was made aware of the consequences of his plea, was apprised of the constitutional rights he was waiving, and pled guilty voluntarily." Ocha v. State, 826 So.2d 956, 965 (Fla. 2002). A review of the plea colloquy reflects that the court properly ascertained that the guilty plea was made voluntarily and intelligently.

A review of the plea colloquy and Appellant's letters leading up to the plea reflect that Appellant's decision to plead guilty was perfectly voluntary. At no point did Appellant ever make any indication that his plea was compelled by mistreatment in jail; in fact, any such claim is directly contrary to Appellant's clearly expressed intent at the time.

As in sub-issue 6 of Issue I, the factual basis for this issue relies upon testimony that was explicitly rejected by the court below as incredible. Again, "[t]his Court does not substitute its judgment for that of the trial court on issues of fact when competent, substantial evidence supports the circuit court's factual findings or on issues of witness credibility." Smith v. State. There is no evidence accepted by the court as credible other than Appellant's self-serving letters that Appellant was beaten or, more specifically, that these beatings compelled him to plead guilty to the offenses. Moreover, any such claim is belied by Appellant's long-standing refusal to contest his guilt ans sentence, long after any alleged

coercion occurred in jail prior to the plea. Accordingly, Appellant has failed to demonstrate that the court erred in denying this claim for relief.

ISSUE III

DID THE COURT ERR IN DENYING APPELLANT'S CLAIM THAT COUNSEL WAS INEFFECTIVE FOR FAILING PRESENT A DEFENSE OF VOLUNTARY INTOXICATION?

Standard of review

Please see Issue I for the standard of review related to an ineffective assistance of counsel order.

Merits

The court below addressed this claim as follows:

> In Claim III, Farr contended that Judge Slaughter was ineffective for not pursuing an involuntary intoxication defense. This is essentially the same contention denied by the Court earlier under Claim I, subpart 3. The Court will largely rely on the earlier analysis. The Court would note that a similar argument was made and rejected in Koon v. Duggar, 619 So.2d 246 (Fla. 1993). As in Koon, Judge Slaughter discussed the option with Farr and Farr rejected pursuing this avenue. Neither a deficiency in conduct, nor a likelihood that Farr would not have plead guilty was shown. Therefore, this claim is denied.

(V7 129).

In sub-issue c of Issue I, Appellant challenged "counsel's unreasonable failure to pursue the viable defense of voluntary intoxication to the charges." The State fails to apprehend any difference between these claims, and will therefore rely primarily on its answer to that sub-issue above.

Again, the fact that Appellant can demonstrate that he was intoxicated that night does not *ipso facto* demonstrate that counsel was constitutionally ineffective for failing to pursue an intoxication defense. The defendant must prove that at the time of

the offense sufficient to establish that he was unable to form the intent necessary to commit the crime charged. Linehan. Moreover, Mr. Slaughter testified that he believed that an intoxication defense rarely succeeds, is especially disfavored with jurors in Columbia County, and would be especially difficult to prove without Appellant's testimony at trial (V25 250-53). Slaughter's considerable experience deserves deference in this respect. See e.g., Provenzano v. Singletary, 148 F.3d 1327, 1332 (11th Cir. 1998) ("Our strong reluctance to second guess strategic decision is even greater where those decisions were made by experienced criminal defense counsel").

Appellant has failed to demonstrate that Slaughter's approach to the voluntary intoxication defense was professionally unreasonable. See Hill v. Lockhart, Grosvenor v. State. This is especially true where Slaughter did discuss the availability of this defense with Appellant (V25 250). Slaughter did not conceal the availability of this defense and then persuade Appellant to plead guilty; instead, Slaughter did discuss this defense with Appellant, who pleaded guilty against Slaughter's advice (D1 I 4, 6, 11). Appellant cannot fault Slaughter for failing to "present" a voluntary intoxication defense when Appellant refused even to follow Slaughter's advice not to plead guilty. See Henry v. State, 937 So.2d 563, 574 (Fla. 2006) ("[t]he reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements and actions"); Rose v. State, 617 So. 2d 294, 297 (Fla. 1993)("[w]hen a defendant preempts his attorney's strategy by

insisting that a different defense be followed, no claim of ineffectiveness can be made”). Accordingly, the court did not err in denying this claim for relief.

ISSUE IV

> DID THE COURT ERR IN DENYING APPELLANT'S CLAIM THAT COUNSEL WAS INEFFECTIVE FOR FAILING TO INVESTIGATE THE FACTS AND CIRCUMSTANCES OF THE COLLISION AND TO PRESENT EVIDENCE THAT THE CRASH WAS AN ACCIDENT? (Restated)

Standard of review

Please see Issue I for the standard of review related to an ineffective assistance of counsel order.

Merits

Appellant argues that Mr. Slaughter did not adequately investigate the circumstances of the crash that lead to the death of Shirley Bryant. Appellant opines that testimony provided during the postconviction hearing evidences that Appellant's crash was an accident, and that a reasonable attorney would have investigated the underlying circumstances.

The court concluded that this issue was same claim as that considered and rejected in Issue I, sub-issue four above, and adopted its earlier analysis, which read as follows:

> Fourth, Farr claimed that Judge Slaughter did not adequately investigate the vehicle crash. The Court did consider the testimony of the accident reconstruction expert. However, in light of Farr's various written assertions that he had intentionally run into the tree and his insistence that his attorney not do any further investigation, it is difficult to fault Slaughter for not going out and obtaining an expert such as Mr. Buchner. As Slaughter freely acknowledged, had litigation continued on, there were many areas to be investigated. However, Farr insisted on resolving this matter before those matters could be pursued. No deficiency has been shown.

(V7 126-27).

The State agrees. Slaughter was confronted with a client who indicated to him at various points that a) the police ran him off the road, that b) he intended to kill himself and Shirley Bryant, the passenger, and finally that 3) he only intended to kill Shirley Bryant (V25 262), and a client who insisted, against his advice, to plead guilty. Against this background, Appellant concludes that no reasonable counsel would have failed to hire an accident reconstruction expert to demonstrate that the crash was an accident, a theory that his own client was denying. The court's rejection of this claim was not error.

If the case had proceeded further, Slaughter might have pursued any number of lines of defense, but Appellant's own account of the events and his desire to plead guilty rendered further investigation futile. See Stano v. State, 520 So.2d 278 (Fla. 1988)("By insisting on pleading guilty and by telling counsel that he had confessed freely and voluntarily, Stano rendered any further investigation pointless"); Henry v. State, 937 So.2d 563, 574 (Fla. 2006) ("[t]he reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements and actions"). See also Waters v. Thomas, 46 F.3d 1506, 1513-14 (11th Cir. 1995):

> That other witnesses could have been called or other testimony elicited usually proves at most the wholly unremarkable fact that with the luxury of time and the opportunity to focus resources on specific parts of a made record, post-conviction counsel will inevitably identify shortcomings in the performance of prior counsel. As we have noted before, in retrospect, one may always identify

> shortcomings, but perfection is not the standard of effective assistance. The widespread use of the tactic of attacking trial counsel by showing what "might have been" proves that nothing is clearer than hindsight – except perhaps the rule that we will not judge trial counsel's performance through hindsight.

The pertinent question is not whether an accident reconstruction expert could have been consulted, but whether counsel's performance was reasonable under the circumstances. It is objectively unreasonable, given Appellant's express directions to Slaughter, his unequivocal correspondence with Judge Agner, Slaughter, and Coleman, and his knowing and voluntarily entered guilty pleas, to suggest that Appellant would have chosen to go to to trial had Slaughter secured a crash reconstruction expert. See Hill; Grosvenor. Accordingly, the court did not err in rejecting this claim.

ISSUE V

DID THE COURT ERR IN REJECTING APPELLANT'S BRADY CLAIMS? (Restated)

Standard of review

Review of a claim under Brady v. Maryland, 373 U.S. 83, 87, 83 S.Ct. 1194 (1963) is a "mixed question of law and fact." Rogers v. State, 782 So.2d 373, 377 (Fla. 2001). "The standard requires an independent review of the legal question of prejudice while giving deference to the trial court's factual findings and ensures the uniform application of the law." Id.

Merits

In his motion, Appellant claimed that the State withheld three pieces of exculpatory material: polygraph examination results and two of the prosecutions notes. The court rejected this claim as follows:

> Farr argued that the prosecutor deliberately withheld exculpatory evidence by not disclosing a failed polygraph examination of Farr relating to a crime in Texas and two of the. prosecutor's notes. The Court does not find that either of these items constitute "exculpatory evidence" as the term has been legally defined. Nor can the Court imagine how the asserted violations had any reasonable probability of having affected Farr's decision to plead guilty or the trial court's sentence of death. Therefore, Claim V is denied.

(V7 130).

This Court has held that a defendant must show three components to establish a claim under Brady: (1) the evidence must be favorable to the defendant because it is materially exculpatory or impeaching; (2) the evidence must have been withheld by the State, either willfully or inadvertently; and (3) prejudice to the defendant must

have ensued. Foster v. State, 810 So.2d 910, 916 n.6 (Fla. 2002). "Under *Brady*, the undisclosed evidence is material if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." Guzman v. State, 868 So.2d 498, 506 (Fla. 2003). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. (internal quotation marks and citation omitted). The burden to establish these factors is on the defendant, and his failure to establish all three is fatal to the claim. Stewart v. State, 801 So. 2d 59, 70 (Fla. 2001). That is, "[a] criminal defendant alleging a *Brady* violation bears the burden to show prejudice, i.e., to show a reasonable probability that the undisclosed evidence would have produced a different verdict." Guzman, 868 So. 2d at 506 (citing Strickler v. Greene, 527 U.S. 263, 281 n.20, 289 (1999)). The State will address three pieces of alleged Brady material in turn.

A) Polygraph examination report

While Appellant was jailed on these charges, he gave a statement to the San Angelo, Texas Police Department "implicating himself in an armed robbery of a jewelry store in San Angelo, Texas, February 12, 1980," in which a clerk was shot and killed (V9 73-74). Appellant was then administered a polygraph examination with questions related to that incident. The polygraph examiner indicated in his report that he believed that Appellant was untruthful. The examiner indicated that Appellant wanted to attribute the failure to his

(Appellant's) uncertainty over the number of shots he fired during the robbery. Id.[4]

Appellant claims that this polygraph examination was exculpatory, because it demonstrated that "the state knew that Mr. Farr [who had already admitted his involvement in the instant crimes] was fabricating his involvement in crimes" (IB 49). The State disagrees.

First, the fact that a polygraph report pertaining to an unrelated crime may be exculpatory to that unrelated crime does not establish that the report is exculpatory to the crimes here charged. Any such claim is speculative and cannot support a claim of a Brady violation. See Wright v. State, 857 So.2d 861, 870 (Fla. 2003) (holding that there was no Brady violation because the exculpatory effect of the disputed documents was merely speculative).

Second, and more significantly, a polygraph report is not evidence and thus not Brady material. Sochor v. State, 883 So.2d 766, 787 (Fla. 2004); Anderson v. State, 241 So. 2d 390, 395 (Fla. 1970) ("Under this decision the evidence must not only be useful, but also admissible. The results of polygraph tests are not admissible as evidence under Florida law. . . . Since the polygraph results were not admissible as evidence, they were not the type of test results

[4]Appellant includes numerous details relating to the San Angelo robbery/murder that are not supported by any of the record he cites for them (IB 49-50). All Appellant cites is the polygraph examination report, and a short selection of testimony from a witness who knew Appellant when he lived in San Angelo. Nor has undersigned been able to locate record support for these "facts" anywhere else in the record.

susceptible to pre-trial discovery"), vacated on other grounds, 408 U.S. 938 (1972); see also Jacobs v. State, 396 So.2d 713, 716 (Fla. 1981) ("Polygraph results themselves are not discoverable").

Accordingly, the court did not err in denying this portion of this claim.

B) Prosecutor's notes

Appellant introduced prosecutor's notes that "flagged" several matter for follow-up investigation after the grand jury, including the following: "problem of victim's identifying the defendant" (V8 115, 116-17).

At the evidentiary hearing, Mr. Coleman indicated that the notation may have been based upon what he read in the reports (as opposed to independent witness interview), but it may also have referred to the "pragmatic" problem that the witnesses before the grand jury could not identify the defendant without his presence there (V24 27-28).

At most, the material at issue constituted Coleman's mental impression of the witness identification. An attorney's mental impression is not evidence and thus not subject to disclosure. Van Poyck v. State, 694 So.2d 686, 698 (Fla. 1997); Bryan v. Butterworth, 692 So. 2d 878, 879-880 (Fla. 1997). This claim was properly denied on this basis alone.

Even if this were not an attorney's mental impression, Appellant admitted in his motion that the defense "was provided with eyewitness descriptions of the shooter that did not match Mr. Farr," but claimed that the defense was not informed that the State had a "problem

identifying the victim" (V1 83). A more reasonable interpretation of the prosecutor's note is that any such identification "problem" was the very fact that eyewitness descriptions of the shooter that did not match Mr. Farr, a fact disclosed to the defense. Moreover, as Mr. Coleman indicated, it could simply have related to the absence of an identification before the grand jury. Either way, the State did not fail to disclose any exculpatory material to the defense. The court did not err.

C) Prosecutor's letter to Lieutenant Albritton

Finally, Appellant contends that the prosecutor's trial strategy, expressed in a letter to the police requesting that they further investigate whether and to what extent defendant was intoxicated when he committed the crimes (V8 142-43), constituted Brady material. Specifically, Appellant claims that the prosecutor's statement in the letter, "If we can show that [Appellant drank those six beers that he bought at the store], it will make him 'less drunk' at the time of the crimes," was a "directive" and that as a result "witnesses were apparently coached to tell investigators that Mr. Farr was not drunk" (IB 53). To the contrary, the prosecutor's statement, explicitly made as a result of his belief that voluntary intoxication would be a defense is obviously trial strategy, and not evidence subject to disclosure. Van Poyck, 694 So.2d at 698; Bryan, 692 So.2d at 879-880. Moreover, any claim that this statement constituted a "directive" to "coach" witnesses to downplay Appellant's intoxication is purely speculative. See Wright v. State, 857 So.2d 861, 870 (Fla. 2003) (holding that there was no

Brady violation because the exculpatory effect of the disputed documents was merely speculative).

Based upon the foregoing, the court did not err in denying Appellant's Brady claims.

ISSUE VI

DID THE TRIAL COURT ERR IN DENYING APPELLANT'S CLAIM THAT COUNSEL WAS INEFFECTIVE FOR CHOOSING NOT TO INVESTIGATE EVIDENCE OF MITIGATING CIRCUMSTANCES? (Restated)

Standard of review

Please see Issue I for the standard of review related to an ineffective assistance of counsel order.

Merits

At the original sentencing, the court found four aggravating factors supporting the death penalty: "(1) Farr had previously been convicted of another capital felony or of a felony involving the threat of violence to the person; (2) the homicide was committed while Farr was fleeing from the commission of a kidnapping, a robbery, two attempted kidnappings, and an attempted robbery; (3) the homicide was committed to disrupt or hinder the lawful exercise of a governmental function or the enforcement of laws; and (4) the homicide was especially heinous, atrocious, or cruel." Farr I, 621 So.2d at 1369. This court "agree[d] with the trial court's conclusions respecting aggravating circumstances," finding that "[t]he four factors cited by the trial court clearly were established beyond a reasonable doubt." Id. at 1370. However, noting that "the record contained a psychiatric report and presentence investigation report containing information about Farr's troubled childhood, numerous suicide attempts, the murder of his mother, psychological disorders resulting in hospitalization, sexual abuse suffered as a child, and his chronic alcoholism and drug abuse, among other matters," this Court vacated the death sentence, finding that the court "failed to consider all

of the available mitigating evidence." Id. at 1369-70. This Court directed the trial court to "conduct a new penalty phase hearing in which it weighs all available mitigating evidence against the aggravating factors." Id.

On December 7, 1993, one day prior to the resentencing proceeding, Appellant wrote a letter to Mr. Slaughter setting forth instructions regarding the resentencing hearing (V8 44-45). Appellant read this letter at the resentencing hearing the following day, and confirmed that it expressed his wishes (DII VII 455-460). Among other things, Appellant indicated that it was his "desire to against proceed to the penalty phase without a jury," and informed counsel "I do not you to present evidence or testimony or argument regarding any mitigating circumstances on my behalf" (DII VII 456, 458). As to the possible mitigating circumstances that this Court noted in Farr I, Appellant indicated, "some of these 'mitigating circumstances' never existed, and those that did, had nothing whatsoever to do with any actions on the night I killed Shirley Bryant" (DII VII 458).

Appellant thereupon, as this Court put it in Farr II, "systematically refuted, belied, or disclaimed virtually the entire case for mitigation that existed in the earlier appeal." Farr II, 656 So.2d at 449. The court found again the four originally-found aggravators and discussed in detail the possible mitigators (DII VII 494-511). The court found that "no mitigating circumstances, either statutory or nonstatutory, exist to outweigh or offset the aggravating circumstances which have been proven to the Court beyond

and to the exclusion of every reasonable doubt" (DII VI 511). This Court affirmed the death sentence, noting that a capital defendant "is entitled to control the overall objectives of counsel's argument," and that Appellant "controverted the case for mitigation, which was his right." Id. "It is within the trial court's discretion to reject either opinion or factual evidence in mitigation where there is record support for the conclusion that it is untrustworthy." Farr II at 449-450.

In Appellant's motion, he claimed that counsel was ineffective for failing to investigate and present mitigation, in spite of Appellant's explicit wishes (V1 89-130). The court rejected this claim as follows:

> In this claim, Farr contended that Judge Slaughter was ineffective for failing to investigate and present mitigating circumstances. Investigation and presentation are two different issues. The failure to "present" mitigation evidence has already been determined by the Supreme Court. Farr v. State, 656 So.2d 448 (Fla. 1995). As indicated, "At the trial, the defendant is entitled to control the overall objectives of counsel's argument. Farr himself controverted the case for mitigation, which was his right." Farr at 449 (citations omitted). Since it was Farr's decision what to present at the hearing, his attorney could not have been ineffective for following his client's dictates.
>
> The issue of Judge Slaughter's investigation of mitigation is a closer point. By the time of the resentencing, Slaughter had obtained Dr. Mhatre's report (SX1), Hunt's interview (SX8), the discovery materials and a presentence investigative report. Slaughter was also aware, based on a review of these records, that intoxication may have been a factor in the crimes. As set out at the resentencing hearing, these documents suggested seven potential areas of mitigation:

(A)My abusive and unsettled childhood.
(B) My history of alcohol abuse and alcoholism.
(C)My previous suicide attempts.
(D)My history of depression.
(E)My previous hospitalizations for depression and hallucinations.
(F)My heavy-drinking, intoxicated condition at the time I kidnaped and killed Ms. Bryant.
(G)Dr. Mahtre's diagnosis of me as having a personality disorder with antisocial traits.

(Resentencing transcript, December 8, 1993 - pages 11 - 12)

Slaughter had discussed this potential mitigation with Dr. Mhatre at least three times. (Hearing transcript - page 319) He also had discussed it with his client, and Farr had directed him not to investigate any mitigation. (Hearing transcript - page 311) Slaughter had done little other investigation largely because Farr had told him not to investigate further and that much of what he had told Dr. Mhatre was untrue or exaggerated. At the resentencing hearing, Farr had carefully dissected most of the seven potential mitigation areas and refuted or minimized them. (Resentencing transcript, December 8, 1993 - pages 24 - 41) Farr did not just offer a blanket denial, he admitted some things were true and denied other things. For instance, he admitted abusing alcohol and some drugs, but acknowledged that it was greatly exaggerated. He admitted going to mental institutions two times, but indicated he did this to get out of trouble. Based on the sentencing judge's findings Farr credibly established that there was no substantial mitigation.

Current counsel certainly has generated a great volume of legally admissible mitigation evidence. By and large the proposed evidence fits into the original seven categories of potential mitigation. The issue is whether Judge Slaughter's performance was deficient for not having generated this detailed information for discussion with Farr. It is important to note that in the Court's estimation, none of this evidence established that Farr lied at the resentencing hearing. For instance, although others may view Farr's childhood as deprived, it is certainly not necessarily wrong for Farr to

view it as a "cop out to say that that [childhood] played any part in that night, for it did not." (Resentencing transcript, December 8, 1993 - page 26) A large segment of the population would certainly share Farr's views. As indicated by the Supreme Court, the reasonableness of counsel's actions has to be assessed in light of their client's statements or actions. Henry v State, 937 So.2d 563, 573 (Fla. 2006). In the final analysis, this Court is of the opinion that Judge Slaughter's mitigation investigation was not professionally unreasonable under the fairly unique circumstances of this case.

As to the prejudice prong of Strickland, the Court must determine whether the alleged failure to investigate is likely to have affected the outcome of the sentencing. As indicated, the defendant presented a large volume of legally admissible mitigation evidence at this proceeding. In general, Judge Slaughter was aware of most of these areas of potential mitigation. It is also quite clear that Slaughter had not thoroughly investigated any of these areas and only had Dr. Mhatre available as a potential mitigation witness. So, the question is if Slaughter had more thoroughly investigated these areas, is it likely that Judge Agner would have imposed a life sentence? The Court does not believe this is likely.

As the Supreme Court has already indicated, it was Farr's right to decide not to present mitigation evidence. There is no reason to believe, and the Court does not believe, that Farr would have changed his mind had the fifteen mitigation witnesses called at this proceeding been available as witnesses back in December 1993. Since Judge Agner would not have heard the witnesses, there is no reason to believe his decision would have been different.

Assuming for sake of argument that these witnesses had been called, the Court still has every reason to believe that Farr would have testified in contradiction to the evidence. Again, Farr did not just issue a defiant denial of all evidence, he carefully refuted the mitigation point by point. None of the purported mitigation evidence was so strong that it is likely to have changed the outcome of the proceeding in the face of Farr's testimony. The Court finds that the defense failed to show that any lack of investigation on Slaughter's part is

> likely to have changed the outcome of the sentencing proceeding.

(V7 130-134).

The court did not err. Appellant may not waive the presentation of mitigation then claim ineffective assistance of counsel for failing to investigate and present mitigation. Schriro v. Landrigan, 550 U.S. 465, 127 S.Ct. 1933 (2007). In Landrigan, the Supreme Court confronted for the first time "a situation in which a client interferes with counsel's efforts to present mitigating evidence to a sentencing court." Landrigan, 550 U.S. at 478, 127 S.Ct. at 1942. There, Landrigan's counsel informed the trial court that he had advised Landrigan "very strongly" that he should present mitigating evidence. Id. at 469, 127 S.Ct. at 1933. The trial court questioned Landrigan, who confirmed that he instructed his counsel not to present mitigating evidence and that he understood the consequences. Id. at 479-80, 127 S.Ct. at 1943. When Landrigan's was proffering, at the court's request, the mitigating circumstances he intended to present, Landrigan interrupted multiple times to explain away the mitigating characteristics of the evidence, and also to reaffirm that he did not want the evidence presented in court. Id. at 469-470, 127 S.Ct. at 1937-38. Finally, at the end of the sentencing hearing, Landrigan stated, "I think if you want to give me the death penalty, just bring it right on. I'm ready for it." Id.

The state court rejected Landrigan's application for state postconviction relief claiming that counsel should have investigated a "biological component" for his violent behavior." Id. at 471, 127

S.Ct. at 1938. Landrigan sought federal habeas relief, which the district court denied, but the Circuit Court of Appeals reversed. Id. at 472, 127 S.Ct. at 1938-39. The Court of Appeals found that Landrigan's counsel "did little to prepare for the sentencing aspect of the case," and that "investigation would have revealed a wealth of mitigating evidence, including the family's history of drug and alcohol abuse and propensity for violence." Id.

The Supreme Court reversed the Court of Appeals. The Court noted, "[i]f Landrigan issued such an instruction [to his counsel not to offer any mitigating evidence], counsel's failure to investigate further could not have been prejudicial under *Strickland*," Id. at 475, 127 S.Ct. at 1941, and that "regardless of what information counsel might have uncovered in his investigation, Landrigan would have interrupted and refused to allow his counsel to present any such evidence. Id. at 477, 127 S.Ct. at 1942.[5]

Appellant's actions at his 1993 resentencing were strikingly similar to Landrigan's at his sentencing. If anything, Appellant's refusal to allow the sentencing court to consider mitigating evidence was more explicit than Landrigan's. Appellant here did not simply interrupt the presentation of mitigating evidence, he refuted much of it point by point. Moreover, unlike Landrigan, the resentencing

[5]The fact that the Supreme Court indicated that Landrigan's mitigation evidence was "weak" does not control the outcome of the case. The opinion clearly states that "***regardless*** of what information counsel might have uncovered in his investigation," it would not have been presented based upon Landrigan's explicit refusal to allow his counsel to present any such evidence. This reasoning would apply equally to strong mitigation evidence.

record here includes a detailed list of areas of mitigation that Slaughter would have explored had Appellant not chosen to forego presentation of mitigation.

Like postconviction counsel in Landrigan, postconviction counsel here presented a "wealth" of mitigation evidence that could have been used at sentencing. As the court here recognized, the evidence generally related to the mitigation grounds mentioned at the resentencing hearing, so Appellant was not misinformed about possible areas of mitigation.

In short, Landrigan makes it clear that a capital defendant, who has been advised of grounds for mitigation that could be presented, may not waive the presentation of mitigation then claim ineffective assistance of counsel for failing to investigate and present mitigation. See also Taylor v. Horn, 504 F.3d 416 (3rd Cir. 2007)(following Landrigan and rejecting a claim of ineffectiveness for failing to present mental health mitigation; develop life-history mitigation; present evidence of substance abuse because, while this capital defendant was not belligerent and obstructive like Landrigan, he was just as determined not to present mitigating evidence and therefore "whatever counsel could have uncovered, Taylor would not have permitted any witnesses to testify, and was therefore not prejudiced by any inadequacy in counsel's investigation or decision not to present mitigation evidence").

This Court has also held that counsel is not ineffective for failing to investigate mitigation where a defendant waived presentation of mitigation. See Grim v. State, 971 So.2d 85 (Fla.

2007)(concluding that counsel conducted a reasonable investigation in light of defendant's decision to waive mitigation evidence during the penalty phase); Lamarca v. State, 931 So.2d 838, 850 (Fla. 2006)(rejecting a claim of ineffectiveness for failing to present mitigating evidence at penalty phase, in part, because the defendant waived mitigation and because "the trial court followed the procedures required to ensure Lamarca knowingly waived his right to present mitigation"); Hannon v. State, 941 So.2d 1109, 1126-1127 & n. 8 (Fla. 2006)(holding that there was no ineffectiveness of counsel for not presenting mitigating evidence where the defendant waived the presentation of mitigation).

Accordingly, the court did not err in rejecting this claim for relief.

ISSUE VII

DID THE COURT ERR IN DENYING APPELLANT'S CLAIM THAT THE SENTENCING ORDER WAS IMPROPERLY DRAFTED BY THE PROSECUTOR? (Restated)

Standard of review

Merits

Prior to the 1993 resentencing, Mr. Coleman sent a proposed judgment and sentence to Appellant's counsel for his consideration (V24 112-13, V9 75-92). No one, in particular Judge Agner, had asked the prosecutor to draft the proposed order, and the proposed order was never forwarded to Judge Agner (V24 113). Coleman also prepared a "Memorandum of Law Regarding Sentence" that he did give to Judge Agner prior to sentencing (V24 117, V9 94-101). Coleman expected Judge Agner to file this memorandum, but it was apparently never filed (V24 117). The memorandum was substantially identical to the proposed order, except that it was written from the State's perspective, "urging" the Court to make certain findings and concluding that the court should reimpose the death penalty. (V9 94-101).

At the sentencing hearing, after the presentation of evidence, Judge Agner retired to chambers "to consider this matter some while" (DII VII 493). After about an hour, Judge Agner summoned counsel, and gave or showed them a copy of the sentencing memorandum with marginal notations on, "changes, additions, things like that he had done" (V24 126, V25 171). Judge Agner then indicated that he needed a sentencing order prepared in accord with his findings, Coleman prepared the sentencing order "in accord with his instructions word

for word, putting down what had he written that I should do" (V24 126-27).

In his motion, Appellant claimed that the trial court, by relying in part on the State's sentencing memorandum, failed to independently weigh aggravating and mitigating circumstances and provide its reasoning for review on appeal (V1 131-139).

The court below addressed this claim as follows:

> The defense first asserted in this claim that the trial judge failed to independently weigh the aggravating and mitigating circumstances. The defense based this contention on the fact that the prosecutor provided the bulk of the language used in the sentencing order by providing the Court with a memorandum of law. (DX 33) Second, the defense contended that Judge Slaughter was ineffective for not objecting to the sentencing procedure.
> Prior to sentencing, the prosecutor sent a copy of a proposed order (DX 30) and a memorandum of law (DX 33) to the defense attorney. The proposed order was not forwarded to the Court prior to sentencing. Prior to sentencing, Slaughter discussed the memorandum of law separately with the prosecutor and Farr. (Hearing transcript - page 341) It is not crystal clear at what point the memorandum of law was presented to Judge Agner, but at some point prior to his ruling, the State's memorandum of law was presented to Judge Agner. After argument and the presentation of evidence at the resentencing, Judge Agner took a recess for about an hour. (Hearing transcript - page 171) Judge Agner then met with the attorneys in chambers to discuss his proposed order. The proposed order had been constructed using the findings from the sentencing memorandum as a template with handwritten changes and additions by the judge. The bulk of the findings were identical to the State's proposed findings. The main additions were determinations by the Court as to the testimony presented that day by the defendant. The prosecutor was then asked to prepare a final order in conformity with the Judge's instructions. (Hearing transcript - pages 126 -

127; 342) Judge Agner met again with the attorneys in chambers to discuss the proposed order after it was typed up by the State. (Hearing transcript - page 127) The sentencing was then announced on the record and the final product was filed as the Judgment and Sentence in this cause. (Resentencing transcript, December 8, 1993 - pages 47 - 68) No objection was interposed as to the order or the process followed.

As to the defense claim relating to the process followed in drafting the sentencing order, this claim is procedurally barred. As to the defense claim that Judge Agner did not independently weigh the aggravating and mitigating circumstances, this claim is also procedurally barred. Walton v State, 847 So.2d 438, 446-447 (Fla. 2003). The Court specifically rejects the defense contention that because the sentencing memorandum did not get made a part of the original record, there was no basis to appeal. The defense attorney and the defendant were totally apprised as to the circumstances involved. There was no impermissible ex parte communication or other wrongful acts on the part of the prosecutor. The defendant chose not to raise this issue on direct appeal and he is barred from raising the issue at this time.

The defense attempted to avoid this obvious bar by claiming that Slaughter was ineffective for not objecting to the procedure followed. The Court can find no basis to say that Slaughter was deficient in not objecting to the procedure employed. The prosecutor informed Slaughter well in advance of sentencing what his proposed findings would be. (DX 30; 33) Farr was made aware of these proposed findings by Slaughter. Farr concurred in these findings. (Resentencing transcript, December 8, 1993 - page 66) Judge Agner did in fact take time to independently weigh the circumstances and the proposed findings. It is simply a little difficult to imagine why the defense would have interposed an objection under the circumstances of this case. Even assuming for sake of argument that Slaughter's performance was deficient, the defense provided no basis to support a finding that Farr was prejudiced by the process followed. The only contention is a vague reference to some of the findings being inaccurate. It is difficult to see how an objection to the process employed had any

> likelihood of changing the factual findings of the court. It also highlights the fact that this is a procedurally barred claim, because claims of inaccuracies in the factual findings clearly should have been resolved on direct appeal. This claim is also denied.

(V7 135-138).

The court's conclusions were sound and supported by the record. First, this Court has ruled that such claims must be raised on direct appeal. In Walton v. State, 847 So.2d 438, 446 (Fla. 2003), the defendant similarly claimed that the trial judge improperly abdicated his sentencing responsibilities because he "relied upon the State's sentencing memorandum." The court ruled that the claim was procedurally barred: "Clearly, any claims regarding the conduct of the resentencing trial judge in the creation of his sentencing order could and should have been raised on direct appeal." Id. "Indeed, in *Swafford v. Dugger*, 569 So.2d 1264 (Fla. 1990), this Court specifically foreclosed argument regarding the trial court's failure 'to independently weigh the aggravating and mitigating factors' because 'they should have been raised, if at all, on direct appeal.'" Id. at 446-447.

The same is true here. The fact that the sentencing memorandum was apparently not contained in the record on appeal does not alter this conclusion. As the court below indicated, Appellant was amply aware of the sentencing procedure if he wished to contest it on direct appeal.

Even if this claim were not procedurally barred, it still does not merit relief. This Court's reasoning in Walton applies here:

> Even if this claim was not procedurally barred, Walton's contentions here are not supported by the record. The only evidentiary support for Walton's assertions here is the use of identical language in somewhat substantial portions of the final sentencing order and the sentencing memoranda submitted to the trial court by the State. This Court has specifically declared that trial courts must not delegate "the responsibility to prepare a sentencing order" to the State Attorney. *Patterson v. State*, 513 So.2d 1257, 1261 (Fla. 1987). In the instant case, however, it is clear that the State simply submitted a sentencing memorandum to the trial court for its consideration, which the trial court subsequently considered before writing its sentencing order. This act alone does not constitute error. See *Patton v. State*, 784 So.2d 380, 388 (Fla.2000) (citing *Anderson v. City of Bessemer City*, 470 U.S. 564, 572, 105 S.Ct. 1504, 84 L.Ed.2d 518 (1985), for the proposition that "even when the trial court adopts proposed findings verbatim, the findings are those of the court and may be reversed only if clearly erroneous"). Walton does not assert that any impermissible ex parte discussions regarding the resentencing or any other wrongful acts occurred in the creation of the sentencing order. Thus, because there is no evidence contained in the record supporting Walton's contention that the State created or originated the sentencing order, we find no reversible error.
>
> As nothing in the record supports Walton's assertions that the trial court delegated its responsibility regarding preparation of the sentencing order to the State, no reversible error occurred. Therefore, Walton's claim of ineffective assistance of counsel is also without merit. See *Engle v. Dugger*, 576 So.2d 696 (Fla. 1991); *Card v. State*, 497 So.2d 1169 (Fla. 1986) (holding that counsel is not ineffective for failing to raise meritless claims).

Walton, 847 So.2d at 447 (footnote omitted).

The same is true here. Judge Agner did not abdicate his responsibility to independently weigh aggravating and mitigating circumstances to the prosecutor. The record reflects that Judge

Agner did not request or receive a "proposed order" from either party, or adopt the State's memorandum verbatim, so Appellant has not proved a violation of the procedures set forth in Spencer v. State, 615 So.2d 688 (Fla. 1993). See Valle v. State, 965 So.2d 960, 965 n.9 (Fla. 2001)(citing Spencer for the proposition that "the trial court may not request that the parties submit proposed orders and adopt one of the proposals verbatim without a showing that the trial court independently weighed the aggravating and mitigating circumstances"). The record also reflects that Judge Agner spent an hour in chambers independently deliberating upon the sentence. The fact that he may have used the State's memorandum as a template is not prohibited by Patterson v. State, 513 So.2d 1257, 1261 (Fla. 1987). Likewise, the fact that the court had the prosecutor reduce his final order to writing does not violate the requirements of Patterson or Spencer, either.

Appellant suggests that the aggravators were "clearly not supported beyond a reasonable doubt" (IB 82). This argument ignores the fact that the resentencing merely adopted the aggravators from the first sentencing, which this Court had already ruled "clearly were established beyond a reasonable doubt." Farr I at 1370. The State also agrees with the court below that Appellant's objections to the mitigating circumstances do not demonstrate that the findings were erroneous.[6]

[6]For the same reason, Appellant's suggestion that counsel was ineffective for failing to object to the sentencing procedure set forth in this issue. Because the court did not violate his duty to independently evaluate the aggravating and mitigating factors, any objection would have been pointless. See Card v. State, 497 So.2d 1169

Finally, it should be noted that the court did not engage in any *ex parte* contact with the prosecutor in preparing the sentencing order. Slaughter was aware of, and participated in, the entire process. Accordingly, the below did not err in denying this claim for relief.

(Fla. 1986) (holding that counsel is not ineffective for failing to raise meritless claims).

ISSUE VIII

DID THE TRIAL COURT ERR IN DENYING APPELLANT'S CLAIM THAT COUNSEL WAS INEFFECTIVE FOR FAILING TO INVESTIGATE APPELLANT'S PSYCHIATRIC HISTORY? (Restated)

Standard of review

Please see Issue I for the standard of review related to an ineffective assistance of counsel order.

Merits

The court below addressed this claim as follows:

> In this claim, Farr contended that Judge Slaughter was ineffective by failing to investigate Farr's psychiatric history and to conduct a proper mental health assessment, and by counsel's unreasonable failure to pursue appropriate mental health defenses. This is basically a restatement of Claim I, subpart 2, and portions of Claim VI. It is not clear what particular part of the proceedings were supposed to have been affected by this failure. As stated earlier, Slaughter promptly obtained an examination by Dr. Mhatre to make sure Farr was competent to enter into a plea and to determine whether there was a sanity issue. (SX I) Dr. Mhatre opined that Farr was currently competent and sane at the time of the offense. Slaughter testified that his client was cooperative, intelligent and articulate. (Hearing transcript - page 378) Farr entered his guilty plea within six (6) weeks of being examined by Dr. Mhatre. As to the guilty plea, there is simply no basis to suggest that Slaughter should have done any further mental health investigation.
> Slaughter was not deficient in his performance, nor was Farr prejudiced as it related to the guilty plea.
> As to the December 8, 1993, resentencing, Slaughter testified that his client appeared sane and rational. (Hearing transcript - page 273) Slaughter further testified that he saw no basis to think that Farr was incompetent. (Hearing transcript - page 315) There is no contrary evidence and no reason to believe that Farr was incompetent at the time of the resentencing. There is no basis to suggest that

> Slaughter was ineffective or that Farr was prejudiced as to the lack of a competency evaluation at the time of the resentencing. The rest of this claim is simply a restatement of Farr's contention in Claim VI that the mitigation investigation was deficient. The Court will rely on its reasoning as set out in Claim VI as to the basis for denying this portion of the claim.

(V7 138-39).

Appellant argues that Slaughter did not pursue, or investigate, any mitigating evidence related to Appellant's troubled family life or his mental health history. Given the record this claim is without merit. First, to reiterate, the transcripts from Appellant's 1991 and 1993 sentencing hearings, as well as Slaughter's testimony during the evidentiary hearing, clearly evidence that his counsel was cognizant of the potentially mitigating evidence that could have been developed , but Appellant did not want this evidence disclosed. Specifically, during both hearings, Appellant affirmatively stated that he did not want any mitigation presented on his behalf.

To the extent that Appellant now argues that counsel was deficient for failing to pursue this mental health history, the State will rely on the arguments previously presented herein. However, Appellant's testimony during his 1993 resentencing hearing is also instructive. During the 1993 hearing , Appellant testified and disclaimed much of the mitigating evidence that had previously been reported to Dr. Mhatre. Appellant stated that he was raised with "lots of love" (DII VII 471); and that his difficult childhood was not reason his crimes (DII VII 472). Moreover, during his testimony Appellant disclaimed: 1) any previous suicide attempts; 2) the extent

of abuse he suffered as a child; and 3) the trauma of his childhood. Id. 472-80. Thus, Slaughter was confronted with a client who did not want to present any mitigation; and testified – notwithstanding his previous statements to Dr. Mhatre – that no mitigating circumstances existed.

In Rompilla v. Beard, 545 U.S. 375 (2005) and Wiggins v. Smith, 539 U.S. 520 (2003), the United States Supreme Court has explained that a lawyer representing a capital defendant has a duty to pursue and investigate mitigating evidence on behalf of his client. As is well-understood, Rompilla and Wiggins stand for the proposition that in order to satisfy the Sixth Amendment, a capital defendant's attorney must conduct a substantive investigation of the accused's background, particularly when this information could yield persuasive mitigation, see, e.g., Wiggins, 539 U.S. at 534-535, or, where the defense is aware of the fact that the accused's background, including his criminal history, will be used as an aggravator to support imposition of the death penalty, see, e.g. Rompilla, 545 U.S. at 389-391. However, the Supreme Court has also observed that a capital defendant's affirmative wish to waive mitigation affects the application of these principles. Schriro v. Landrigan, 127 S.Ct. at 1942 (2007)("Neither *Wiggins* nor *Strickland* addresses a situation in which a client interferes with counsel's efforts to present mitigating evidence to a sentencing court"). Accordingly, given the record is clear that Slaughter was cognizant of the existence of mitigating evidence; but Appellant – as was his right – refused to allow its admission.

Any other matters regarding mental-health mitigation have been amply addressed in sub-issue 2 of Issue I and in Issue VI above. The court did not err.

ISSUE IX

DID THE COURT ERR IN DENYING APPELLANT'S CLAIM THAT THE PROSECUTOR HAD IMPROPER CONTACT WITH APPELLANT? (Restated)

Standard of review

To the extent that this issue claims a pure issue of law, review is *de novo*. State v. Glatzmayer, 789 So.2d 297, 301 n.7 (Fla. 2001).

Merits

In his motion, Appellant claimed that the State engaged in "improper, unethical and unlawful direct contacts and communications" with him, in spite of their knowledge that he was represented by counsel (V1 148-154). In particular, Appellant complains of three visits to Appellant in jail by Chief Owens, as well as three letters the prosecutor wrote to Appellant long after his resentencing. As Appellant was "susceptible to manipulation," these contacts demonstrate that his guilty plea "was induced by trickery and exploitation of Mr. Farr's status as a jail prisoner" (V1 153).

The court below rejected this claim as follows:

> In this claim, Farr contended that the judgment and sentences should be vacated because the Lake City Chief of Police visited Farr on three occasions and because Farr improperly wrote to the prosecutor. These claims are procedurally barred, absurd on their face and suggest no legal basis for the requested relief. The plain fact is that Farr is a prolific letter writer. He has written a variety of people. It is true that at some time, the prosecutor began to respond to the correspondence. It would appear that this response was out of human decency. It is very confusing to sort out whether at any of these times, Farr was represented by an attorney. However, there is no basis to say that any of this communication had any effect on the case. This claim is denied.

(V7 139-140).

The court's conclusions are sound. Appellant does not deny that Chief Owens' visits came at Appellant's request ("ostensibly" at Appellant's request (IB 92)). Owens' visits did not violate Appellant's right to counsel pursuant to Edwards v. Arizona, 451 U.S. 477, 484-85, 101 S.Ct. 1880, 1885 (1981)("[A]n accused ... having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, **unless the accused himself initiates further communication, exchanges, or conversations with the police"**). Appellant's contention that Owens' visits constituted "trickery and exploitation" of Appellant intended to induce a guilty plea or to induce Appellant to write inculpatory letters to the prosecutor is, at best, mere speculation.

As for Mr. Coleman's letters to Appellant, they of course could not have induced his plea, his desire to waive a penalty phase jury, or his desire to waive mitigation, inasmuch as all of them were written after the resentencing (V20 192, 195, 196, V21 3-4, 5, 12, 16, 18-19). Moreover, all of the letters were in response to Appellant's various requests for assistance from Mr. Coleman, and a review of these letters reflects nothing coercive or unprofessional about them. Without conceding that the letters were improper, they certainly do not demonstrate that Appellant's plea and sentence were induced by the prosecutor's misconduct. The court did not err in denying this claim for relief.

ISSUE X

DID THE TRIAL COURT ERR IN DENYING APPELLANT'S CLAIM THAT COUNSEL WAS INEFFECTIVE FOR FAILING TO OBJECT TO PROSECUTORIAL MISCONDUCT? (Restated)

Appellant claims that "numerous instances of misconduct were committed by the prosecutor," were committed, "as detailed in Arguments V, VII, and IX, *supra*," (the Brady claim, the sentencing order claim, and the improper communications claim) and that counsel was ineffective for failing to object to this misconduct (IB 97). As argued above, none of the claims above have any merit, so counsel could not be ineffective for failing to register objections. The court did not err in denying this claim.

ISSUE XI

DID THE COURT'S CONDUCT THROUGHOUT THE EVIDENTIARY HEARING RESULT IN AN UNCONSTITUTIONAL DENIAL OF A FULL AND FAIR POSTCONVICTION HEARING?

Standard of review

To the extent that this issue claims a pure issue of law, review is *de novo*. State v. Glatzmayer, 789 So.2d 297, 301 n.7 (Fla. 2001).

Merits

In this issue, Appellant presents a catalogue of perceived wrongs against him by the postconviction judge occurring at the evidentiary hearing, for the most part identified by nothing more than a broad category of complaint followed by a list of page citations where the alleged offense occurred.

For instance, Appellant accuses the court of making "abusive and derisive comments to [his] counsel simply for being zealous advocates" (IB 98). This comment is followed by a list of page citations from the hearing transcript which allegedly prove this allegation. Here are some of the "abusive and derisive comments" indicated (the shorter passages are included for the sake of brevity):

> THE COURT: You're just starting to argue, Ms. McDermott. Let's move on. All we're doing is arguing with the witness.

(V24 172).

> I'm sorry, Ms. McDermott. I did not follow that question. Would you restate that, please? That was very convoluted.

(V24 173).

> I'm not following you, Ms. McDermott. We started talking about whether there was anything that reputed Mr. Farr's letters and somehow or

other we ended up on mitigation relating to use of alcohol or intoxication. Somewhere you lost me in there.

(V24 174).

THE COURT: Ms. McDermott, all we're doing is repeating, you know, what you've done and what has been repeated by the State. Do you have some new area that we need to cover on redirect?
MS. McDERMOTT: I think I do, Your Honor.
THE COURT: Then let's get to something that's new.

(V24 175).

THE COURT: No, we're not going to argue legal questions with the witness. Move on, Ms. McDermott.
Q (Ms. McDermott continues) Well, undoubtedly you had --
THE COURT: Ms. McDermott, move on.
MS. McDERMOTT: Okay.

(V24 177).

THE COURT: Several times, your editorial comments are not appreciated or needed. Let's ask him a question. This witness is being straightforward with you, let's not have your editorial comments on it, please.

(V25 242).

Q (By Mr. Lohman) Did you have an investigator in this capital case that you felt like you were sure was going to go to a death penalty?
THE COURT: Mr. Lohman, stop.
MR. LOHMAN: He said he was --
THE COURT: No, you keep characterizing things, sticking things in. I don't appreciate it. Do you understand me?
MR. LOHMAN: Yes, sir, and I --
THE COURT: Don't act innocent. You know exactly what I'm saying. We're not going to do it that way.
MR. LOHMAN: I would ask the court reporter to please read back --
THE COURT: I heard what you said. I want you to ask straightforward questions without putting in innuendo and your editorial comments when you ask the questions. Please do that and

we'll have a full and fair hearing, otherwise I'm going to ride it the whole time. Is that clear?
MR. LOHMAN: Yes, sir.

(V25 256).

THE COURT: Lets not get into legal argument.

(V25 264).

THE COURT: Ask another question.

(V25 291).

THE COURT: We're just starting to repeat, Mr. Lohman. Do you have some new material you want to cover? It's too late to be repeating things.
MR. LOHMAN: Okay. I think that's enough for direct. Thank you.

(V25 299).

THE COURT: When you get through, if you'd advise the State of who you plan to call tomorrow. If we're moving that slow, we probably need to plan on going a little later tomorrow night, so y'all make plans that tomorrow night might be a little longer. I was actually planning to go, but it seemed like everybody was getting a little grumpy here and we don't need to reach that.

(V25 303).

THE COURT: Ma'am, sit down and be quiet. We're not going to have this kind of discussion on the record. I told her to show you the letter. We don't need to hear any further discussion on the record.

(V28 647).

THE COURT: That's argumentative, Mr. Lohman.

(V30 916).

THE COURT: We're not going to do that. Move on, Mr. Lohman.
MR. LOHMAN: I would object to not getting a simple answer to a simple question.
THE COURT: Move on, Mr. Lohman.

(V30 928).

> THE COURT: We're just arguing with the witness. Move on, Mr. Lohman.

(V30 959).[7]

Similarly, Appellant complains that the court "numerous comments and ruling that evidenced bias," referring only to a list of page citations from the evidentiary hearing transcript (IB 99). A review of these "rulings that evidence bias reveals that it consists almost entirely of rulings sustaining the prosecutor's objections to Appellant's cross-examination questions of Mr. Coleman, on the ground that they were "beyond the scope of direct," "beyond the scope of expertise," "asked and answered," and "argumentative" (V30 875,896,902,931,943,965). The State asserts that each of these evidentiary rulings was correct. Moreover, to the extent that ruling on objections demonstrates the court's bias, the State notes that the court *overruled* 25 of the State's objections to Appellant's cross-examination questions of Coleman, more than four times as many as it sustained (V30 872,874,884,886,893,915,916,917,928,930,931, 933,934,949,955,957,959,966,967,968,975,981,988,990,994). Any suggestion that the court's evidentiary ruling demonstrated judicial bias is meritless.

[7]In the interest of brevity, this list includes most, but not all of the "abusive and derisive comments" complained of, including every comment that Appellant identified as "the most glaring" (IB 98). While it is impossible to be sure that the State has correctly identified the offending comments, these are the comments appearing on the pages identified by Appellant.

Without conceding that the judge was hostile to Appellant and his counsel during the hearing, the Supreme Court has held, "**judicial remarks during the course of a trial that are critical or disapproving of, or even hostile to, counsel, the parties, or their cases, ordinarily do not support a bias or partiality challenge**" unless they reveal "an opinion that derives from an extrajudicial source" or "such a high degree of favoritism or antagonism as to make fair judgment impossible." Liteky v. United States, 510 U.S. 540, 555, 114 S.Ct. 1147, 1157 (1994). "[E]xpressions of impatience, dissatisfaction, annoyance, and even anger, that are within the bounds of what imperfect men and women, even after having been confirmed as federal judges, sometimes display" do not establishing bias or partiality. Id., 510 U.S. at 555-556, 114 S.Ct. at 1157. "A judge's ordinary efforts at courtroom administration-even a stern and short-tempered judge's ordinary efforts at courtroom administration-remain immune." Id.

The same is true here. Any remarks by the court that were critical or disapproving of counsel do not demonstrate that he had an unfair bias against him.[8] See also United States v. Powers, 500 F.3d 500, 512-13 (6th Cir. 2007)("Comments such as (1) 'not helping the jury;' (2) 'move on to something else;' or (3) 'please don't repeat your questions over and over'" "can be construed as attempts to keep

[8]The Liteky court also ruled that, unless an extrajudicial source is involved, "judicial rulings alone almost never constitute a valid basis for a bias or partiality motion." Id. "Almost invariably, they are proper grounds for appeal, not for recusal." Id. Any suggestion that the court's evidentiary rulings demonstrated bias should be rejected.

the parties focused on the issues related specifically to the crime charged and to prevent counsel from asking repetitive questions," and do not demonstrate judicial bias).[9]

The fact that this case involves a death sentence does not relieve a trial judge of the right and responsibility to control the courtroom. The fact that Appellant's counsel are representing a capital defendant does not exempt them from admonishments from a judge attempting to preserve good order and dignity of court proceedings. The court's conduct did not demonstrate judicial bias or deny Appellant his right to a full and fair hearing.

[9]These observations apply equally to the court's comments after Appellant indicated that "Mr. Farr's life is at stake." Counsel implied that the court was rushing procedures, insensitive to the fact that it involves a capital defendant.

CONCLUSION

Based on the foregoing discussions, the State respectfully requests this Honorable Court affirm the Order Denying Appellant's Motion To Vacate Judgments Of Conviction And Sentence With Special Request For Leave To Amend entered in this case.

SIGNATURE OF ATTORNEY AND CERTIFICATE OF SERVICE

I certify that a copy hereof has been furnished to James C. Lohman, Esq., 1806 East 39th Street, Austin, Texas, 78722; and Linda McDermott, McClain & McDermott, P.A., 141 Northeast 30th Street, Wilton Manors, Florida 33334, by U.S. MAIL on September 15, 2009.

Respectfully submitted and served,

BILL McCOLLUM
ATTORNEY GENERAL

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By: THOMAS D. WINOKUR
Attorney for State of Florida

Assistant Attorney General
Office of the Attorney General
Pl-01, the Capitol
Tallahassee, Fl 32399-1050
(850) 414-3300
(850) 922-6674

Florida Bar No. 906336
[AGO# L08-2-1221]

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the font requirements of Fla. R. App. P. 9.210.

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Thomas D. Winokur
Attorney for State of Florida

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