**IN THE SUPREME COURT OF FLORIDA**

**MICHAEL GORDON REYNOLDS,**

**Appellant,**

**v.** **Case No. SC10-1602**

**STATE OF FLORIDA,**

**Appellee.**
**_____ /**

# ANSWER BRIEF OF APPELLEE

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## STATEMENT OF THE CASE AND FACTS

Reynolds murdered three people on July 21, 1998, was found guilty on May 9, 2003, was sentenced to death for two of the three murders, and the convictions and sentences were affirmed by this Court, which rendered a detailed summary of the procedural history and facts:

### I. FACTS AND PROCEDURAL HISTORY

> The circumstances surrounding the crimes involved in this matter and the nature of the physical evidence cause the facts established at trial to be crucial in our analysis of this case. Specifically, we note that physical evidence produced at trial placing Reynolds at the scene of the crimes, inconsistencies in Reynolds' statements to the authorities regarding injuries he sustained on the evening the murders were committed, and evidence tending to establish his involvement in the murders are all important to our decision to affirm Reynolds' convictions and sentence. On August 25, 1998, the grand jury indicted the appellant, Michael Gordon Reynolds, on three counts of first-degree premeditated murder for the murders of Danny Ray Privett, Robin Razor, and Christina Razor, and for the burglary of a dwelling during which a battery upon Robin or Christina or both was committed while armed with a weapon. On July 22, 1998, the bodies of the victims were found on the property located at 1628 Clekk Circle in Geneva, Florida. Danny's body was found outside near a large pine tree, and the bodies of Robin and Christina were found inside a trailer in which the victims were living. The trial in this case began on April 21, 2003, and on May 7, 2003, Reynolds was found guilty of the lesser-included offense of second-degree murder as to the murder of Danny, and guilty as charged as to the remaining three counts of the four-count indictment.
>
> The evidence established that on July 22, 1998, Shirley Razor, the mother of victim Robin Razor, traveled to the crime scene to deliver items Danny used in the work he was doing on trailers at that location. Upon arriving at the property, Shirley noticed Danny lying on the ground outside. Shirley, being accustomed to seeing Danny drunk and passed out,

proceeded to her separate trailer on the property and ate her lunch. After finishing her lunch, Shirley walked over to the trailer in which Danny and Robin were living when she noticed that Danny had a “hole in his head.” After discovering that Danny was dead, Shirley ran to a neighbor's residence and called the authorities. Subsequent to the arrival of the fire department personnel, Shirley went to her daughter's trailer and upon looking inside found that her daughter, Robin, and her granddaughter, Christina, were inside and apparently dead.

At trial, a medical examiner, Dr. Sara Hyatt Irrgang, testified that the deaths had occurred at least eight hours, but probably more than twelve hours prior to her arrival at the crime scene, placing the time of death between nine p.m. on July 21 and seven a.m. on the morning of July 22. The evidence demonstrated that Danny Ray Privett was found lying outside beneath a large pine tree on his side with his face down, surrounded by bloody pieces of concrete block and broken pieces of glass. Danny's jeans were partially unzipped suggesting that he had been in the process of urinating when the attack occurred. The autopsy of Danny Ray Privett revealed that he suffered a large depressed skull fracture with additional injuries to the head area. The wounds appeared to have been caused by three or more separate blows, with the injuries indicating that the assailant had been behind the victim. There was no indication of any defensive wounds on Danny, and examination of his major skull injury revealed that the injury was likely caused by a partially broken cinder block, based on fragments found within the wound. The medical examiner was unable to determine the order in which the injuries had been inflicted upon him. The cause of death for Danny was determined to be primarily due to blunt force trauma to the head with the large depressed skull fracture probably being the fatal blow. If this blow had been inflicted first, the medical examiner opined that the victim would have lost consciousness within a second to a minute or two.

Robin and Christina Razor were found dead inside the living room portion of the camper trailer being used as living quarters. Robin was found lying on the floor, face up. Christina was found nearby sitting on the couch and leaning to her left. The living room area was in disarray and a large amount of blood was scattered throughout this area of the trailer. Robin Razor's autopsy revealed that she suffered multiple stab

wounds along with multiple blows to the side of her face and a broken neck resulting in injuries to her spinal cord. Closer examination revealed that Robin suffered ten stab wounds to the head and neck area and one to the torso area. The wounds appeared to have been inflicted with a sharp object such as a knife or scissors. Based on examination of Robin's body and the defensive wounds present, the medical examiner opined that she had been involved in a violent struggle. In addition to the above wounds, Robin suffered multiple superficial wounds to her torso area which the medical examiner stated to be consistent with torment wounds-wounds produced not to cause serious injury but to cause aggravation and produce fear in the victim. The medical examiner was of the opinion that because blows to the victim's head were inflicted at different angles and the presence of significant defensive wounds, it was likely that she was conscious and struggling when these wounds were inflicted. The primary cause of death for Robin was determined to be the broken neck and spinal cord injury, although bleeding from the stab wounds would have also resulted in death.

The autopsy of Christina Razor revealed that she suffered blunt force trauma to her head, a stab wound to the base of her neck that pierced her heart, and another stab wound to her right shoulder that pierced her lung and lacerated her pulmonary artery. These latter two wounds would have resulted in significant internal and external hemorrhaging and would have been fatal. The medical examiner indicated that the only sign of defense wounds to Christina was the presence of a small contusion to her left hand, which could have occurred as she attempted to block a blow from her assailant. The medical examiner opined that Christina would have lost consciousness within a minute or two of receiving the stab wounds. The primary cause of death for Christina was determined to be internal and external hemorrhaging.

During his investigation of the crimes, Investigator John Parker of the Seminole County Sheriff's Department made contact with Reynolds and requested that he submit to an interview, to which Reynolds voluntarily agreed. During this interview, Investigator Parker also inquired about injuries that he observed on Reynolds' hand and ankle. In response to inquiries made about these injuries, Reynolds advised the investigator that at approximately five a.m. on the morning that the victims' bodies

were discovered, he was taking his dog outside and slipped on the exterior step of his camper, twisting his ankle. Reynolds stated that the cut on his hand occurred when he caught his hand on a burr on the aluminum door frame of his trailer as he attempted to break his fall by grabbing the door frame. Reynolds advised the investigator that approximately thirty or forty minutes after sustaining the injuries he cleaned the cut to his hand and proceeded to an emergency room for treatment. Reynolds stated that while on his way to the emergency room he suffered a flat tire and borrowed a jack from a convenience store to change his tire and after doing so he proceeded to the emergency room. After receiving treatment for his injuries, Reynolds informed the investigator that he returned to his residence and removed the burr from the trailer door frame with a pair of channel-lock pliers.

In addition to the discussion concerning the injury, Reynolds also discussed an altercation in which he was involved with Danny Ray Privett regarding a trailer that was allegedly given to Reynolds by his landlord. According to Reynolds, the argument with Danny was centered upon Danny removing the trailer from Reynolds' property without permission. Upon discovering that Danny had removed the trailer, Reynolds indicated that he confronted Danny and a heated argument ensued. Reynolds stated that after exchanging words with Danny, he left Danny's property but returned a short while later to apologize and advise Danny that he could keep the trailer. Significantly, during this interview Reynolds advised the investigator that he had never been inside the trailer in which the victims were living. Subsequent to this interview, Reynolds gave permission for the search of both his trailer and his vehicle, and he also agreed to provide hair and blood samples for DNA analysis. Additionally, pursuant to a search warrant certain evidence was seized from Reynolds' vehicle and residence.

At trial, a neighbor of the victims testified that on the night prior to the discovery of the bodies he observed a car similar to that of Reynolds parked at the victims' residence. Fingerprint and shoe pattern analysis of the crime scene and items collected from the scene revealed several prints of value, but none of them connected Reynolds to the scene. However, extensive evidence with regard to DNA analysis resulting from testing of items of evidence recovered from the crime scene was presented. Several

of the items recovered from the crime scene inside the trailer and on the exterior of the trailer contained a DNA profile matching that of Reynolds. There was no eyewitness testimony offered by the State and, other than the concrete block allegedly used to strike the victims, no other weapon was recovered.

The defense attempted to establish mishandling and contamination of the evidence, along with suggesting that other individuals had committed the crimes with which Reynolds had been charged. The defense elicited testimony from Danielle Privett, Danny and Robin's other daughter, indicating that her parents had been having an ongoing disagreement regarding rent payments with a man by the name of Justin Pratt, a friend of Pratt's, Alan Combs, and Pratt's girlfriend, Nicole Edwards. In addition to this testimony, Reynolds presented evidence consisting of portions of an interview conducted by the Sheriff's Department with Pratt wherein Pratt discussed the disagreement and admitted that he had left a note at the victims' residence indicating that “it was war, ... conventional weapons.” After hearing all the evidence, the jury rendered a verdict finding Reynolds guilty of second-degree murder as to the death of Danny Privett, two counts of first-degree murder as to the deaths of Robin and Christina Razor, and burglary of a dwelling during which a battery was committed while Reynolds was armed with a weapon.

During the penalty phase the State presented four witnesses. Donna Birks established multiple prior convictions of Reynolds. Tonya Chapple, the victim of Reynolds' prior conviction for aggravated battery, described the circumstances surrounding the prior crime. Christina Razor's grandmother testified as to Christina's age at the time of the crimes, and Robin Razor's brother read a prepared statement in the nature of victim impact evidence. Reynolds, after thorough consultation with his attorneys and the trial court, waived his right to present mitigating evidence.

On May 9, 2003, the jury returned unanimous recommendations of death for both first-degree murder convictions. During the *Spencer*FN1 hearing, the sole testimony presented by the defense was the testimony of Reynolds himself. The State did not present any testimony, relying solely on the evidence and testimony admitted during the guilt and penalty phase trials as support for the aggravating factors. At sentencing, the

State presented testimony of Teresa Barcia, the sister of Danny Ray Privett, who read a prepared statement expressing the pain caused by the victims' death and asking the court to impose the maximum sentence provided by law. On September 19, 2003, the trial judge sentenced Reynolds to concurrent sentences of life for the murder of Danny Ray Privett and the burglary conviction, and the trial judge entered separate sentences of death for the murders of Robin and Christina Razor. In pronouncing Reynolds' sentence, the trial court found that the State had proven beyond a reasonable doubt the existence of four statutory aggravators for the murder of Robin Razor: (1) Reynolds had previously been convicted of a another capital felony or a felony involving a threat of violence to the person (great weight); (2) Reynolds committed the murder while he was engaged in or was an accomplice in the commission of or an attempt to commit a burglary of a dwelling (great weight); (3) the murder was committed for the purpose of avoiding a lawful arrest (great weight); and (4) the murder was committed in an especially heinous, atrocious, or cruel fashion (great weight).

FN1. *Spencer v. State*, 615 So. 2d 688 (Fla. 1993).

As to Christina Razor's murder, the trial court found that the State had proven beyond a reasonable doubt the existence of five statutory aggravators: (1) Reynolds had previously been convicted of a another capital felony or a felony involving a threat of violence to the person (great weight); (2) Reynolds committed the murder while he was engaged in or was an accomplice in the commission of or an attempt to commit a burglary of a dwelling (great weight); (3) the murder was committed for the purpose of avoiding a lawful arrest (great weight); (4) the murder was committed in an especially heinous, atrocious, or cruel fashion (great weight); and (5) the victim of the murder was a person less than twelve years of age (great weight).

In its analysis of the mitigation present, the trial court acknowledged the defendant's waiver of the presentation of mitigating evidence but, nonetheless, the court considered and weighed any mitigation that it found to be established. In doing so, the trial court found that the following nonstatutory mitigating circumstances had been established and were applicable to both the murders of Robin and Christina Razor: (1)

> that Reynolds was gainfully employed at the time of the crimes (little weight); (2) that Reynolds manifested appropriate courtroom behavior throughout the proceedings (little weight); (3) that Reynolds cooperated with law enforcement (little weight); and (4) that Reynolds had a difficult childhood (little weight). The trial court determined that the evidence did not establish that Reynolds could easily adjust to prison life. The trial court recognized that evidence was presented by Reynolds for purposes of establishing lingering doubt. However, the trial court noted that it would not consider any theory of lingering doubt as nonstatutory mitigation in its sentencing analysis. This direct appeal followed.

*Reynolds v. State*, 934 So. 2d 1128, 1134 -1139 (Fla. 2006).

Reynolds raised seven issues on direct appeal:

(1) Trial court erred in admitting portions of Justin Pratt statement;

(2) Trial court erred in denying motion for judgment of acquittal;

(3) Trial court erred in denying motion to waive penalty phase jury;

(4) Trial court erred in allowing witness to testify to details of prior violent felony in penalty phase;

(5) Trial judge erred in limiting consideration of residual doubt in penalty phase;

(6) Trial judge failed to consider and properly weigh mitigating circumstances;

(7) *Ring v. Arizona.*

The United States Supreme Court denied Reynolds' petition for writ of certiorari on January 8, 2007. *Reynolds v. Florida*, 549 U.S. 1122 (2007). Reynolds filed a Rule

3.851 Motion for Postconviction Relief on December 28, 2007. (V2, R106-214).[1] The State filed a response. (V2, R215-287). The Case Management Conference was held April 3, 2008. (V16, TR996-1052). The trial judge entered an order setting an evidentiary hearing for October 27, 2008. (V3, R366-68). Right before the evidentiary hearing began on October 27, 2008, Reynolds filed a *pro se* motion in open court to discharge counsel. (V5, R599-626). After a hearing on Reynolds's motion, the trial judge entered an order allowing CCRC to withdraw and allowing Reynolds to represent himself. (V5, R631-633). The evidentiary hearing was re-scheduled to February 2, 2009. (V5, R632).

On December 5, 2008, Reynolds moved to continue the evidentiary hearing. The trial court re-scheduled the evidentiary hearing for April 13-17, 2009. (V5, R653, 660). On February 6, 2009, Reynolds filed a *pro se* Emergency Motion for Appointment of Counsel or, in the Alternative, Motion for Appointment of Co-Counsel. (V5, R664-665). The trial court set a hearing on March 11, 2009, at which time Melodee Smith was appointed to represent Reynolds. (V5, R669, 673). On April 1, 2009, Ms. Smith moved for a continuance of the evidentiary hearing. (V5, R674-75).

The evidentiary hearing was re-scheduled to July 6-10, 2009. (V5, R677-78).

[1] Cites to the record on appeal are by volume "V" followed by "R" for cites to the pleadings and "TR" for cites to the hearing transcripts, including the evidentiary hearing.

On May 27, 2009, Ms. Smith moved to continue the evidentiary hearing. (V5, R687-689).[2] The trial court re-scheduled the evidentiary hearing for September 14-18, 2009, and set a scheduling order. (V5, R706-708). On July 31, 2009, Ms. Smith filed a Motion for Leave to Amend the Motion to Vacate. (V5, R715-742). The State filed a Response on August 4, 2009. (V5, R743-755). Ms. Smith filed the Amended Motion on August 10, 2009, the day of the Case Management Conference. (V6, R763-871). The motion raised five (5) claims in addition to the sixteen (16) previously raised. At the case management conference, the State agreed that an evidentiary hearing should be held on Claim A-1 (V17, TR1348) and A-2 (V17, TR1349). The State argued that no other claim was legally sufficient to allow an evidentiary hearing. (V17, TR1350-1364). The trial court granted an evidentiary hearing on Claims A-I and A-II of the Amended Motion. (V6, R874-75).

The evidentiary hearing was held September 14-16, 2009. (V11-15, TR1-925).

## EVIDENTIARY HEARING TESTIMONY

The defense called ten witnesses: Audrey Skidmore, Stacia Adams, Christine Houston, Candy Zuleger, Kristjan Olafsson, Gary Cumberland, Janice Johnson, Michael Reynolds, Francis Iennaco, and Steve Laurence. The State called one rebuttal

[2] This motion was titled ""Stipulated Motion for Defense Continuance;" however, the State filed an objection because no one had stipulated to the continuance. (V5, R693-97). Collateral counsel withdrew the motion. (V5, R706-707).

witness: Dr. Jeffrey Danziger.

Audrey Skidmore was the victim services coordinator for the State Attorney's Office at the time of Reynolds' trial. (V11, R24). Audrey had direct contact with the victims' family members at times. At one point in the trial, Audrey was informed there was "a question about some flowers that were outside in the hallway." (V11, TR26). When the trial judge questioned the victim advocates about the issue, Audrey responded that there were flowers brought by the family for the two advocates the family had worked with. (V11, TR28).

Stacia Adams, Reynolds' younger sister, testified that Reynolds had three sisters: herself, Sharon, and Susan. (V11, TR35-36). Reynolds was born in Alabama in 1961. (V11, TR36-37). Stacia and Michael were very close when they were young and lived in Hollywood, Florida. (V11, TR37-38). Reynolds was always very helpful and independent. When he was 8 years old he mowed neighbors' yards and save his money. He then bought a lawn mower and edger for himself. Reynolds was a Boy Scout. (V11, TR40).

Until around 1970, the family had a fairly normal lifestyle. When they lived in South Florida, the parents managed approximately 1,000 rental homes for a gentleman in Miami. (V11, TR42). They moved to Titusville in 1970, and their mother became very sick. (V11, TR41). The father was drinking and would become violent when he

drank. They lived in a golf-course community in Titusville when the mother had aneurisms. Stacia was around 5 years old. (V11, TR42). When the father was sober, he was a loving father to Reynolds. When the mother became ill, the children were not able to "do the outings we once had done" and the father was not as loving as before. (V11, TR43). One time, the father bought an air conditioner to install in the living room. Reynolds was supposed to help his father by holding up some 2 x 4's. The father dropped the air conditioner on the mother's leg and cut it open. The father "whipped" Reynolds. (V11, TR46). The father did not use an instrument on that occasion, but subsequently used a belt on the children, and sometimes used the belt buckle. (V11, TR47). The father went to AA many times to try to quit drinking. (V11, TR48).

Around 1974, the children had a Shetland pony. Even though the mother was sick, she worked at a local convenience store. She died in 1975. (V11, TR47 49). The father, Reynolds, and his two sisters came home to find some of the neighborhood children with the pony, and Susie, Reynolds' younger sister ran to get the pony. The pony kicked Susie and the father hit the horse right between the eyes with a hammer and it fell down dead. That night, the father made Reynolds and Stacia dig a hole to bury the pony. (V11, TR50). One time, the children came home from an out-of-town visit with some Jehovah Witness books their aunt gave them, and the father burned

them in the street. (V11, TR51-52). That same night, the father had an argument with the mother and threw his wad of keys through the fish tank, breaking the aquarium. (V11, TR51). He also started busting up furniture. (V11, TR52). Sometimes the father woke the children in the middle of the night. (V11, TR61). If the children did not wake up (sometimes they would pretend they were sleeping), the father would throw ice water in their faces. (V11, TR62).

Stacia and Reynolds had to do all their father's "dirty work" like going to people's houses and relaying messages, then bring back the response. (V11, TR62). The father called Reynolds a "lame brain" and "hopped-up hippie." Sometimes he would curse. (V11, TR63).

After the mother died, Reynolds had permission to go out with friends one night; but, when he came home, the father kicked him out of the house. The father then burned Reynolds clothes. (V11, TR52). Reynolds first left home at age 14. He was in "a couple of juvenile schools" like Delaney and Dozier, and was in juvenile detention centers. One of the centers was in Marianna. Stacia did not have any direct contact with Reynolds after that point. (V11, TR66). They would exchange letters, but at one point, Stacia did not care for the things in his letters and she broke off contact with him. (V11, TR67, 69). Reynolds talked about being a member of a gang, the Texas mafia. (V11, TR82). Reynolds said he only joined the gang so he didn't get killed.

(V11, TR86). Stacia had a baby, and she was scared. (V11, TR86). Stacia saw Reynolds in 1981 when their father died, then did not see him again until 10 years later. (V11, TR68). Stacia was living in east Orlando the entire time with her husband. (V11, TR68).

During his lifetime, Reynolds had sustained some injuries. (V11, TR59). When the family lived in Hollywood, Reynolds, 8, was riding in the back of a trailer. The father became angry and slammed on the brakes. Reynolds fell off the trailer and had stitches in his head. (V11, TR60). Reynolds did not act differently after the accident. (V11, TR79).

Stacia was interviewed by Ray Parker, sheriff's investigator, after Reynolds was arrested for murder. (V11, TR64). Mr. Iennaco came to her house to talk to her about the family history. (V11, TR65). Stacia had been deposed in Ft. Myers by Mr. Hastings, the Assistant State Attorney, on November 27, 2001. (V11, TR53, 72). Mr. Iennaco, Reynolds' trial attorney, was also present. (V11, TR54). Stacia had been to Iennaco's office in Orlando. (V11, TR72). Stacia attended Reynolds' trial. (V11, TR55). She was subpoenaed to testify at the penalty phase. (V11, TR58). Susan was also at the penalty phase waiting outside the courtroom to be called as a witness. Both of them were prepared to testify. (V11, TR76). Mr. Iennaco came out and told them they were not needed to testify. (V11, TR77). Stacia was not aware Reynolds had

advised the trial judge that he did not want his sisters to testify. (V11, TR78). Stacia stayed for the proceedings to support her brother. (V11, TR59).

In the deposition,[3] Stacia recounted the story about Reynolds buying a lawn mower and mowing grass in the neighborhood and that Reynolds was a Boy Scout. Stacia said that the family was close. (V11, TR73). She talked about the father being an alcoholic and that he would hit the children with belts and belt buckles. (V11, TR74). Stacia told Mr. Iennaco before the penalty phase about the horse being killed with the hammer. (V11, TR75). Stacia also said Reynolds had been in trouble with law enforcement before the mother died. (V11, TR80, 81).

At the time of the evidentiary hearing (September 2009), Reynolds' sister, Sharon, was in critical care on life support. Sharon had cerebral palsy, and Reynolds would help with her care when the mother was ill. (V11, TR70).

Stacia also testified that when she was sitting in the hallway at the penalty phase, she saw some stuffed animals or balloons outside the courtroom. (V11, TR83-84). However, the jury went in and out another door. (V11, TR85).

Christine Houston, clinical social worker and addictions counselor, conducted a "qualitative assessment of a variety of different circumstances" to reach psychological diagnoses regarding Reynolds' mental health. (V11, TR103). She met with Reynolds

[3] The deposition is in the record on direct appeal at pages 749-808.

and collateral counsel, then consulted "research and the DSM-IV." (V11, TR103). Her assessment was not based on the evaluation of a psychologist, mental health practitioner, or psychological testing. (V11, TR103). Ms. Houston reviewed school and other records, and spoke with Reynolds' family. (V11, TR104). The highest degree Houston had was a Master's in social work. (V11, TR104). She was also certified in addictions. (V11, TR105). Her major focus is abused children and addictions. (V11, TR105). Houston was in a group which included a psychologist, but had never trained or practiced with the psychologist in doing clinical evaluations. (V11, TR106).

The State objected to Houston testifying or diagnosing mental health disorders. (V11, TR107). The trial court denied the objection, citing §491.03(c) which allows a "social worker under certain circumstances" to perform qualitative tests. (V11, TR109).

Houston interviewed Reynolds and his sister, Stacia Adams. (V11, TR116). She also reviewed Reynolds' statement, Stacia's deposition, the sentencing order, and penalty phase testimony. (V11, TR116). She also reviewed reports from Dr. Herkov, Dr. Olander, and Dr. Danziger. (V11, TR118).

Houston diagnosed Reynolds with post-traumatic stress disorder (using DSM-IV criteria) because Reynolds was exposed to the terrorizing event of physical abuse, loss of his mother, and living in a home where domestic violence regularly occurred. (V11,

TR120). Further, Reynolds engaged in fights and was hit on the head. (V11, TR120). Reynolds had a fear of abandonment. His "responses to bullies and authority figures" was a response to that trauma. (V11, TR124). Reynolds also becomes "agitated, somewhat irritable" when he talks about past trauma. (V11, TR124). This shows another DSM-IV criteria: avoidance. (V11, TR125).

Houston also diagnosed Reynolds with an Axis I DSM-IV diagnosis of bereavement disorder because he had "strong unresolved feelings about the death of his mother." (V11, TR126). Houston ruled out the DSM diagnosis of major depressive disorder recurrent. (V11, TR127). Although Reynolds had some depressive symptoms, further testing would be necessary to diagnose depressive disorder. (V11, TR128).

In Houston's opinion, Reynolds suffered from alcohol dependence disorder. (V11, TR129). Reynolds began drinking around age 11 or 12. At his heaviest use, Reynolds could drink a case of beer and a bottle of liquor. Reynolds had brief treatment at The Doors, a treatment facility in Orlando. He did not complete the treatment. Reynolds was dependent on Cannabis. (V11, TR130). He started smoking marijuana at age 11 and used it every day. (V11, TR131). Reynolds abused heroin around age 20, with last use in 1997. (V11, TR132). He was also addicted to nicotine. (V11, TR133). Houston diagnosed Reynolds with polysubstance abuse. (V11, TR134). He liked methamphetamines and had tried PCP. (V11, TR135-136).

After Reynolds was released from prison and moved back to the area, he decided to make changes in his life. He stopped using heroin but continued to drink and smoke marijuana. (V11, TR133).

Reynolds told Houston he had cirrhosis of the liver, stage 4, and hepatitis C. (V11, TR134).

Houston diagnosed Reynolds with Axis II DSM diagnosis of antisocial personality disorder. (V11, TR137). Antisocial persons have a pervasive pattern of disregard for the rights of others and do not conform to social norms. Reynolds began skipping school at an early age, is impulsive, irritable and aggressive. He is irresponsible with his partners and children. (V11, TR138).

Axis III diagnoses included multiple head injuries. (V11, TR141). When Reynolds was 8 or 9 years old, he was riding in the back of a truck and fell forward, he hit his head, was treated, and received stitches. Reynolds self-reported that he had been hit by baseball bats and had some memory loss afterwards. At age 2, Reynolds fell from a second-story window. (V11, TR142).

As a child, Reynolds was "punched, kicked, hit with objects and hammers, water hoses, tools." He was called names. Reynolds' father broke his aquarium and the fish died. (V11, TR145). The Reynolds children were forced to carry messages to neighbors. Reynolds missed school, and Houston suspected it was because he was

either working or caring for his sick mother. (V11, TR146). When Reynolds was 8 years old, he would tell his father, Leo, to stop abusing the sisters after Leo threw soup on them. (V11, TR152). In 1972, Leo killed Reynolds' sisters' horse with a hammer and made the children pull it around the back of the trailer. (V11, TR154). Also in 1972 or 1973, Reynolds intervened when Leo was going to strike the mother, and Leo socked Reynolds in the shoulder. (V11, TR154). The family tried to hide the abuse. (V11, TR155).

After Reynolds' mother died in 1975,[4] Leo's abuse escalated. (V11, TR155). He kicked the family dog, which ultimately died of its injuries. (V11, TR156). Leo banished Reynolds from the home and burned his clothes. (V11, TR155). There are no reports of the abuse and child services was never involved. (V11, TR156). At some point after Reynolds left the home, Leo was arrested and the sisters went into a foster home. (V11, TR156). Neither the State, the community, nor the school intervened to help Reynolds. (V11, TR177).

Reynolds does not trust people and refused to see a therapist at the prison because he did not trust him. (V11, TR170-71).

A timeline of events included:

| | |
|---|---|
| Reynolds born: | 1961 |
| Mother died: | 1975 |

[4] Reynolds was in the 9th grade when his mother died. (V11, TR163).

| | |
|---|---|
| Murders occurred: | July 1998 |
| Deposition of Stacia Adams: | December 7, 2001 |
| Dr. Herkov report: | September 1, 2002 |
| Trial: | April 24, 2003 |
| Penalty Phase: | May 8, 2003 |
| *Spencer* hearing: | June 6, 2003 |

(V11, TR179).

Houston acknowledged that Dr. Herkov interviewed Reynolds pre-trial, had conferences with trial counsel, and reviewed records. (V11, TR180). Dr. Herkov's September 1, 2002, report indicated that Leo was abusive when drinking, would abuse his wife, tear things up, chase Reynolds with a hammer, force Reynolds to work when he was 7 or 8 years old, and whip Reynolds with a gun. (V11, TR181-182; Defense Exhibit 2, V8, R1251-60).

Dr. Herkov's report references Reynolds' three sisters, one of which had cerebral palsy. The report also states that Reynolds withstood a lot of mental abuse and that his mother died suddenly of a brain aneurism when he was fourteen. (V11, TR184). Dr. Herkov reported that Reynolds was drinking by age fourteen and that at one point his parents dropped him on I-4 and told him to go to Louisiana; that Reynolds flew back for a visit and his mother was screaming in pain but the father would not let Reynolds see her. The mother died the same night, and Reynolds said he felt as if he died that day. (V11, TR185). Stacia told Dr. Herkov that Reynolds got meaner after his mother died, started smoking marijuana, and partied a lot. Dr. Herkov

also reported Reynolds being hit with a paint can and hit in the legs with a gun. (V11, TR186).

Houston acknowledged Dr. Herkov documented information that Houston did not have; i.e., that Reynolds lost interest in school, hit an assistant principal with boots and was suspended. (V11, TR186). Dr. Herkov reported that Reynolds was sent to Marianna School for Truancy and was ruled ungovernable. While at Marianna, Reynolds and a friend left the facility and stole some guns. (V11, TR187). Reynolds obtained a GED while he was in Texas. Dr. Herkov documented that Reynolds was hit in the head with a baseball bat and suggested that a brain scan could determine whether Reynolds had a tumor. (V11, TR187). Reynolds violated probation at one point because he became a fugitive. (VR187). Reynolds told Dr. Herkov that he would work awhile then want the thrill of getting back on the road. Houston was not aware Reynolds reported to Dr. Herkov that a corrections officer in Texas assaulted him, so Reynolds waited 6 months and hit a corrections officer. (V11, TR188).

Houston had "no concept" of Reynolds' mental state at the time he committed the murders and had no idea what his mental state was at the time of, or before, the murders. Reynolds did not discuss the murders with Houston. Houston said her role was merely to "do a psychosocial related to his life, not to review the criminal history." (V11, TR189). The extent of what Houston knew about Reynolds' mental state near

the time of the murders was that he told her that when he left Arizona he was making changes in his life, limiting substance abuse, working, and getting on a right track. (V11, TR191). However, if Houston were asked to testify about Reynolds' mental state at the time of the murders, she would not be able to. (V11, TR193).

Houston agreed that Dr. Herkov reported Reynolds' marijuana use as early as age 11 or 12, shooting and snorting cocaine in the 1970's, shooting methamphetamines and heroin in the 1990's, and excessive alcohol use. (V11, TR194). Alcohol abuse began at age 13. Stacia Adams' deposition talked about Reynolds getting into trouble even before the mother died, and Dr. Herkov confirmed that Reynolds' delinquency career began at age 13 when he stole some guns. (V11, TR196-97). Reynolds also robbed some dope dealers, and his sister said he "would steal anything," and even stole a cow. (V11, TR197). Dr. Herkov also documented injuries Reynolds sustained, like getting hit with a baseball bat, falling off the back of a trailer at age 8 or 9, shot in the leg and arm, and stabbed in the back of the arm. Dr. Herkov had documents back to 1980 showing problems with sleeping. (V11, TR198).

The trial attorneys had school records in their files, which Houston reviewed. (V11, TR199). The records showed that Reynolds was committed to Dozier Behavior School in 1976. (V12, TR206). Reynolds has a lengthy criminal history, starting in 1974. (V12, TR204).

Houston admitted that the information in her report came from either Reynolds or his sister, Stacia Adams, or from persons who had obtained information from Reynolds or Stacia. (V12, TR182, 220).

Candy Zuleger, lab director for Trinity DNA Solutions located in the Florida panhandle, left FDLE in 2004 and was not allowed to participate in "outside" work for defense attorneys. (V12, TR225). She would not have been available to testify for the defense in April 2003, the time of Reynolds' trial. (V12, TR225). While Zuleger was employed with FDLE, she would not have been allowed to "check the work" of another expert outside the normal course of business within the lab. (V12, TR234).[5] At the time of Reynolds' trial, Zuleger could not have consulted against FDLE. (V12, TR235, 257). If she were subpoenaed for trial by a defense attorney, she would have called FDLE legal department; however, she knows that she would not have been allowed to conduct a review or consult against FDLE. (V12, TR257). The subpoena would either have been quashed or there would be litigation. (V12, TR258).

Based on Zuleger's non-availability, the State moved to exclude her testimony.[6]

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[5] FDLE has internal checks and balances such as a second sizer. (V12, TR234).

[6] In order to prove a 3.851 claim involving ineffective assistance of counsel for failing to present certain expert testimony, the defendant must be able to show the witness testifying at the evidentiary hearing would have been available to testify at the trial-stage proceeding. *Nelson v. State*, 875 So. 2d 579, 583 (Fla. 2004) ("if a witness would not have been available to testify at trial, then the defendant will not be able to

(V12, TR225). The trial court requested research on the issue and Ms. Zuleger was not available to testify the next day, so her testimony was proffered. (V12, TR235). After the testimony was proffered the trial judge stated that there would be specific findings of fact in the final order regarding whether Ms. Zuleger was "available" and, in the meantime, that her testimony did "not necessarily advance the position of the defendant in this particular case." (V12, TR268).

Zuleger's proffered testimony was that FDLE mislabeled tracking forms: the blood sample from Reynolds was labeled "Michael Razor." A belt loop was submitted as TC-51, but there were no results reported. (V12, TR236). However, it appeared the item had been tested by FDLE analyst Baer. Zuleger also noticed a discrepancy between DNA reports and trial testimony: Mr. Badger testified that Reynolds matched on the vaginal swab, but the report stated differently. (V12, TR237).[7] There was also a sink trap that was not tested. (V12, TR240).

Zuleger had concerns about the way the evidence was stored at the sheriff's

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establish deficient performance or prejudice from counsel's failure to call, interview, or investigate that witness."). *See also Melton v. State*, 949 So. 2d 994, 1003 (Fla. 2007).

[7] The transcript of the testimony was the subject of the State's Motion to Correct. Zuleger admitted that if the period in the transcript were placed in front of the words "and Reynolds" rather than behind the word "Reynolds" on page DAR TT2015, the testimony and report would be consistent. (V12, TR247, 249). Zuleger had not received the court reporter's affidavit indicating the period was in the wrong place. (V12, TR248). If Zuleger had that information, she would have removed the finding of

office. She could not determine what time the evidence came in; whether the evidence was already bagged; whether the bag was sealed; or whether the evidence was wet. (V12, TR237). She also noted that Reynolds' blood sample was in the same room with the other evidence, raising concerns about contamination and how the blood sample was packaged. Zuleger was aware of an FDLE case in Jacksonville in which blood leaked out onto samples. That is one reason buccal swabs are now used instead of liquid blood. (V12, TR238). In Zuleger's opinion, evidence TC-55-A and TC-55-B were not swept properly. There should be a 7-day wait period between working on items, and these items were worked the same day in the same room. This raises issues of contamination. The hairs on TC-55-A and TC-55-B would be the biggest concern because hairs in one package could "float around" and get onto another piece of evidence. (V12, TR239).

FDLE tested a total of 89 samples for DNA: 25 got RFLP testing and about 70 got STR testing. RFLP is an older form of testing. STR testing is currently used. (V12, TR241).

On proffered cross-examination, Zuleger conceded that the mislabeling of Reynolds' blood did not lead to any improper result. (V12, TR243). The switch plate, TC-64-D was tested by both RFLP and STR methods, and both test methods reached

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inconsistency from her report. (V12, TR249).

the same result. (V12, TR244). Insofar as packaging and contamination, Zuleger had not seen "any documentation of leakage on the packaging." (V12, TR250). Zuleger noted that in TC-55-A the packaging of the pillow and towel together could result in contamination; however, she was unable to see the crime scene photographs because she was only given photocopies which were "blacked out." (V12, TR251). She was not aware the pillow and towel were right next to each other at the crime scene. (V12, TR252). Zuleger acknowledged that the technician who collected the items was vigorously cross-examined by trial counsel on the issue. (V12, TR251). Zuleger admitted that, even though she recommended additional testing, she had not done any such testing. (V12, TR252). Zuleger was aware that trial counsel hired Dr. Litman, and some of the exhibits were sent for independent DNA testing. (V12, TR253).

Kristjan Olafsson, neuropsychologist, was accepted as an expert. (V12, TR277). Olafsson administered standardized tests to Reynolds, reviewed records, and record excerpts during which Reynolds waived mitigation. (V12, TR278-80). Reynolds also signed a written waiver of mitigation. (V12, TR280).

In Dr. Olafsson's opinion, Reynolds was below average in intellectual functioning, had average memory, and showed deficits in executive functioning. (V12, TR281). There was little documented medical history for Reynolds, but the defendant described injuries and symptoms. Olafsson believed that in 1990 Reynolds sustained an

injury consistent with brain injury. Brain injury is consistent with deficits in executive functioning. (V12, TR282). The injury reported was a blow on the right side of the head after which Reynolds lost consciousness. (V12, TR284). There was also evidence of "lateralization" in which one side of the brain functions better than the other. (V12, TR283).

Olafsson diagnosed Reynolds with the following DSM diagnoses:

Axis I: Cognitive disorder, not otherwise specified;
Posttraumatic stress disorder;
Polysubstance dependence. (V12, TR285-86)

Axis II: Antisocial personality disorder (V12, TR287);

Axis III: Multiple traumatic brain injury;
Cirrhosis of the liver and hepatitis C (V12, TR294);

Axis IV: Cognitive difficulties, incarceration (V12, TR295).

Olafsson did not see evidence of a learning disorder documented in school records, but that was a possibility because he made failing grades. (V12, TR292, 294). Polysubstance abuse can lead to cognitive defects. (V12, TR305).

Olafsson did not speak to family members or any person regarding Reynolds' background history and substance abuse. (V12, TR308). He reviewed the social worker's report that included information on history and the sister. Olafsson did review Stacia Adam's deposition and Dr. Herkov's report, both of which were available prior to Reynolds' trial. (V12, TR309).

Olafsson had no idea what Reynolds' mental status was at the time of the murders in 1998. (V12, TR310-11). Olafsson did not discuss Reynolds' mental state at the time of the murders when he interviewed Reynolds. They did discuss substance abuse, which Reynolds said began at age 13. Olafsson assumed substance abuse was "probably a factor" in the murders. (V12, TR311).

Olafsson acknowledged that Stacia Adams said there was no significant change in Reynolds' behavior after he fell from the trailer, but said Adams may not be qualified to make that assessment even though she was his sister, two years younger than Reynolds. (V12, TR314). In Olafsson's opinion, Adams' deposition statements that Reynolds was taken to the hospital, received stitches, and there was no behavior change was not relevant. (V12, TR315). In any case, Olafsson believed the cognitive disorder did not begin after Reynolds fell off the trailer, but later in 1990. The fact the 9th grade grades were so poor was "more of a factor of antisocial personality characteristics." Substance abuse also could have been a factor. (V12, TR320).

Reynolds had twelve (12) criminal offenses before 1990. (V12, TR322).

Olafsson acknowledged that before trial Dr. Herkov evaluated Reynolds and met with the trial attorneys. (V12, TR323-324). Dr. Herkov reported the head injuries at age 8 and in 1990. (V12, TR325).

Reynolds definitely is not mentally retarded. (V12, TR327). Olafsson

recommended an MRI to confirm brain damage, but that was never done. (V12, TR328). Cognitive disorder, NOS, can be due to a general medical condition. (V12, TR329). Olafsson conceded that Reynolds did not meet several of the DSM criteria for post-traumatic stress syndrome. (V12, TR331-332).

Olafsson was not trying to diagnose Reynolds' mental status at the time of the murders: only current mental status. (V12, TR332). Any opinion regarding mitigating circumstances related to Reynolds' current mental state. (V12, TR333). Olafsson had no idea what Reynolds' mental state was at the time of the murders. (V12, TR333). Olafsson's diagnosis of antisocial personality disorder is consistent with Dr. Danziger's. (V12, TR336).[8] In Dr. Olafsson's opinion, organic brain damage did not have a direct affect on Reynolds' state of mind at the time of the murders or contribute to the murders. (V12, TR347). In fact, "the reality is that people with organic brain damage do not go out and kill people." In Reynolds' case, "the factor that is dominant is antisocial personality disorder." (V12, TR348). There is no cause and effect between brain damage and murder. Brain damage may impair judgment or increase the likelihood of problematic behavior, but "we should not expect that someone with organic brain damage would kill someone." (V12, TR351).

Dr. Gary Cumberland, forensic pathologist, was accepted as an expert in

[8] Dr. Danziger testified for the State at the evidentiary hearing. (V14, TR790-799; V15,

forensic pathology. (V12, TR363). He had reviewed photographs of the injuries to Reynolds' hand (V12, TR363-64). He also reviewed the testimony of investigators and experts, and interviewed Reynolds. (V12, TR365). Cumberland had seen the healed scar on Reynolds' hand. (V12, TR366). If Reynolds cut his hand while he was at the crime scene, blood from the cut would not be localized unless Reynolds wrapped it or put a tourniquet on it, or the cut occurred at the end of the sequence of all the stabbings and blunt force injuries. (V12, TR369-70). Cumberland would expect to find more of Reynolds blood on or around the victims if he cut his hand during the violence. (V12, TR370). Reynolds' version of how the cut had occurred (falling out of his trailer) was consistent with the injuries. (V12, TR371). The cut was consistent with a metal cut. (V12, TR373). The experts at trial described the wound as an "incised" wound, but Cumberland believed it was a laceration. (V12, TR375).

Dr. Cumberland did not examine the door, only photographs. He reached his opinion by using four photographs. (V12, TR377). Cumberland recognized that a person with a long criminal history would know how to avoid leaving evidence at a crime scene. (V12, TR379-80). A person who cut his hand during brutal murders would be motivated to wrap the wound to avoid bloodshed. (V12, TR380).

Janice Johnson, forensic specialist, was qualified as an expert in crime scene

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R803-841).

reconstruction. (V12, TR393). Johnson would not sweep evidence from both the victims and the defendant in the same room. (V12, TR397). The potential for contamination exists because hair and fiber evidence is transient. (V12, TR397). FDLE normally waited 5-7 days between sweepings during which time the room is cleaned and remains sterile. (V12, TR398). Further, analysts will change clothes, gloves and hair nets between sweepings. (V12, TR398). Wet items should always be packaged separately, preferably in brown paper bags. If they need to be air dried, they should be in separate drying chambers. (V12, TR398). In Reynolds' case, all the evidence was in one room drying. (V12, TR398).

Hairs that were collected could have been contaminated by sweeping them all "in the same room at the same time." (V13, TR403). Johnson would have advised defense counsel to examine FDLE's policies and procedures and potential contamination issues. (V13, TR486). In her opinion, "the procedures were unacceptable." (V13, TR488). Blood stain patterns appeared to be transferred blood versus dropped blood. Johnson did not see any trails of blood on the carpet inside the trailer that led to the outside. (V13, TR403, 410-11, 470). The major blood patterns were located around the bodies of Robin and Christina. (V13, TR408). There was blood in the kitchen around the sink area, on the faucets, on the cabinets, and on a piece of wood on the air conditioner unit directly above Robin's head. (V13, TR409,

469). The blood in the kitchen was not analyzed by FDLE. (V13, TR409). If a person had a severe injury to his hand, Johnson would have expected to see a blood trail leading from the inside of the trailer to the outside. (V13, TR411, 470).

Johnson took a photograph of the piece of wood that was located by the air conditioning unit. The blood smear had been swabbed off. Johnson said the wood should have been processed for "possible" fingerprints. (V13, TR413-14, 467). The bloodstain was a transfer stain containing Reynolds' blood. (V13, TR417). Johnson could not say "who put the blood there" or when it was put there. "Anything is possible." (V13, TR418).

Johnson photographed a pair of panties which had been collected at the crime scene, which contained a transfer blood stain. (V13, TR415). In her opinion, DNA analysis should have been done to determine who had been wearing the underwear. (V13, TR415, 471).

Johnson photographed a cutting from a couch cushion which contained transfer blood stains. (V13, TR420-21). In her opinion, the cutting should have been tested for epithelial cells, fingerprints, or impressions. (V13, TR421, 472). The bloody cushions were packaged in plastic, "which is not the proper way to preserve blood." (V13, TR421, 472). The blood on the cushions was not identified as Reynolds'. (V13, TR447). Johnson noted that law enforcement was not able to identify shoe track

impressions found at the crime scene. (V13, TR427, 474).

Johnson agreed Reynolds would have been motivated to discard clothing and shoes he wore while committing the murders. (V13, TR474). Johnson said it is possible to detect blood or DNA on clothing even if the clothes had been washed in bleach. (V13, TR481).

Johnson photographed and examined the door of Reynolds' residence. She found some elliptical stains consistent with "castoff blood stains." In addition, she noticed a smear stain "consistent with someone coming in contact with the door and placing blood there with a bloody hand." (V13, TR429-30). She noted a jagged edge on the door which was "in very poor condition." (V13, TR430). Johnson said the blood should have been tested. (V13, TR432-33, 476). She testified there was no search conducted for the victims' blood in Reynolds' trailer or car. (V13, TR483).

Johnson said a belt loop found underneath a blanket and the body of Robin should have been tested for skin cells. However, she admitted no DNA identification was made from the blood stain found on the belt loop. (V13, TR436, 476-77). There was no documentation in any lab reports that indicated hairs or fibers from the victims had been found in Reynolds' residence. (V13, TR437).

Johnson said there could have been "potential contamination" with a pink pillow and blanket that were packaged together, found in the same location at the crime scene.

(V13, TR438, 478, 479). Reynolds' pubic hair was found in these pieces of evidence. (V13, TR478). A pair of panties found in the passenger seat of a Ford escort should have been tested to see who they belonged to. (V13, TR440-41, 479, 483). Further, Johnson noted there was no evidence that the entryway to the crime scene trailer had been screened off to preserve potential evidence. (V13, TR442-43). The carpet around the victims should have been examined for probative hairs and fibers. (V13, TR443). Johnson said the blood stain patterns within the crime scene needed to be "analyzed for reconstruction." (V13, TR449). There was a mixture of Reynolds' blood and Christina's blood on several pieces of evidence but none of his DNA or blood was found on either of the victims' bodies. (V13, TR451-52). In Johnson's opinion, Reynolds' trial counsel should have called its own DNA expert. (V13, TR454). However, as far as Johnson knew, FDLE followed appropriate protocols and procedures in this case. (V13, TR463-64).

Michael Reynolds testified in his own behalf. (V13, TR511). He acknowledged that he signed a waiver to present mitigation (V13, TR570, 572; V14, R646), that he wanted to skip a penalty phase and go directly to sentencing (V13, TR580), and that at the beginning of the penalty phase, Reynolds stated to the Court, "Mr. Laurence and Mr. Iennaco did their job." (V13, TR582). Reynolds knew his sisters were ready to testify on his behalf at the penalty phase. (V14, TR637). However, Reynolds claimed

he was distraught when he signed his waiver of mitigation because of the State's "closing arguments." (V14, TR607). He chose not to present mitigation because "he could only answer questions pertinent to, well, did you have a bad childhood? And so I couldn't address the jury." (V14, TR610). He wanted to tell the jury that the State made unacceptable closing arguments. (V14, TR610, 648). Reynolds said his waiver of mitigation was not voluntary and knowing. (V14, TR613). In retrospect, Reynolds would have presented mitigation. (V14, TR648-49).

Reynolds said he was "stunned" when he was found guilty. (V14, TR614). He had requested trial counsel hire various experts. To his knowledge, only a blood spatter expert was hired. (V14, TR616, 617, 618, 623, 650-51). Reynolds insisted he had never been in the victims' home. He did not know how his DNA got "mixed" with the victims. (V14, TR621). He did acknowledge that trial counsel asked their own experts to re-test the evidence for DNA and the results were the same as FDLE's. (V14, TR651-52).

Francis Iennaco and Steve Laurence were Reynolds' trial counsel. (V14, TR665, 668; V15, R847, 852). Laurence and Iennaco discussed everything that they did in this case. (V15, TR870). Iennaco spoke with previous counsel from the public defender's office about mitigation. Iennaco's primary responsibility was preparation for the penalty phase. (V14, TR675; V15, R870-71). However, Reynolds "never really wanted

to focus on that." Laurence and Iennaco both said it was "very difficult" to get Reynolds to talk about mitigation. (V14, TR678, 739; V15, R872). Iennaco met with Reynolds on many occasions and spent a lot of time with Reynolds. (V14, TR678). Laurence said Reynolds refused to have a PET scan and was opposed to any psychological or mental health evaluations. (V15, TR872, 899).

Iennaco hired mitigation investigator Sandy Love to assist with mitigation. (V14, TR679, 683; V15, R854). Love was supposed to locate and interview witnesses. (V15, TR855). Together, Iennaco and Love tried to convince Reynolds to "let us do anything mitigation-wise." (V14, TR685). Laurence said Reynolds' sisters were prepared to testify at the penalty phase. (V15, TR903). Iennaco requested and received Reynolds' school records. (V14, TR686). Some school records were unavailable as they had been destroyed. (V15, TR688). Iennaco received Reynolds' medical records, prior criminal records, and records from various prisons. (V15, TR688). Reynolds' sister gave Iennaco family photographs. (V15, TR688). Iennaco hired Dr. Michael Herkov to interview and evaluate Reynolds. (V15, TR689; V16, R872-73). Reynolds made it "perfectly clear he had no interest in presenting mental mitigation or any mitigation." (V14, TR691; V15, R898). Iennaco said it took a few years for Reynolds to agree to meet with Dr. Herkov as "a favor to Sandy Love and I, to make our jobs easier and so that we could do one of the things that we're required to do." (V14,

TR691, 694, 740). There were no records that indicated Reynolds had ever been diagnosed with a specific mental illness. (V14, TR691). Laurence and Iennaco spoke with Dr. Herkov about his evaluation results. Herkov said he could not be of any help regarding mitigation. (V15, TR898).

Iennaco reviewed the Diagnostic and Statistical Manual of Mental Disorders ("DSM IV") for five hours to see if there was any illness that "fit" Reynolds. (V14, TR691-92, 701). He looked at the criteria for schizophrenia, bipolar disorder, obsessive-compulsive disorder, and intermittent rage disorder, to see if any were applicable to Reynolds. (V14, TR692, 697). Iennaco thought Reynolds had a mental disorder but could not "put (his) finger on it." (V14, TR696). Dr. Herkov diagnosed Reynolds with antisocial personality disorder and was a "textbook" case for it. (V14, TR697, 741). Dr. Herkov told counsel that he would "make a much better witness for the other side." (V14, TR700, 741). Iennaco said it is significant to present mental health mitigation to the jury "if you have the facts to back it up." (V14, TR702). Iennaco was confident that Dr. Herkov had the ability to properly evaluate Reynolds. (V14, TR740). No "reputable" expert would disagree with Herkov's conclusions. (V14, TR747). Insofar as a second opinion, Ienacco testified that not only would the Court require a "pretty good reason" to hire a second expert for the same issue, but also, Reynolds made it perfectly clear that he would not speak to another mental health

expert and wanted nothing to do with presenting mitigation. (V14, TR743, 746). Still, Iennaco tried to convince Reynolds to present mitigation. (V14, TR746).

Reynolds was "quite open" with Iennaco about his own drug and alcohol abuse. (V14, TR702-03, 748). Although Reynolds was aware this was a potential source of mitigation evidence, Reynolds "had specifically said he would not want to bring out that sort of thing." (V14, TR703, 748). Iennaco spoke with Reynolds and his sisters about mitigation. Reynolds had a wife and child he was estranged from, but "he absolutely refused to allow us to have any contact with (them)." (V14, TR704).

Iennaco said Reynolds' father was abusive and they lived in poverty most of the time. Reynolds was very devoted to his mother. Reynolds had three sisters, but he and his sister Stacia took the "brunt of the abuse from their father." (V14, TR705-06). Although Iennaco had a lot of family information, he ultimately did "nothing" with it because "Michael would never allow it."(V14, TR708). Reynolds repeatedly told counsel, "If they think I did this, it doesn't matter how much mitigation you present." (V14, TR709). Iennaco developed mitigation, discussed it with Reynolds, and was prepared to present it to the jury. (V14, TR709, 762).[9] Iennaco said there was no statutory mitigation but there was nonstatutory mitigation they could have presented.

[9] Reynolds legally waived presentation of mitigation on May 8, 2003, the first day of the penalty phase. However, he had told his counsel for "years" that he was not going to allow the presentation of mitigation at the penalty phase. (V14, TR761-62).

Reynolds would not "let him use it." (V14, TR710). Further, Reynolds said "many times" that he would "rather be executed than spend (his) life in prison." (V14, TR750).

Laurence, primary attorney for the guilt phase, deposed a large number of potential witnesses. (V15, TR853). He initially spoke with Dr. Gary Litman to assist in the development of the DNA part of the trial. (V15, TR857). Laurence said Litman "did a great job" in helping the defense understand the chain of custody of evidence. (V15, TR862, 863, 893). Laurence said Litman advised counsel about all aspects of DNA. Litman reviewed reports from FDLE and spoke to defense counsel about the significance of any FDLE reports. (V15, TR864). In addition, the defense hired LabCorp to re-evaluate DNA work conducted by FDLE. (V15, TR894). LabCorp's results were the same as FDLE's. Litman concurred with the findings. (V15, TR895). Another lab, ASTB, also conducted DNA testing on evidence. (V15, TR895). This lab's results were not helpful to the defense as there was not enough sample for the lab to test. (V15, TR896, 907).

Iennaco had a science background, so he cross-examined some of the witnesses on DNA matters at trial. (V14, TR717, 753, 764; V15, R864). Iennaco brought out facts on cross-examination that there were problems with collection and packaging of some of the evidence and potential tainting. (V14, TR753-54, 755). In addition,

Iennaco was successful in bringing out the fact that none of Reynolds' blood was found on the victims. Nor was their blood found on Reynolds or his clothing or vehicle. (V14, TR755). Laurence said the defense team effectively rebutted DNA issues that were presented by the State, "in each and every instance." (V15, TR865, 866, 867).

Iennaco spoke with Dr. Feegal, a forensic pathologist, who was "imminently qualified" as an expert. (V14, TR751). Dr Feegal said the tear on Reynolds' finger was not caused by the door frame on his trailer, as Reynolds claimed. (V14, TR720-21, 751-52, V15, R856-57). Dr. Feegal was not able to provide testimony in the defense's favor. (V14, TR764). Laurence hired Stuart James as a crime scene investigator and blood spatter expert. (V15, TR859). However, James' opinion "was not helpful," and it "would not be in Mike's best interest to call him as a witness." (V15, TR860). Further, James had "extremely" damaging information to Reynolds' case that the State was not aware of. (V15, TR860-61). James reviewed photographs of Reynolds' hands and pointed out what looked like fingernail marks on the back of the hands consistent with a victim struggling against him. (V15, TR893). Reynolds told Laurence the marks were from a briar patch. (V15, TR904, 906).

Iennaco vaguely remembered a memorial set up for the victims outside the courtroom door. (V14, TR726, 728). Laurence and Iennaco did not see the memorial.

(V14, TR728; V15, R889).[10]

Mr. Laurence did not object to the prosecutor's statement about the removal of Christina's panties because it was not an objectionable argument due to the evidence presented by the State. (V15, TR868). Laurence did not see the need for a curative instruction or that it was proper to move for a mistrial. (V15, TR870).

Iennaco remembered that Reynolds wanted to testify at the penalty phase but only about residual doubt or to complain about the State's closing arguments. (V14, TR749). Reynolds was adamant about not presenting mitigation. (V14, TR757). Reynolds would not allow counsel to present any testimony that he had organic brain damage. (V14, TR733). Although Iennaco and Reynolds discussed brain injuries Reynolds had suffered, Reynolds "just was not interested" in hiring a neuropsychologist. (V14, TR734).

Iennaco and Laurence discussed mentioning Reynolds' prior felony convictions during *voir dire*. (V14, TR735-36). Since jurors would eventually find out during the trial about Reynolds' prior felony convictions, Laurence and Iennaco thought it best to mention it during *voir dire.* Some jurors might agree that they could not be fair. (V14, TR735-36). Further, Reynolds had repeatedly said he was going to testify at trial. (V14, TR757, 888). Iennaco and Laurence were "absolutely convinced" Reynolds

[10] The trial court clarified that it ordered the display to be removed, and it was removed

would testify and the jurors would find out about a prior felony convictions. (V14, TR736; V15, R888). A witness for the State, a "snitch," was going to testify that he had been in jail with Reynolds. (V14, TR758; V15, R891-92). It was the defense's strategy to let the jurors know early on about Reynolds' prior convictions. (V14, TR758-59). Laurence said everything the defense team did was based on Reynolds testifying. However, Reynolds ultimately decided not to testify. (V15, TR902).

Iennaco could not recall the specific questions he asked State DNA witness Charles Badger on cross examination. (V14, TR765-66). The FDLE report was admitted as Defense Exhibit 9. (V14, TR768-69). The FDLE report read as follows:

> "ME-9E. Vaginal swabs from Christina Razor. The partial DNA profile, parentheses, DE-3S1358 comma, VWA, comma, amelo - - amelogenin, comma, D8 1179 and THL1, close parentheses, obtained from exhibit ME-9E is consistent with the profile obtained for - - from ME-2B stained card of liquid blood represented as being from Christina Razor, closed parentheses, period. **Michael Reynolds, Robin Razor, and Danny Privett are excluded from being the donor of the DNA profile observed."**

(V14, TR769-70; Defense exhibit 9; V8, R1301). Mr. Iennaco recognized that there was a difference between what Badger's report said and what the transcript of his testimony said. (V14, TR771).[11] The audiotape of the trial testimony was played for

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before the jury was brought into the courtroom. (V14, TR635, 660-61).

[11] The trial transcript has the "period" placed in the wrong place and reads that the DNA results were "consistent with Christina Razor and Michael Reynolds. Robin Razor and Danny Privett were excluded." By placing the "period" in the same position

Mr. Iennaco, who clarified that if the transcript were changed to change the period, indicated the following testimony was given by DNA expert Charles Badger:

> "and those results that were obtained were found to be consistent with Christina Razor. **And Michael Reynolds, Robin Razor and Danny Privett were excluded from being the donors of the DNA profile observed."**

(V14, TR774-777). That testimony would be consistent with the report and the corrections the court reporter indicated should be made in the trial transcript. (V14, TR778; State Exhibit 5, V8, R1216). Because the testimony was actually consistent with the report, there was no reason for Iennaco to object. (V14, TR778-79). Furthermore, the markers shown in the report show that the results could not possibly match both Christina Razor and Reynolds. (V14, TR779).

Dr. Jeffrey Danziger, M.D., a board certified forensic psychiatrist, conducted a mental health evaluation on Reynolds. (V14, TR789-90, 795; V15, R804). Dr. Danziger's August 21, 2009, report was admitted as State Exh. 8. (V8, R1225-1240; V14, R797, 798). He reviewed a vast amount of material related to Reynolds which included notes written by Dr. Herkov and a deposition given by Reynolds' sister, Stacia. (V14, TR797; V15, R804).

Dr. Danziger explained that organic brain damage is not a term used in the

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as the report, the sentence reads that the DNA results were "consistent with Christina Razor. And Michael Reynolds, Robin Razor and Danny Privett were excluded."

DSM-IV. He uses different terms such as dementia or cognitive disorder NOS, that imply something physical happened to cause an injury to someone's brain, which resulted in some sort of mental health or intellectual problem. (V14, TR798-99).

Reynolds told Dr. Danziger that he was innocent and thus, did not discuss the offenses. (V15, TR807). Reynolds denied excessive drinking and substance abuse at the time of the murders. (V15, TR809). Based on Reynolds' self-reporting, Dr. Danziger diagnosed Reynolds as drug dependent "generally upon his life" not specifically for the time of the murders. (V15, TR810). As a result of Reynolds' denial of drug or alcohol use at the time of the murders, Reynolds did not meet the criteria for extreme emotional distress or substantially-impaired capacity. (V15, TR810-11). There was no information, collateral or otherwise, that indicated any psychosis or any extremes of mental abnormality. (V15, TR812, 813).

In 1990, Reynolds was hit in the head with a baseball bat. Dr. Danziger said it "potentially could, or it might not" cause organic brain damage, depending upon the impact and what damaged was caused. (V15, TR814). Reynolds was knocked to the ground but gained control of the bat before police arrived. Reynolds told police that nothing had happened because "he didn't want to rat." (V15, TR815). Reynolds' self-report of the incident did not suggest a prolonged period of unconsciousness. Reynolds

did not receive any treatment for the injury. (V15, TR815). Dr. Danziger said Reynolds' antisocial personality disorder was primarily responsible for his criminal conduct over the years, "not a baseball bat in 1990." (V15, TR815).

Reynolds had conduct disorder and an extensive juvenile and adult criminal history. (V15, TR815, 831). The murders committed in this case are consistent with the killer having antisocial personality disorder. (V15, TR817).

Dr. Danziger said Reynolds' self-report of a distressful childhood did not meet the criteria for post traumatic stress disorder. Reynolds did not report that he persistently re-experiences traumatic events. (V15, TR818-19, 829). Reynolds has cirrhosis of the liver and hepatitis C, medical conditions which may overlap with mild depressive syndrome. (V15, TR819-20). Cirrhosis of the liver may be caused by alcohol or by any condition that damages and kills liver cells. Liver damage can affect appetite, sleep or energy. The three core symptoms are also consistent with depressive disorders. (V15, TR820). However, Reynolds did not report any mental health distress he was experiencing when the murders occurred. He was steadily employed and had a girlfriend. (V15, TR821).

Testing conducted by Dr. Olafsson indicated an eight-point difference in scores on the WAIS-III and the TONI, which does not suggest organic brain damage. (V15, TR823). Dr. Danziger agreed with Dr. Olafsson that Reynolds has antisocial

personality disorder and substance dependence issues. He disagreed that Reynolds has post traumatic stress disorder and recurrent major depressive disorder. In addition, Dr. Danziger "question[ed] the reliance of head injuries given the scarcity of data." (V15, TR835).

Dr. Danziger diagnosed Reynolds with antisocial personality disorder and polysubstance dependence. The polysubstance dependence is not connected to the murders. (V15, TR825). There is not much in terms of treatment for people diagnosed with antisocial personality disorder. Neither is there medication, and those diagnosed usually end up in jail or prison. (V15, TR832).

In his opinion, Dr. Danziger said it would not have made any difference had a mental health expert testified for Reynolds during his trial. (V15, TR840). Reynolds had "no significant mental health history … nothing that suggests he had bipolar disorders, schizophrenia, (or) was psychotic at the time." (V15, TR840-41).

## SUMMARY OF ARGUMENTS

**Point 1:** The trial judge did not err in summarily denying claims which were procedurally barred, legally insufficient, refuted by the record or without merit. Claims not adequately briefed on appeal are waived.

**Point 2:** The trial judge held an evidentiary hearing on each of the claims raised in this point. His findings are supported by competent substantial evidence. Reynolds

failed to meet his burden on deficient performance and prejudice as required by *Strickland.* Claims not adequately briefed on appeal are waived. Testimony of witnesses not available to testify at the penalty phase should not considered in postconviction proceedings.

**Standard of Review on Claims of Ineffective Assistance of Counsel**

Before ruling on the claims of ineffective assistance of counsel, the trial judge properly recognized Strickland as the controlling authority for claims of ineffective assistance of counsel:

> According to the United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), a defendant must meet a two-prong test to successfully allege 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.

466 U.S. at 687, 104 S.Ct. at 2064. The Supreme Court further stated that

> > 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.
>
> 466 U.S. at 689, 104 S.Ct. at 2065. "Moreover, strategic decisions do not constitute ineffective assistance of counsel if alternative courses have been considered and rejected and counsel's decision was reasonable under the norms of professional conduct." *Occhicone v. State,* 768 So. 2d 1037, 1048 (Fla. 2000). "A Defendant bears the burden of establishing both prongs of the *Strickland* test before a criminal conviction will be vacated." *Schofield v. State*, 681 So. 2d 736, 737 (Fla. 2d DCA 1996).

(V10, R1645-46).

## ARGUMENT

## POINT 1

### THE TRIAL JUDGE DID NOT ERR IN SUMMARILY DENYING CLAIMS WHICH WERE PROCEDURALLY BARRED, LEGALLY INSUFFICIENT, OR REFUTED BY THE RECORD

Reynolds argues the trial judge erred in summarily denying Claims 1, 2, 3A, 5, 10, 12, A-III, A-IV, and A-V. (Brief at 36). He concedes that summarily denied claims not raised on appeal are waived. Notwithstanding, Reynolds attempts to argue the summary denial of nine claims but only brief seven. Any issue which is not briefed on appeal is waived. *See Simmons v. State,* 934 So. 2d 1100, 1111 n.12 (Fla. 2006) *citing Coolen v. State,* 696 So. 2d 738, 742 n.2 (Fla. 1997)*; Duest v. Dugger*, 555 So. 2d 849,

852 (Fla. 1990). The claims which are argued on appeal include:

> Claim 3(a): ineffective assistance of counsel - failure to object to false testimony;
>
> Claim 5: ineffective assistance of counsel - failure to object to misstatement regarding burden of proof;
>
> Claim 10: ineffective assistance of counsel - Inv. Ray Parker not qualified to give expert testimony;
>
> Claim 12: ineffective assistance of counsel - neighbor not qualified to give lay testimony about bleaching clothing;
>
> A-III: lethal injection;
>
> A-IV: ineffective assistance of counsel – fail to object to sleeping juror;
>
> A-V: ineffective assistance of counsel – fail to prepare defendant to testify.

This Court has consistently held that a claim that could or should have been raised on direct appeal is procedurally barred. *Miller v. State,* 926 So. 2d 1243, 1260 (Fla. 2006); *Davis v. State, 915* So. 2d 95, 129 (Fla. 2005). A procedurally barred claim cannot be relitigated under the guise of ineffective assistance of counsel. *See Rodriguez v. State/Crosby,* 919 So. 2d 1252, 1262 (Fla. 2005); *Freeman v. State/Singletary,* 761 So. 2d 1055, 1067 (Fla. 2000). Postconviction claims also may be summarily denied when they are legally insufficient, should have been brought on direct appeal, or are positively refuted by the record. *Connor v. State,* 979 So. 2d 852 (Fla. 2007). Allegations of ineffective assistance of counsel may be summarily

denied when refuted by the record or the allegations are conclusory. *Id. See also Troy v. State*, 57 So. 3d 828, 834 (Fla. 2011); *Franqui v. State*, 59 So. 3d 82, 96 (Fla. 2011); *Walls v. State*, 926 So. 2d 1156, 1173 (Fla. 2006); *Knight v. State*, 923 So. 2d 387 (Fla. 2005).

**Claim 3(a): ineffective assistance of counsel - failure to object to "false" testimony of Charles Badger.** Claim 1(a) of the Motion for Postconviction Relief alleged the prosecutor presented false testimony from FDLE analyst Charles Badger. (V2, R 110-126). Claim 3(a) of the motion to vacate also raised a claim of ineffective assistance of counsel for failing to object to the "false" testimony. (V2, R129). The trial transcript indicates that FDLE analyst Charles Badger testified regarding the Christina Razor vaginal swab:

> And those results that were obtained were found to be consistent or matched the DNA results that were obtained were found to be consistent or matched the DNA profile of **Christina Razor and Michael Reynolds. Robin Razor and Danny Privett were excluded** from being the donors of the DNA profile observed. (Emphasis supplied)

(DAR, V17, R2015). Charles Badger's report[12] at page 6 reports the results of DNA testing on the vaginal swabs from Christina Razor:

> The partial DNA profile... obtained for exhibit ME-9E is consistent with the profile obtained from ME-2b (stain card of liquid blood represented

[12] Defense counsel had Charles Badger's report, which was provided in discovery on September 18, 2000. (V2, R254-64). Defense counsel even moved to exclude the report as improper bolstering. (DAR2747-48).

> as being from Christina Razor). **Michael Reynolds, Robin Razor and Danny Privett are excluded** from being the donor of the DNA profile observed. (Emphasis supplied)

(V2, R261; Def. Exh. 9, (V14, TR768-69). This was obviously a scrivener's error on the part of the court reporter, and there was a "." in the wrong place. The State obtained an affidavit from the court reporter in which she corrected the error and the State attached the affidavit to its response to the postconviction motion together with the tape recording of Badger's trial testimony. (V2, R252, 253). The disparity between Badger's report and the transcript was the subject of the State's Motion to Correct Record. (V3, R332-354). The defense opposed the motion to correct. (V380-414). The trial judge held a hearing, after which he denied the motion to correct the record. (V5, R627-28).

Even though Claim 3(a) was summarily denied, the issue was explored during the testimony of trial attorney Iennaco at the evidentiary hearing. Mr. Iennaco recognized that there was a difference between what Badger's report said and what the transcript of his testimony said. (V14, TR771). The audiotape of the trial testimony was played for Mr. Iennaco, who clarified that if the transcript were changed to change the period, Badger's testimony would be:

> "and those results that were obtained were found to be consistent with Christina Razor. **And Michael Reynolds, Robin Razor and Danny Privett were excluded from being the donors of the DNA profile observed."** (Emphasis supplied)

(V14, TR774-777). That testimony would be consistent with Badger's report. (V14, TR778, State Exhibit 5). Because the testimony was actually consistent with the report, there was no reason for Iennaco to object. (V14, TR778-79). Furthermore, the markers shown in the report show that the results could not possibly match both Christine Razor and Reynolds. (V14, TR779).

The trial judge noted in his order after the postconviction evidentiary hearing:

> The Defendant continues to argue what he terms "the Badger lie." This issue has been litigated extensively throughout the post-conviction process, and is outlined at various points in the record. This Court declined to correct the transcript to comport with the State's interpretation of what it said, nor did the Court accept that the Defendant's interpretation was correct. The Court simply let the transcript speak for itself, leaving the parties to argue about the differing interpretations. However, this Court has heard the tape of the trial, as did Attorney Iennaco. (EH 769-79). It does appear that the State's interpretation of the testimony is correct, especially when noting, as Attorney Iennaco did, that the presence of a gender marker would necessarily make the identification of the DNA coming from both the Defendant and the female victim a genetic impossibility.

(V10, R1646 n. 2). These findings are supported by competent, substantial evidence.

Further, the prosecutor did not, as Reynolds argues, state that Reynolds's sperm was on Christina's vaginal swabs. Just the opposite. The prosecutor told the jury there was ***no*** sperm on Christina's body. (DARV21, R2939). The prosecutor presented testimony that there was no semen on Christina's vaginal swab, and the defense expanded on that testimony in direct examination. (DAR, V15, R1651, 1691). This

claim was properly denied summarily. *See Troy v. State*, 57 So. 2d 828 (Fla. 2011); *Franqui v. State*, 59 So. 3d 82 (Fla. 2011).

**Claim 5: ineffective assistance of counsel - failure to object to misstatement regarding burden of proof.** Reynolds claims defense counsel failed to object to the trial judge's misstatement when giving instructions to jurors during *voir dire*. The direct appeal record shows that the trial judge mistakenly said "the State doesn't have to do anything" rather than "the defense" or "the Defendant." (DAR571). The prosecutor subsequently brought the error to the attention of the trial judge, who responded "I think I drove it home enough to where they understand." (DAR627). Defense counsel asked the judge to correct the mistake, but the trial judge did not correct the misstatement. (DAR, V10, R627-28).

First, this issue should have been raised on direct appeal and is procedurally barred. The record shows on its face that the judge failed to correct the misstatement.

Second, this issue has no merit. As the trial judge stated, he "drove it home enough" so there was no question regarding the State's burden. Prior to the misstatement, the judge repeatedly "drove home" the fact that the Defendant was presumed innocent and the State had the burden beyond a reasonable doubt, as follows:

> Presumptions have long been a part of criminal law. The presumption of innocence is such an example. Our system of justice is accusatorial

in nature. That means that the State has the power to accuse, and the responsibilities to prove, a charge against a Defendant. As a result, a Defendant is presumed innocent until proven guilty beyond a reasonable doubt. (DAR30).

Do you agree with the principle of law that a person is presumed to be innocent until proven guilty beyond a reasonable doubt?(DAR199).

Will you continue to give the Defendant the benefit of the presumption of innocence through each stage of the trial until the State of Florida, if it can, overcomes that presumption by proving the Defendant guilty beyond a reasonable doubt? (DAR204).

Presumptions have long been a part of criminal law, the presumption of innocence is such an example. Our system of justice is accusatorial in nature. That means the State has the power to accuse and the responsibility to prove a charge against the defendant. As a result, a defendant is presumed innocent unless proven guilty beyond a reasonable doubt. (DAR220)

Do you agree with the principle of law that a person is presumed to be innocent until proven guilty beyond a reasonable doubt?" (DAR380)

Will you continue to give the Defendant the benefit of the presumption of innocence through each stage of the trial until the State of Florida, if it can, overcomes that presumption by proving the Defendant guilty beyond and to the exclusion of a reasonable doubt? (DAR381).

In a criminal case, the burden is much higher, it's beyond and to the exclusion of a reasonable doubt. Do does everyone understand the higher burden of proof applies in the criminal case? (DAR435).

I always ask the State in the presence of all the members of the panel, if they accept the burden of proving the case beyond and to the exclusion of a reasonable doubt? This case is no different. Mr. Hastings, does the State of Florida accept the burden of proof beyond and to the exclusion of all reasonable doubt?

MR. HASTINGS: We do. (DAR564-65).

After the trial judge misspoke and said the State had the burden, the prosecutor repeatedly made it clear that the State had the burden of proof:

> [E]ach of the crimes in the State of Florida, no matter what they are, whether it's a shoplifting or first degree murder, have certain number of elements, and each of those elements, the Judge told you, has to be proven beyond a reasonable doubt. (DAR574).
>
> And you all indicated that before you would find the Defendant guilty, you would make sure that the State proved those elements beyond a reasonable doubt. (DAR575).
>
> Now, the burden of proof, as you've heard and everything, in a criminal case, it doesn't matter whether it's a shoplifting case or a first degree murder case, is beyond a reasonable doubt. Would you -- Do you feel that's appropriate burden?" (DAR619)

Defense counsel also drilled the jurors on the burden:

> Do you believe he, in fact, should be presumed to be innocent?
>
> PROSPECTIVE JURORS: Yes.
>
> MR. LAURENCE: That presumption stays with Mr. Reynolds until such time, if any, that the State Attorney's office proves beyond a reasonable doubt that it should go away; that, in fact, he was guilty. Do you understand that? (DAR716).
>
> In a criminal case, the burden of proof is much different, it's beyond each and every reasonable doubt. Standard is much higher. Do each of you accept that that standard is much higher?" (DAR717).

Before they were sworn, the jurors were once again reminded of the burden

of proof:

> It is your solemn responsibility to determine if the State has proved its accusation beyond a reasonable doubt against Mr. Reynolds. Your verdict must be based solely on the evidence, or lack of evidence, and the law. (DAR717).

During closing argument, both the State and the defense constantly reminded the jury of the burden of proof, reasonable doubt, and the presumption of innocence. (DAR2782, 2783, 2794, 2823, 2825, 2828, 2829, 2830, 2950, 2952) (State on reasonable doubt); (DAR2934) (State on burden); (DAR2870, 2880, 2885, 2891-92, 2913, 2925, 2949) (defense on reasonable doubt); (DAR2891-92, 2894, 2897, 2900) (defense on burden of proof). Throughout the arguments, the parties referenced the judge's instructions. The judge instructed the jury on each count about the burden of proof and reasonable doubt. (DAR2973, 2975, 2976, 2977, 2979, 2980, 2981, 2982, 2984, 2985, 2986, 2987, 2989, 2990, 2994, 2995, 2996).

Counsel was not deficient because he asked the judge to correct the misstatement. There was no prejudice from the judge's one misstatement. The jury was reminded over and over that the State had the burden to prove the defendant's guilt beyond a reasonable doubt and the Defendant was presumed innocent.

There is no possibility, much less a reasonable probability, this one statement affected the outcome of the trial. *Johnston v. State/Buss,* 36 Fla. L. Weekly S193 (Fla. Apr. 28, 2011); *Gonzalez v. State,* 990 So. 2d 1017, 1027 (Fla. 2008). *See, e.g.*

*Hojan v. State*, 3 So. 3d 1204, 1212 n.4 (Fla. 2009) ("misstatement by the trial court does not undermine the remaining evidence supporting the trial court's rejection of the motion to suppress"); *Henyard v. State*, 689 So. 2d 239 (Fla. 1996) (finding that the prosecutor's misstatement of the law during *voir dire* was harmless error because it only happened three times and the misstatement was not repeated by the trial court when instructing the jury prior to deliberations); *Allen v. State*, 939 So. 2d 273, 276 (Fla. 4th DCA 2006) ("the determination of whether fundamental error occurred requires that the trial judge's slip of the tongue be examined in the context of the other jury instructions, the attorneys' arguments, and the evidence in the case to decide whether the 'verdict of guilty could not have been obtained without the assistance of the alleged error.' ") (*quoting State v. Delva*, 575 So. 2d 643, 645 (Fla. 1991)). This claim was properly denied summarily. *See Troy v. State*, 57 So. 2d 828 (Fla. 2011); *Franqui v. State*, 59 So. 3d 82 (Fla. 2011).

**Claim 10: ineffective assistance of counsel - Inv. Ray Parker not qualified to give expert testimony.** Reynolds alleges that Investigator Ray Parker gave an opinion as an expert when he testified about a metal notch Reynolds cut from a metal door. The crux of this issue is whether or not a piece of metal would be shiny if recently cut. Reynolds had given a statement that he cut the notch from the door the night of the murder. The door was in the courtroom, and the notch was in evidence.

(DAR1312-1313, State Exhibits #96, #97). Crime scene investigator Coy showed the door to the jury, pointed out the location of the metal "nick," and described how the door opened. (DAR1313). The jury was quite aware of the logistics of the piece metal as it related to the door. Reynolds claims that Inv. Parker's testimony that if the metal would be shiny if recently cut requires "expert" testimony, that Parker is not an expert in metallurgy, and that counsel was ineffective for failing to object. Further, Reynolds claims Parker's testimony that the notch would "have to be really sticking out" to cut his finger, was expert testimony. Neither subject requires expert testimony. Whether metal is shiny when recently cut is a subject about which a lay person may testify about. Likewise, whether a notch is large enough to cause a serious injury is within the knowledge of the common person. Section 90.701, Florida Statutes provides:

> If a witness is not testifying as an expert, the witness's testimony about what he or she perceived may be in the form of inference and opinion when:
>
> (1) The witness cannot readily, and with equal accuracy and adequacy, communicate what he or she has perceived to the trier of fact without testifying in terms of inferences or opinions and the witness's use of inferences or opinions will not mislead the trier of fact to the prejudice of the objecting party; and
>
> (2) The opinions and inferences do not require a special knowledge, skill, experience, or training.
>
> Inv. Parker was not testifying as an expert on either subject. He was relaying

his opinion on a common subject: whether cutting off a piece of metal will leave a shiny mark and whether a small piece of metal could cause a serious injury. When a lay witness has firsthand knowledge through personal observation of the facts, his testimony is admissible. *See Bolin v. State*, 41 So.3d 151, 158 (Fla. 2010)(law witness may testify to color of blood); *Holland v. State*, 916 So. 2d 750 (Fla. 2005) (officer testified gun on floor "appeared dropped" because it was lying in crevice); *Floyd v. State,* 569 So. 2d 1225, 1231 (Fla. 1990) (officer testified tablecloth looked like someone wiped blood with it and left it on bed); *Miller v. State*, 934 So. 2d 580, 582 (Fla. 2006) (officer testified bruise on arm was fading and laceration healing when defendant arrested). Counsel cannot be deficient for failing to raise an objection that has no merit. Reynolds' statements regarding the door, the door itself, and the notch were in evidence and the jury was free to reach their own conclusion. Thus, there is no prejudice.

Further, there is no prejudice because the medical examiner, Dr. Irrgang, testified about the notch in the metal door. (DAR1349-50). Dr. Irrgang gave her expert opinion that the burr on the metal door did not cause the injury to Reynolds' hand. (DAR1351). The cut to Reynolds' hand was deep and lacerated the tendon. (DAR1352). The injury was very likely from a knife. (DAR1354). Two of the stab wounds to Robin Razor, one to the neck and one to the rib, hit bone. (DAR1353).

Hitting bone could cause the knife to slip and cause the hand to slide down the knife. (DAR1354). Thus, the testimony of Parker was cumulative to the testimony of Dr. Irrgang on the hand injury, and there is no prejudice. This claim was properly denied summarily. *See Troy v. State*, 57 So. 2d 828 (Fla. 2011); *Franqui v. State*, 59 So. 3d 82 (Fla. 2011).

**Claim 12: ineffective assistance of counsel - neighbor not qualified to give lay testimony about bleaching clothing.** Next Reynolds faults counsel for failing to object to the testimony of the neighbor, Gloria Laschance, because she was allowed to testify Reynolds' clothes were on the clothesline and "They appeared to be bleached, strongly bleached. They were faded." (DAR1307). Reynolds lived on property owned by Gloria Laschance and had purchased a trailer from her. (DAR2217). On the morning the bodies were discovered, Laschance saw Reynolds doing laundry at 5:30 a.m. (DAR2218). Reynolds said he had done laundry the night before and was finishing up that morning. (DAR2223), but Laschance did not believe he had. done any the night before because he borrowed laundry powder the next day. (DAR2224).

Reynolds advances no explanation why this testimony was inadmissible. Mrs. Laschance personally observed the clothes. She allowed Reynolds to use her washing machine. She did not testify that she believed Reynolds washed his clothes

to eliminate evidence. The State is allowed to draw inferences from the evidence. Reynolds was washing clothes at 5:30 a.m. the morning after the murders when he supposedly had fallen down the stairs and injured his finger so badly he had to go to the emergency room.

As stated in above, whether clothes have been washed and bleached is a subject clearly within the province of a lay witness. *See Holland v. State*, 916 So. 2d 750 (Fla. 2005) (officer testified gun on floor "appeared dropped" because it was lying in crevice); *Floyd v. State*, 569 So. 2d 1225, 1231 (Fla. 1990) (officer testified tablecloth looked like someone wiped blood with it and left it on bed); *Miller v. State*, 934 So. 2d 580, 582 (Fla. 2006) (officer testified bruise on arm was fading and laceration healing when defendant arrested). Counsel cannot be deficient for failing to raise an objection that has no merit.

Furthermore, Mrs. Laschance's testimony was cumulative to that of Ann Coy and Charles Badger, so there can be no prejudice. Ann Coy testified that clothing on the clothesline that appeared to be strongly bleached was seized. (TT1307). Charles Badger testified that clothes that had been washed would remove DNA; the fresher the stain, the easier to remove. (TT1992). Bleach has an additional effect of washing away DNA. (TT1993). This claim was properly denied summarily. *See Troy v. State*, 57 So. 2d 828 (Fla. 2011); *Franqui v. State*, 59 So. 3d 82 (Fla. 2011).

**A-III: lethal injection;** This claim is procedurally barred for failure to raise it on direct appeal. *Reynolds v. State*, 934 So. 2d 1128 (Fla. 2006). Lethal injection was adopted as the method of execution in 2000. Further, this issue has no merit. This Court has consistently rejected lethal injection claims, and Reynolds advances no reason for this Court not to follow established law. *See Mosley v. State*, 46 So. 3d 510 (Fla. 2009); *Beasley v. State*, 18 So. 3d 473 (Fla. 2009); *Reese v. State*, 14 So. 3d 913 (Fla. 2009); *Chavez v. State*, 12 So. 3d 199 (Fla. 2009); *Marek v. State*, 8 So. 3d 1123 (Fla. 2009); *Cox v. State*, 5 So. 3d 659 (Fla. 2009); *Thompson v. State*, 3 So. 3d 1237 (Fla. 2009); *Bates v. State*, 3 So. 3d 1091 (Fla. 2009); *Walton v. State*, 3 So. 3d 1000 (Fla. 2009); *Parker v. State*, 3 So. 3d 974 (Fla. 2009); *Burns v. State*, 3 So. 3d 316 (Fla. 2009); *Rigterink v. State*, 2 So. 3d 221 (Fla. 2009); *Ventura v. State*, 2 So. 3d 194 (Fla. 2009); *Peterson v. State*, 2 So. 3d 146 (Fla. 2009).

**A-IV: ineffective assistance of counsel – fail to object to sleeping juror;** Reynolds claims counsel was ineffective for failing to remove Juror Golden from the jury because she was sleeping. This issue was extensively discussed on the record. (DAR2022-2026). Counsel consulted with Reynolds, and Reynolds did not want the juror removed. (DAR2038-39). This claim was waived by Reynolds personally and does not constitute a claim of ineffectiveness. Counsel properly dealt with the situation and there was no deficiency. *See Prince v. State*, 40 So.3d 11, 12 (Fla. 4th DCA

2010)(counsel not deficient where, upon being informed of the drowsy juror, counsel immediately brought the matter to the trial court's attention). Further, there was no prejudice as Reynolds has not alleged the juror was biased. *Cf. Johnston v. State/Buss*, 36 Fla. L. Weekly S122 ( Fla. Mar. 24, 2011); *citing Carratelli v. State*, 961 So.2d 312, 324 (Fla. 2007) (To prove *Strickland* prejudice defendant must show that juror was actually biased; otherwise, confidence in the outcome is not undermined.)

**A-V: ineffective assistance of counsel – fail to prepare defendant to testify.** Reynolds argues trial counsel was ineffective for failing to prepare him to testify, telling jurors he would testify, then coercing him into not testifying. (Brief at 55-56). The trial court personally asked Reynolds whether he would testify, and Reynolds stated that he did not want to testify:

> THE COURT: Go back on the record in Case Number 98-3341-CFA, State of Florida versus Michael Gordon Reynolds. Note the presence of the State, presence of the Defense, presence of the Defendant. Mr. Laurence, have you figured out what the order of trial is gonna be for this afternoon, sir?
>
> MR. LAURENCE: Judge, we're gonna rest at this time
>
> THE COURT: Okay. Mr. Reynolds, like I said before, this would be the time when in the trial if you wanted to testify where you would be able to testify. If you want to testify, that's fine, your testimony is considered by the same standard as any other witness. If you don't want to testify, that's fine, it can't be held against you. As I said before, you should naturally listen very carefully to your attorneys whenever they advise you as far as this particular matter, but again, this is your case, your life, so to speak, you make the final decision.

MR. REYNOLDS: Yes, sir.

THE COURT: Knowing that -- You've spoken to your attorneys about this; is that correct?

MR. REYNOLDS: Yes, sir, I have.

THE COURT: And have you reached a decision whether you want to testify or not testify?

MR. REYNOLDS: Yes, sir.

THE COURT: And what is your decision, sir?

MR. REYNOLDS: No, I don't want to testify.

THE COURT: And you understand that this is the one time of the trial where basically you'd be able to if you wanted to?

MR. REYNOLDS: Right.

THE COURT: And is this your personal decision?

MR. REYNOLDS: Yes, sir.

THE COURT: Then we'll abide by that. So you're gonna rest at this time?

MR. LAURENCE: Yes, sir.

(DAR2730-2731). Reynolds personally waived the right to testify, the record refutes his claim that there was no voluntary waiver, and the trial judge properly denied this summarily. *See Troy v. State*, 57 So. 2d 828 (Fla. 2011); *Franqui v. State*, 59 So. 3d 82 (Fla. 2011). Reynolds seems to think that the trial judge must follow the plea

colloquy when asking the defendant personally whether he elects to testify. This Court has never held that a trial judge must conduct the same colloquy as if this were a plea. In fact, a trial judge does not even need to place the right-to-testify waiver on the record. *See Lawrence v. State*, 831 So.2d 121, 132 (Fla.2002) (rejecting defendant's argument that counsel should have obtained a waiver of his right to testify on the record to ensure that the waiver was knowing and intelligent and stating that due process does not require that the defendant waive his right to testify on the record); *Torres-Arboledo v. State*, 524 So.2d 403, 410-11 (Fla.1988) (holding that although there is a constitutional right to testify under the Due Process Clause of the United States Constitution, "this right does not fall within the category of fundamental rights which must be waived on the record by the defendant himself"). In the present case, the judge did obtain the waiver on the record, and Reynolds' statements in hindsight after closing argument and after the he is convicted is just that – hindsight. The personal waiver of defendant on the record does, however, protect against claims of ineffective assistance of counsel. *Torres-Arboledo v. State*, 524 at 411, n.2. There is no allegation Reynolds has mental defects or was unable to understand the conversation he had with the judge. The colloquy by the trial judge illustrates that Reynolds made a personal, on-the-record that was voluntary. *Gonzalez v. State,* 990 So. 2d 1017, 1031 -1032 (Fla. 2008)(The colloquy before the

trial court was sufficient to demonstrate that Gonzalez validly waived his right to testify). Reynolds' claims on this subjected are refuted by the record and were properly denied summarily. *See Troy v. State*, 57 So. 2d 828 (Fla. 2011); *Franqui v. State*, 59 So. 3d 82 (Fla. 2011).

Reynolds argues that Claim A-V "alleges defense counsel failed to investigate or effectively challenge the State's jailhouse witnesses." (Brief at 57). This claim was not specifically alleged and is legally insufficient on its face. The issue consists of one sentence in the motion to vacate. (V6, R803). There was no information provided in the amended motion as to what information could have been discovered. This issue was properly denied summarily. *See Troy v. State*, 57 So. 2d 828 (Fla. 2011); *Franqui v. State*, 59 So. 3d 82 (Fla. 2011); *Bryant v. State/Crosby*, 901 So. 2d 810 (Fla. 2005).

Regarding the waiver of mitigation penalty phase, this issue is barely alleged and not briefed on appeal. (Brief at 57-58). Thus it is waived. *Duest v. Dugger*, 555 So. 2d 849, 852 (Fla. 1990). Even if the issue were properly raised on appeal, it has no merit and was properly denied summarily. *See Troy v. State*, 57 So. 2d 828 (Fla. 2011); *Franqui v. State*, 58 So. 3d 82(Fla. 2011). The record shows that Reynolds filed a Waiver of Right to Present Mitigation Evidence and Waiver of Right to an Advisory Sentencing Jury (DAR719-20, 721-22). The trial court followed the

appropriate procedures to ensure the voluntariness of Reynolds' waiver. (DAR946, 3475-3477, 3480-3488). After the State's presentation at the penalty phase, the trial judge again questioned Reynolds personally regarding his desire not to present mitigating evidence. (DAR3541-42). The trial judge even recessed to afford Reynolds time to re-consider his decision overnight. (DAR3542-43), and addressed the issue the next day (DAR3555-57). Reynolds' only statement regarding testifying was that the State's closing argument "left a real bitter taste" and Reynolds wanted to tell his side. (DAR3559, 3560). He said "I should have took the stand during the trial and I made a mistake." (DAR3560). After Reynolds was advised that testimony regarding residual doubt was not allowed in the penalty phase, he stated that he did not want to testify at the penalty phase. (DAR3565). This claim is refuted by the record and was properly summarily denied. Reynolds' statement that he should have testified was a classic case of hindsight.

## POINT 2

**THE TRIAL JUDGE DID NOT ERR IN DENYING CLAIMS 3(b), 4, 8, A-1 AND A-2; THE TRIAL COURT FINDINGS ARE SUPPORTED BY COMPETENT SUBSTANTIAL EVIDENCE.**

Reynolds claims the trial judge erred in denying Claims 3(b), 4, 8, A-1 and A-2 after the evidentiary hearing on those claims. When the postconviction court rules after holding an evidentiary hearing, this Court "review[s] the trial court's findings on

questions of fact, the credibility of witnesses, and the weight of the evidence for competent, substantial evidence." *Green v. State*, 975 So. 2d 1090, 1100 (Fla. 2008). Appellate courts do not "reweigh the evidence or second-guess the circuit court's findings as to the credibility of witnesses." *Nixon v. State*, 2 So. 3d 137, 141 (Fla. 2009) (*quoting Brown v. State*, 959 So. 2d 146, 149 (Fla.2007)). "[W]e review the trial court's application of the law to the facts de novo." *Green*, 975 So. 2d at 1100. *Lambrix v. State,* 39 So. 3d 260, 268-269 (Fla. 2010).

**Claim 3(b): ineffective assistance of counsel - failure to object to closing argument about a sexual battery not charged.** Reynolds claims counsel was ineffective for failing to object to the State arguing in closing argument that "Reynolds' motive was the Attempted Sexual Battery of an 11-year old." (Brief at 61). Reynolds makes no record cite to any allegedly objectionable statement, and this issue is insufficiently briefed. *See Kilgore v. State,* 55 So.3d 487, 511 (Fla. 2010).

If further discussion is required, the State notes that any argument made by the prosecutor was a fair comment on the evidence. The only statements in the record are supported by the evidence:

- Christina Razor always slept with panties on;
- Christina always slept with her Rugrats blanket;

- When the investigators viewed the crime scene, Christina was not wearing panties;

- The Rugrats blanket was on the floor;

- "Christina's panties were removed, indicative that the perpetrator had other things on his mind other than just killing Christina;"

- Blood on the panties matched Christina and her mother, Robin Razor;

- "You might expect that if a Defendant, after he's killed Robin, is going over removing the panties of Christina;"

- ". . .the evidence certainly is suggestive that the Defendant had other thoughts in mind, you might look for some evidence that the Defendant went beyond just thinking about this, and you might look for pubic hair, and, indeed, the hairs were found . . .";

- " . . . the Defendant didn't follow through, as evidenced by the fact there was no sperm, no semen found on or about this little girl's body, is indicative of the fact that something caused him to want to leave quick."

(V2, R114-117). The basis for these statements are facts in evidence. Shirley Razor, Christina's grandmother, testified that Christina slept with her panties on and identified Christina's Rugrats blanket. (DAR855, 866). Tanya Pennington testified that that Christina slept with her Rugrats blanket (which was actually a sleeping bag.) (DAR892-93). When the crime scene investigators arrived, the panties were on the floor. (DAR1008). Trial counsel Laurence testified at the evidentiary hearing that he did not object to these statements because "I did not think it was objectionable." Further:

> I would differ with you about the way you phrased the question, as in reference to the motive for the murders. I'm not sure that that's how it was presented. But there was – Mr. Hastings had made a – there was evidence that was presented during the course of the trial that there was a blanket that the child had that had Mike's DNA on it, allegedly. Her panties that were located near her had Mike's DNA on it, allegedly, and then there was a pubic hair that was located near both of those.
>
> And it was my position then and still is now that that leads to an inference based upon the evidence in the case that the State could argue that there potentially was or was an attempted battery of that child. Sexually. Now, as being the motive, I don't remember that being the case, but – but the inference that was derived from the evidence, I think that the State Attorney's Office had the right to make that argument.

(V15, R868-69).

Mr. Laurence testified that, in his opinion, the comment was not objectionable. In order to find trial counsel deficient, Reynolds would need to show that no reasonable attorney would agree with Mr. Laurence's assessment and that Mr. Laurence made errors so egregious that he was not functioning as counsel. Further, Reynolds would have to show that there is a reasonable probability that, had trial counsel objected to the comments, the outcome would have changed. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Next, the reviewing court must determine whether there is a reasonable probability that, but for the deficiency, the result would have been different. *Strickland* at 694. Reynolds fails to meet either prong of *Strickland*. *See Conde v. State*, 35 So. 3d 660 (Fla. 2010); *Blackwood v. State*, 946 So. 2d 960, 971 (Fla. 2006).

In denying postconviction relief, the trial judge held:

> In claim 3B, the Defendant alleges that counsel was ineffective for failing to object to the portion of the State's closing argument that the motive for the murder was to commit a sexual battery on the child victim. At the evidentiary hearing, Attorney Laurence explained that he believed the argument was a fair comment on the evidence. (EH 868-70).[13] Witnesses had testified that the child victim always slept in her panties, but those panties had been removed and there was one of the Defendant's pubic hairs found near her body. Even though there was no injury consistent with the commission of a sexual battery or semen found on the child victim, the State is permitted to review the evidence and make inferences which may reasonably be drawn from that evidence. *Bertolotti v. State*, 476 So. 2d 130, 134 (Fla. 1985); *Mann v. State*, 603 So. 2d 1141, 1143 (Fla. 1992). The attempted sexual battery motive was a fair inference from the evidence presented. Accordingly, counsel was not ineffective for failing to object. *Spann v. State*, 985 So. 2d 1059, 1068 (Fla. 2008), citing *Mungin v. State*, 932 So. 2d 986, 997 (Fla. 2006).

(V10, R1646).

These findings are supported by competent substantial evidence. As trial counsel testified, he made a strategic decision not to object to the comments because they were fair comments on the evidence. Strategic decisions made by counsel which are reasonable under the norms of professional conduct do not constitute "ineffective assistance of counsel." *See Schwab v. State*, 814 So.2d 402 (Fla. 2002). In order to prevail on an ineffective assistance of counsel claim on this ground, a defendant "must first show that the comments were improper or objectionable and that there was no tactical reason for failing to object." *Stephens v. State*, 975 So.2d

[13] The trial judge cites are to the evidentiary hearing transcripts and the pages

405, 420 (Fla.2007). Second, he must demonstrate prejudice. Reynolds brutally killed three people. Reynolds has shown neither.

**Claim 4: ineffective assistance of counsel - failure to object to closing argument in penalty phase about a sexual battery not charged.** Reynolds claims counsel was ineffective for failing to object to the State argument at the penalty phase regarding the agony Christina Razor endured. Reynolds makes no record cite to any allegedly objectionable statement, and this issue is insufficiently briefed.

Insofar as further argument is required, the State postulates that the supposedly objectionable argument by the prosecutor was that Christina suffered a defensive wound, contusions to her face, and injury to her mouth and:

> You couple that with the removal of her panties and we know the last few moments of Christina's life, first with the realization that her mother was being brutally attacked by this Defendant, and then the last few moments of her life were really indescribable.

(DAR106).

The prosecutor's statement was a fair comment on the evidence. Because the statement was not objectionable, counsel was not deficient. Trial counsel Laurence testified that he did not object to the comments because they were not objectionable. Shirley Razor testified that Christina always wore her panties under her nightgown. (DAR855). Christina's panties were under the Rugrats blanket on the right side of

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correspond to the cited "TR" pages in this brief.

Robin's body. (DAR 942). Attorneys are permitted wide latitude in closing arguments. *Gore v. State,* 719 So. 2d 1197, 1200 (Fla. 1998). Closing argument is an opportunity for counsel to review the evidence and to explicate those inferences which may reasonably be drawn from the evidence. *Merck v. State,* 974 So. 2d 1054, 1061 (Fla. 2007).

Reynolds argument that the State improperly argued the facts in evidence to support the heinous, atrocious, and cruel ("HAC") aggravator defies logic. (Brief at 69). The prosecutor was describing the last minutes of Christina's life. An important consideration in HAC is suffering and anxiety of the victim. As this Court held on direct appeal:

> With regard to Christina Razor, the trial court made the following findings:
>
> a. Dr. Sarah Irrgang, the medical examiner, testified that the victim Christina Razor, suffered two stab wounds to the neck and shoulder area, contusions to her face, and injuries to her mouth. It was Dr. Irrgang's testimony that Christina Razor also suffered an abrasion on the back of one of her hands which was characterized as being consistent with a defensive wound.
>
> b. The presence of defensive wounds allows the assumption to be made that the victim was alive unless shown otherwise by the evidence.
>
> c. The existence of a defensive wound demonstrates that the victim was aware of her plight and was resisiting[resisting]. The stab wounds suffered by the victim, Christina Razor, are consistent with having been made with a weapon such as a knife.

d. At the moment that the victim, Christina Razor, was being attacked, it is not known whether or not her mother was still alive and conscious or unconscious or had been murdered. Regardless, in the close confines of that cramped camping trailer, Christina Razor, in great pain and fear, was forced to fight a losing battle for her life knowing that either her mother had already been killed and she was next or that after Reynolds killed her, he was sure to end her mother's life. For a child to experience the fear, terror and emotional strain that accompanied Christina Razor as she fought for her life, knowing full well that she was fighting a losing battle, is unimaginable, heinous, atrocious and cruel. In a prior decision, the Florida Supreme Court has dealt with a similar situation. *Francis v. State*, 808 So. 2d 110 (Fla. 2003[2002]). The Francis decision discusses the unique circumstances associated with close proximity homicides:

Moreover, as we have previously noted, "the fear and emotional strain preceding the death of the victim may be considered as contributing to the heinous nature of a capital felony." *See Walker*, 707 So. 2d at 315; see also James v. State, 695 So. 2d 1229, 1235 (Fla. 1997) ("[F]ear, emotional strain, and terror of the victim during the events leading up to the murder may make an otherwise quick death especially heinous, atrocious, or cruel."). In this case, although the evidence did not establish which of the two victims was attacked first, the one who was first attacked undoubtedly experienced a tremendous amount of fear, not only for herself, but also for what would happen to her twin. In a similar manner, the victim who was attacked second must have experienced extreme anguish at witnessing her sister being brutally stabbed and in contemplating and attempting to escape her inevitable fate. We arrive at this logical inference based on the evidence, including photographs presented at the guilt phase, which clearly establishes that these two women were murdered in their home only a few feet apart from each other. As a result, we conclude that the trial court's HAC finding is further buttressed by the logical fear and emotional stress experienced by the two elderly sisters prior to their deaths as the events were unfolding in close proximity to one another.

The evidence presented at trial through the admission of the medical examiner's testimony and the copious amounts of DNA evidence offered support the trial court's findings regarding the circumstances surrounding

the murders.

Notwithstanding the foregoing, Reynolds asserts that HAC is inapplicable because the evidence does not establish that he intended or desired to inflict a high degree of pain or that he was utterly indifferent to or enjoyed the suffering of his victims. However, we have specifically rejected Reynolds' contention. In *Lynch v. State*, 841 So. 2d 362 (Fla. 2003), we held that "[i]n determining whether the HAC factor was present, the focus should be upon the victim's perceptions of the circumstances as opposed to those of the perpetrator." *Id.* at 369 (emphasis supplied); *see also Farina v. State*, 801 So. 2d 44, 53 (Fla. 2001) ("[The HAC] aggravator pertains more to the victim's perception of the circumstances than to the perpetrator's."); *Guzman v. State*, 721 So. 2d 1155, 1160 (Fla.1998) ("The intention of the killer to inflict pain on the victim is not a necessary element of the aggravator.") Based on the above, Reynolds' contention lacks merit.

Reynolds next asserts that HAC is inapplicable because there was evidence that the victims lost consciousness quickly and, therefore, the prolonged suffering associated with HAC is not present in this case. As support for his contention, Reynolds relies on *Rhodes v. State*, 547 So. 2d 1201 (Fla. 1989), wherein this Court struck the trial court's application of HAC to a strangulation murder where evidence supported the defendant's "statement that the victim may have been semiconscious at the time of her death." *Id*. at 1208. Rhodes is distinguishable from the instant matter. In the present case, the testimony of the medical examiner established that both of the victims exhibited defensive wounds, indicating that they were conscious during some part of the attack and attempting to ward off their attacker. Additionally, the medical examiner testified that the evidence indicated that there had been a "violent struggle" during the attacks, again establishing that the victims were aware of the attack and attempting to defend themselves. Moreover, the medical examiner testified that the wounds to Robin Razor's torso were consistent with being "torment wounds"-wounds that are intended to cause aggravation and to scare the victim.

This Court has repeatedly upheld the HAC aggravating circumstance in cases where a victim was stabbed numerous times. *See, e.g. Guzman v.*

*State*, 721 So. 2d 1155 (Fla. 1998); *Mahn v. State*, 714 So. 2d 391 (Fla. 1998); *Rolling v. State*, 695 So. 2d 278 (Fla. 1997); *Williamson v. State*, 681 So. 2d 688, 698 (Fla. 1996); *Finney v. State*, 660 So. 2d 674, 685 (Fla. 1995); *Barwick v. State*, 660 So. 2d 685, 696 (Fla. 1995); *Pittman v. State*, 646 So. 2d 167, 173 (Fla. 1994); *Campbell v. State*, 571 So. 2d 415 (Fla. 1990); *Hardwick v. State*, 521 So. 2d 1071, 1076 (Fla. 1988); *Nibert v. State*, 508 So. 2d 1 (Fla.1987); *Johnston v. State*, 497 So. 2d 863, 871 (Fla. 1986); *Peavy v. State*, 442 So. 2d 200 (Fla. 1983). In *Francis v. State*, 808 So. 2d 110 (Fla. 2001), we noted that we have upheld the application of HAC even when the "medical examiner determined that the victim was conscious for merely seconds." *Id*. at 135. In Rolling, we upheld the application of the HAC aggravating circumstance even when the medical examiner testified that the "victim would have remained alive for a period of thirty to sixty seconds." *Rolling*, 695 So. 2d at 296. Moreover, in *Peavy* the Court determined that the application of HAC was not improper when the medical examiner testified the victim would have lost consciousness within seconds. *See* 442 So. 2d at 202-03. Testimony in this case established that Christina Razor could have remained conscious for a "matter of a minute or two," that the stab wounds to Robin Razor were likely to have occurred during an active struggle, and that she was conscious during the perpetrator's infliction of blunt force trauma to her head. Therefore, based on these prior decisions in which we upheld a trial court's finding of HAC, we likewise conclude that competent, substantial evidence exists in the instant matter to support the trial court's finding that these murders satisfied the HAC aggravating factor.

In addition to the above, we have held that "fear, emotional strain, and terror of the victim during the events leading up to the murder may make an otherwise quick death especially heinous, atrocious, or cruel." *James v. State*, 695 So. 2d 1229, 1235 (Fla. 1997). Further, "the victim's mental state may be evaluated for purposes of such determination in accordance with the common-sense inference from the circumstances." *Swafford v. State*, 533 So. 2d 270, 277 (Fla. 1988). Significantly, this case involved the killing of a mother and her daughter within close proximity. Therefore, consistent with the trial court's findings in its sentencing order, "although the evidence did not establish which of the two victims was attacked first, the one who was first attacked undoubtedly experienced a

> tremendous amount of fear, not only for herself, but also for what would happen to [the other]. In a similar manner, the victim who was attacked second must have experienced extreme anguish at witnessing [the other] being brutally stabbed and in contemplating and attempting to escape her inevitable fate." *Francis v. State*, 808 So. 2d 110, 135 (Fla. 2001). All of these circumstances leading up to the killing of Robin and Christina Razor, in addition to the actual wounds inflicted upon the victims, support the trial court's finding of the HAC aggravator.

*Reynolds v. State*, 934 So. 2d 1128, 1154-1156 (Fla. 2006).

Thus, not only was the comment about Christina's last moments not objectionable, there was no prejudice from the comment given the enormity of the evidence supporting HAC. To establish prejudice, a defendant must demonstrate that because of counsel's deficient performance, he was deprived of a fair trial with a reliable result. *Bradley v. State/McNeil*, 33 So. 3d 664, 672 (Fla. 2010) (*citing Strickland*, 466 U.S. at 689, 104 S.Ct. 2052). The prejudice requirement is satisfied only if 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 694, 104 S.Ct. 2052. Mere speculation that counsel's error affected the outcome of the proceeding is insufficient. *Id*. at 693, 104 S.Ct. 2052. Reynolds has shown neither deficient performance or prejudice.

In denying postconviction relief, the trial judge held:

> Next, the Defendant argues that counsel should have rebutted the

> improper argument about a sexual battery in his closing argument, but failed to do so. As noted above, the State's argument was a fair comment on the evidence. As cited in the original Motion to Vacate, trial counsel argued in closing that there was no actual evidence of a sexual battery, and that the proffered motive was speculative. Therefore, it cannot be said that counsel took no action to rebut the State's argument. Just because counsel could have spent more time on it does not mean that counsel was ineffective; such a finding would require this Court to make a hindsight determination that is improper under *Strickland.*

(V10, R1646-47). These findings are supported by competent, substantial evidence.

As the postconviction court found, trial counsel did take steps to neutralize the State's comments by arguing there was no evidence of a sexual assault on Christina and the State was contriving motives. (DAR132; DAR109-10).

Reynolds' argument on page 69 that defense counsel was ineffective for failing to call FDLE analyst Badger at the penalty phase to "refute" his guilt phase testimony was abandoned at the trial level and not properly before this Court. *See Dailey v. State*, 965 So.2d 38, 47 (Fla. 2007); *Reaves v. State*, 826 So.2d 932, 942 (Fla.2002) ("[W]here a defendant fails to pursue a claim ... at the trial court, he waives such claim and cannot raise it on appeal with this Court."). There was no evidence presented at the evidentiary hearing on this allegation and no argument presented to the trial judge regarding Badger testifying in the penalty phase. (V9, R1397-1399). In any case, the "Badger lie" issue was discredited by both trial counsel Iennaco and the trial judge findings after the tape recording was played as follows:

The Defendant continues to argue what he terms "the Badger lie." This

> issue has been litigated extensively throughout the post-conviction process, and is outlined at various points in the record. This Court declined to correct the transcript to comport with the State's interpretation of what it said, nor did the Court accept that the Defendant's interpretation was correct. The Court simply let the transcript speak for itself, leaving the parties to argue about the differing interpretations. However, this Court has heard the tape of the trial, as did Attorney Iennaco. (EH 769-79). It does appear that the State's interpretation of the testimony is correct, especially when noting, as Attorney Iennaco did, that the presence of a gender marker would necessarily make the identification of the DNA coming from both the Defendant and the female victim a genetic impossibility.
>
> (V10, R1646 n. 2).

This claim does not entitle Reynolds to relief.

**Claim 8: ineffective assistance of counsel - request voir dire of jurors regarding "shrine" to victims.** During the trial, the following occurred:

> THE COURT: What's happened, it's been brought to my attention that somebody has put a memorial or shrine to the victims right outside the courtroom. I don't know, does anybody know?
>
> VICTIM ADVOCATE: Yes, sir, I do. That is some thank yous that the family has provided to some of the advocates for all their time and attention for the past five years, so –
>
> THE COURT: I understand. Remove it at this time.
>
> VICTIM ADVOCATE: Yes, sir, I will.
>
> THE COURT: Take it out of here. You should know better. That's not allowed. As I told you before, that takes place outside of the courthouse. Inside the courthouse is a sterile environment.
>
> VICTIM ADVOCATE: Not a problem, sir.

THE COURT: State, any problem with that instruction?

MR. HASTINGS: No.

THE COURT: Defense, any problem with that instruction?

MR. IENNACO: No.

THE COURT: State, Defense, approach.

(Whereupon, the jurors were returned to the courtroom.)

THE BAILIFF: Jury is now present.

(Whereupon, a discussion was had out of the hearing of the jury as follows:)

THE COURT: I'll speak with you afterwards if you can, after this is over. We can just come back in chambers for a few moments.

(Whereupon, the proceedings resumed in the presence of the jury as follows:)

THE COURT: Come on in.

THE BAILIFF: Jury is now present, Your Honor.

(DAR3544-3545).

Reynolds claims trial counsel was ineffective for filing to request a jury *voir dire* to determine whether any juror had seen the memorial. Several witnesses testified at the evidentiary hearing regarding the "shrine." The trial court then clarified that:

Let me – let me just – I have to interrupt here at this stage, as far as that's concerned. Because what's being portrayed here is somehow not –

missing in the record, or incomplete.

What transpired on that particular instance was, there was a break. During the breaks, as is the case for years on end and throughout the course of that trial, we admonish the jury to remain away from Courtroom E, not Courtroom B, where the jury trial was being held, because from time to time attorneys need to meet with witnesses, there's a lot of activity out there, people don't talk.

The jury is down the hall toward the north end of the building. Mr. Reynolds was correct, the trial room is – the trial courtroom is on the south end of the building. And the lobby area or the mezzanine away by the banks of the elevators.

Mr. Reynolds was brought into the courtroom. Prior to Mr. Reynolds being brought into the courtroom, I had gone down the hall, nothing was in the hallway. I had taken the bench, Mr. Reynolds was brought in, at that time it was brought to my attention that the shrine – and his recollection and his sister's recollection is more accurate than the witness coordinator for the State Attorney's office, there was an actual poster board of sorts there at that time. At that time, ordered it to be removed, it was removed, jury was then brought in. Jury was brought in down from the mezzanine area. Jury did not see the shrine, did not have the opportunity to pass by it. They were brought into the room in back. Mr. Reynolds is correct in one extent, there's a room inside there, they're brought into the room and taken to the jury room in the back. The jury room used in the courtroom only has one entrance in and out. That's why mention is made in the record as far as that shrine being there. But the jury was never exposed to the shrine. It was removed before the jury was brought down from the mezzanine area into the courtroom area.

(V14, TR635-36). Subsequently, the "shrine" issue was re-visited, and the trial judge advised collateral counsel:

THE COURT: And Mr. Reynolds and everybody else is aware of this, you aren't. What happens is, we keep the jury away from Mr. Reynolds, because Mr. Reynolds is correct, he's in a holding cell down the hall. We

keep the jury away from Mr. Reynolds so they don't see him as he's being led. I think you had shackles on at that time, Mr. Reynolds.

MR. REYNOLDS: Yes, sir.

THE COURT: Then they remove that in the courtroom. So the jury is down out of sight. In between the time that I came and the time that Mr. Reynolds appeared is when the shrine was put up, and that's when they told me. As far as Mr. Reynolds, that's when Mr. Reynolds had the opportunity to see it, as he was being led in the courtroom at that time.

MS. SMITH (collateral counsel): Well, Judge, I'll just ask you straightaway, is there any way you know for sure that these jurors never saw that shrine?

THE COURT: Yes, because I tell –

MS. SMITH: you know for a fact that no one –

THE COURT: Because I tell the Bailiff afterwards to bring the jury down. The same people who bring in Mr. Reynolds that we have the jury brought down.

MS. SMITH: So to clarify the record, you know when the shrine was placed there and you know when it was taken away.

THE COURT: Right.

MS. SMITH: Okay.

(V14, TR660-61).

In the order denying postconviction relief, the trial judge held:

The Defendant asserts in his eighth claim that counsel was ineffective for failing to conduct an inquiry of the jurors to see if any had seen a "shrine" set up outside the courtroom dedicated to the victims. The Defendant has failed to carry his burden as to this claim. There is no dispute that there

> was a sort of memorial set up outside Courtroom E. However, the shrine was ordered to be removed before the jurors would have had any opportunity to see it. (EH 634-35, 660-61). The Defendant did nothing more than speculate that the jurors must have seen it. (El-I 529). Neither attorney saw it. (EH 725-28, 889). His sister, Stacia Adams, saw it as she entered the courtroom, but she was unable to say whether the jurors saw it. She did confirm that the jurors entered the courtroom through a different entrance. (El-I 83-85). In Attorney Iennaco's opinion, further inquiry would only have drawn attention to the issue and, even so, the courtroom was full of the victims' angry families and friends at every session, so even if the even seeing a small shrine would not have made any difference. (EH, 725-26). Counsel was not ineffective because there is no basis to find that the jurors saw the shrine and, even if there was an inadvertent view, there was no prejudice.

(V10, R1648).

These findings are supported by competent substantial evidence. Because this issue has no merit, trial counsel cannot be ineffective. The trial court handled the situation immediately, and counsel was not deficient for failing to request juror interviews. There was no prejudice because no juror saw the "shrine."

**Claim A-I: ineffective assistance of counsel – fail to investigate and present mitigation.** Reynolds argues at pages 74-75 that his waiver of mitigation was not voluntary because there is no evidence in the trial record that defense counsel investigated mitigation or was prepared for the penalty phase. To the extent Reynolds is arguing that the trial judge failed to conduct a proper *Koon*[14] waiver

14 *Koon v. Dugger*, 619 So.2d 246 (Fla. 1993).

hearing, that issue is procedurally barred because it should have been raised on direct appeal.[15] Insofar as it was counsel's responsibility to recite the available mitigation

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15 Without waiving the procedural bar, the State does note that in *Twilegar v. State,* 42 So. 3d 177, 201 (Fla. 2010), the defendant prohibited counsel from conducting a mitigation investigation and waived mitigation. On appeal, Twilegar claimed the trial judge did not conduct an adequate *Koon* inquiry. This Court stated:

> Obviously, our primary reason for requiring this [*Koon*] procedure was to ensure that a defendant understood the importance of presenting mitigating testimony, discussed these issues with counsel, and confirmed in open court that he or she wished to waive presentation of mitigating evidence. Only then could the trial court, and this Court, be assured that the defendant knowingly, intelligently, and voluntarily waived this substantial and important right to show the jury why the death penalty should not be imposed in his or her particular case.

*Chandler v. State,* 702 So. 2d 186, 199 (Fla. 1997).

> Applying the above law to the present case, we conclude that Twilegar has failed to show that the trial court erred with respect to this claim. Prior to trial, defense counsel notified the court of Twilegar's desire to waive a penalty phase jury, to waive investigation into mitigation, and to waive the presentation of mitigation, and the court held hearings and conducted extensive inquiries into these matters.

*Twilegar v. State,* 42 So. 3d 177, 202 (Fla. 2010). It appears *Twilegar* contradicts Reynolds' argument that *Koon* requires strict compliance with the mitigation-presentation colloquy in order to have a valid waiver. If no mitigation was investigated, there would be no mitigation to present. In any case, the trial judge did adequately explore Reynolds' competence and desire to waive mitigation. *See Boyd v. State,* 910 So. 2d 167, 188 -189 (Fla. 2005); *Waterhouse v. State,* 792 So. 2d 1176, 1184 (Fla. 2001) (*Koon* requirements were met when defendant made it "abundantly clear" that he was waiving mitigation); *Chandler v. State*, 702 So. 2d 186, 200, n. 19 (Fla. 1997) (as long as it was demonstrated that waiver was made knowingly,

evidence or bring that evidence to the attention of the trial judge, trial counsel testified that he "was hoping that the waiver would not be done carefully enough to hold up, so that maybe some day he'd get another shot at it if he changed his mind." (V14, TR711). Insofar as what part of the waiver or form would not be valid, trial counsel testified: "Oh, I didn't know. I was just hoping. I know at some point – I'm trying to remember – the Judge asked me to testify as to what I would have presented if he had allowed me to, and I tried to keep it responsive, but brief." (V14, TR712). Thus, to the extent Reynolds argues trial counsel was deficient for not ensuring a valid waiver, counsel made a strategic decision to attempt to create reversible error.

As background: Reynolds filed a Waiver of Right to Present Mitigation Evidence and Waiver of Right to an Advisory Sentencing Jury. *(*DAR719-20, 721-22). Before the penalty phase began, the court addressed Reynolds and verified he had instructed his attorneys he did not want to present mitigation. *(*DAR3476). Reynolds advised the judge he had been in prison all his life, and "My mitigating is not nothing compared to the aggravators that the State is gonna bring in here against me." *(*DAR476-77). Reynolds advised the judge he did not want to present a mitigating case. *(*DAR3477). He felt the attorneys had done a great job, but if the case came back it would be because of the trial. *(*DAR3577). Therefore, Reynolds wanted to proceed

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intelligently, and voluntarily, defense counsel was not required to go into explicit

to the *Spencer* hearing as quickly as possible. *(*DAR3477).

Defense counsel represented that Reynolds had been examined by a mental health professional and there was no question of incompetence. *(*DAR3481, 3490). Reynolds said he did not want to put his family through testifying. Family members were there, including two sisters. (ROA3583). Reynolds said he had studied the law and knew what the aggravators and mitigators were. However, he was an innocent man. *(*DAR3485). He did not want to put the victims' family through more proceedings, either. *(*DAR3485). Reynolds signed a waiver of penalty phase and fully understood it. *(*DAR3486). He said he would rather be executed than spend his life in prison. *(*DAR3487).

The defense attorneys were prepared to go forward with the penalty phase and had witnesses available. (DAR3488). The State proceeded with its presentation, and the court recessed overnight. (DAR3547). The next morning, the trial judge addressed Reynolds again regarding the waiver of mitigation. (DAR3455-56). At the evidentiary hearing, Iennaco confirmed that he had gone over the waiver form with Reynolds before the latter signed it. (V14, TR712). Reynolds was able to comprehend, read and write. In fact, Reynolds "would study his discovery incessantly, and would quite often pick out things that were helpful or useful." (V14, TR713).

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detail about what the favorable mitigation evidence would be).

An attorney cannot be ineffective for failing to present mitigation when the defendant blocks his efforts to do so. Although the trial judge did not inquire into the specifics of the mitigation investigation at the time of the penalty phase, Mr. Iennaco stated on the record that he was ready for the penalty phase and had witnesses available. Reynolds acknowledged the existence of mitigation, but his position was that he was innocent.

Trial counsel conducted an extensive mitigation investigation and was not deficient in their investigation. Mr. Iennaco testified at the evidentiary hearing that he obtained all background material from the public defender after he and Mr. Laurence were appointed. (V14, TR675). For the three years between his appointment and the trial, Mr. Iennaco conducted an extensive mitigation investigation. He hired Sandy Love as a mitigation specialist (V14, TR679-70). Iennaco and Love obtained school records. (V14, TR685-86). Some school records were unavailable because they had been destroyed. (V14, TR688). Mr. Iennaco had medical records, prison records from Arizona and Florida, and criminal records from Reynolds prior criminal cases. (V14, TR688). Reynolds' sister, Stacia, gave Iennaco family photographs. (V14, TR688). Stacia gave a deposition in Ft. Myers and Iennaco had a lengthy conversation with her at her house where "she really came forward and laid out the whole sorted (sic) picture to me". (V14, TR745).

Iennaco retained Dr. Herkov to evaluate Reynolds. (V14, TR689). Reynolds did not want to meet with any kind of mental health professional and "had no interest in presenting mental mitigation or any mitigation." (V14, TR691, 746). He eventually agreed to meet with Dr. Herkov (V14, TR691). Dr. Herkov told Iennaco that Reynolds had an antisocial personality disorder and explained how it fit with Reynolds' behavior and background. (V14, TR697). Dr. Herkov told Iennaco that Reynolds was a "textbook case" of antisocial personality, and no one "reputable would disagree." (V14, TR697, 741). Iennaco discussed Reynolds' mental condition with Dr. Herkov. (V14, TR700). Dr. Herkov said he would "be a better witness for the State than for you [Reynolds]". (V14, TR741). Iennaco discussed Reynolds' substance abuse and use history at length. (V14, TR702). Reynolds drank heavily and used methamphetamines; however, Reynolds would not allow Iennaco to use substance abuse as mitigation. (V14, TR703, 748). Likewise, there was no chance Reynolds would allow Iennaco to hire a neuropsychologist or present his testimony. (V14, TR733). Reynolds only allowed one psychologist (Dr. Herkov) to evaluate him and that was "very reluctantly, for a specific reason." (V14, TR734). Iennaco was aware Reynolds had head injuries which requires evaluation and Reynolds "just was not interested." (V14, TR734).

Although it was extremely difficult to get Reynolds to agree to allow Mr.

Iennaco to prepare mitigation, the latter discovered background information by talking to Reynolds and his two sisters. (V14, TR704, 739). At first the sisters were not willing to help, but Iennaco was eventually able to "get them on board." (V14, TR705). Reynolds was estranged from his wife and child, and refused to allow the attorneys to have any contact with them. (V14, TR704). Between Reynolds, Love, and other material, Iennaco believed he had a very good history on Reynolds. (V14, TR705). Iennaco was aware Reynolds:

- had an alcoholic father who was extremely abusive;

- lived in poverty most of the time;

-the father worked sporadically and was absent long periods of time;

- Reynolds was very devoted to his mother;

- the household was the "typical abusive situation where the mother was kind of a doormat for the father";

- Reynolds had three sisters, one of which was severely disabled;

- Stacia and Reynolds took the brunt of the abuse from the father;

- Reynolds told Iennaco horrible stories about the father such as being woken up in the middle of the night by the father pouring ice water on the children;

- The father killed their pt horse and made Reynolds dig a grave for it in the middle of the night;

- the mother became very ill around the holiday season "and he pulled the plug on her" on Christmas eve or Christmas day;

- Reynolds left home to escape the abuse; he was already involved in drugs and alcohol;

- The sisters fared better: Stacia marrying, having a teenage daughter, and living in LeHigh Acres near Ft. Myers, and the other sister going to pharmacy school;

(V14, TR705-707). Iennaco discussed statutory and nonstatutory mitigation with Reynolds. There were no statutory mitigators, but a lot of nonstatutory mitigation. (V14, TR710).

The fact that Reynolds would not cooperate with the mitigation investigation and ultimately refused to present mitigation to the jury does not make counsel ineffective. *See Spann v. State*, 985 So. 2d 1059, 1070-1071 (Fla. 2008). "The law is well-established that a competent defendant may control decisions pertaining to his defense, including the presentation of mitigation evidence, and that counsel will not be rendered ineffective for following a competent defendant's wishes." *See Dessaure v. State/McNeil,* 55 So. 3d 478, 484 (Fla. 2010); *Grim v. State/McDonough,* 971 So. 2d 85, 101 (Fla. 2007) (counsel not ineffective as counsel conducted a reasonable investigation despite Grim's decision to waive mitigation); *Hamblen v. State*, 527 So. 2d 800, 804 (Fla.1988) ("[I]n the final analysis, all competent defendants have a right to control their own destinies."); As the United States Supreme Court noted in *Strickland*, "[t]he reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions." 466 U.S. at

691. In the instant case, defense counsel's investigation was limited by Reynolds' lack of cooperation. As a result, if there were a lack of mitigation, Reynolds' own lack of cooperation undermines his allegations of ineffective assistance of counsel for failing to investigate additional mitigating evidence. *See Rodriguez v. State*, 919 So. 2d 1252 (Fla. 2005) (counsel was not ineffective when the defendant refused to cooperate with counsel and refused to offer information that would have helped in the presentence investigation); *see also Cherry v. State*, 781 So. 2d 1040 (Fla. 2000); *Rose v. State*, 617 So. 2d 291 (Fla. 1993).

There was no prejudice: first, because Reynolds waived mitigation and, second, because the evidence presented by Reynolds at the postconviction evidentiary hearing was cumulative to that which the trial court found in the sentencing order: gainfully employed, difficult childhood, upbringing marked by physical and psychological abuse, father a chronic alcoholic, mother chronically ill and hospitalized during Reynolds' childhood, Reynolds regularly hit, slapped and kicked without warning by drunken father, kept awake all night by father and awakened by ice water; regularly cared for disabled, wheelchair-bound sister, ran household affairs such as cooking/cleaning/yard work, close to mother who died on Christmas Day in 1975, attended church as child even though parents did not, education limited to 10th grade, began using alcohol age 14, no adult supervision as a child. (DAR 901-902). Prior to

the *Spencer* hearing, defense counsel filed documents for the trial court to consider. *(*DAR748-830). The deposition of Reynolds' sister, Stacia Adams, outlined the family history and was cited extensively in the trial court's sentencing order. *(*DAR948-50). The witnesses at the postconviction evidentiary hearing added little or nothing to that history. Trial counsel submitted a sentencing memorandum, listing 20 mitigating circumstances. *(*DAR860-864).

Reynolds cannot establish a deficient investigation or prejudice because the evidence at the evidentiary hearing was cumulative. *Whitfield v. State*, 923 So. 2d 375, 380 (Fla. 2005); *Gudinas v. State*, 816 So. 2d 1095, 1106 (Fla. 2002); *Sweet v. State*, 810 So. 2d 854, 863-64 (Fla. 2002). Further, even if more detailed mitigation had been available, Reynolds was adamant it would not be presented. Thus there is no prejudice. *See Rimmer v. State/McNeil*, 59 So. 3d 763, 780-782 (Fla. 2010). Likewise, the mental health testimony presented at the evidentiary hearing was contradictory and the conclusion of all involved was Reynolds is antisocial. The antisocial diagnosis of Dr. Herkov led him to tell defense counsel he would be a better witness for the State. In any case, Reynolds was adamant that mental health testimony would not be presented to the jury or the trial court.

In denying postconviction relief, the trial judge held:

> In claim A-I of the Supplemental Motion, counsel argues that counsel was ineffective in failing to obtain and present mitigating evidence.

Before analyzing this claim on its merits, it should be noted that the Defendant expressly waived the presentation of mitigation evidence. He signed a written waiver, which, at the time, he claimed to have read and understood. The Court went through an extensive verbal colloquy about the decision, ultimately finding the Defendant competent to make the decision to waive mitigation. At the evidentiary hearing, though, the Defendant claims to have just signed the waiver without reading it. (EH 646-48). This claim is similar to those situations where a defendant, under oath, answers questions presented by a Court during a plea colloquy then, on collateral motion, asserts that the answers were not truthful in an effort to withdraw the plea. The Fifth District Court of appeal has rejected these types of claims, stating:

> This motion presents the all too common occurrence where defendants, in an attempt to invalidate their pleas, contend they committed perjury when they sought to have their pleas accepted. Defendants are bound by the statements made by them under oath; they are not entitled to have their plea set aside by later claiming the plea was involuntary based on their allegedly perjured testimony.

*Henry v. State*, 920 So. 2d 1245, 1246 (Fla. 5th DCA 2006). The Defendant is similarly bound by his answers in the colloquy regarding his waiver of mitigation. As it was on May 8, 2003, the Defendant's waiver is again found to have been knowing and voluntary.

Even so, this was not a case where counsel failed to develop mitigation; it is a case where the Defendant refused to cooperate fully in the mitigation investigation. Counsel retained a private investigator, Sandy Love, to help in the preparation of a case in mitigation. The Defendant begrudgingly participated in a mental health evaluation performed by Dr. Herkov, but counsel did not seek a PET scan or evaluations from a neuropsychologist or a forensic social worker because the Defendant would not have allowed it. (EH 746-750, 898-99). The Defendant was not forthcoming with any details of his upbringing. He initially refused to allow counsel to speak to his sisters, to the point where counsel had to "go behind [the Defendant's] back" to get much of the family information. (EH 708). Virtually all such information was eventually provided by the

> Defendant's sister, Stacia Adams. (El-I 638). Any information that counsel obtained was despite the Defendant's best efforts and not because of his assistance.
>
> Considering this claim in the context of the Defendant's obstruction, counsel still had the Defendant's sisters available at the penalty phase hearing to present mitigation evidence, but excused them once the Defendant waived mitigation. Among the reasons stated on the record for his waiver was his belief that the mitigation would not outweigh the aggravation and that he would rather be executed than spend the rest of his life in prison. Based upon all of the above reasoning, even if counsel failed to properly develop mitigation, the Defendant would be unable to show that he was prejudiced because he waived such presentation before the jury. It cannot be fairly said that counsel did not develop mitigation, it can only be said that the Defendant waived his right to present it to the jury.

(V10, R1650-51). These findings are supported by competent substantial evidence. As in *Clark v. State*, 35 So.3d 880, 890 -891 (Fla. 2010), this is not a case where the trial court did not consider mitigation evidence present in the record. The record establishes that trial counsel presented the mitigating evidence at the *Spencer* hearing.

Reynolds killed three people, including an 11-year old child. The jury recommendation of death was unanimous. This Court affirmed the aggravating circumstances: four as to Robin Razor and five as to Christina Razor. The murders of both Robin and Christina were heinous, atrocious and cruel.

**Claim A-II: ineffective assistance of counsel – fail to present expert or lay testimony to support defense theory and/or other suspects.** Reynolds argues that

trial counsel was ineffective for failing to present expert testimony on:

- mental health;

- the wound on Reynolds' hand; and

- DNA.

(Brief at 84-90). Insofar as the mental health expert, trial counsel did retain Dr. Herkov who was allowed to conduct a limited evaluation. Reynolds refused any further evaluation and waived mitigation. There was no deficiency or prejudice.

Regarding the wound and DNA evidence, trial counsel did retain Dr. Feegel, a forensic pathologist, to review photos of the wound on the Defendant's hand and Dr. Gary Litman as a consultant to review the DNA evidence and procedures. Dr. Feegal said the tear on Reynolds' finger was *not* caused by the door spur, and Dr. Litman had independent DNA testing at LabCorp and even tried to follow up on that testing after LabCorp reached the same results as FDLE. Trial counsel moved to exclude the DNA evidence. (DAR442-443). They moved for conventional serology testing. (DAR444-445). The trial court held a *Frye*[16] hearing on the evidence which spanned five days. (DAR462, 499, 402, 507). At each and every stage of the State's forensic testimony, trial counsel vigorously cross-examined the State witnesses. Trial counsel was not deficient. The bottom line is that Reynolds is guilty. The independent DNA testing

[16] *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923).

only confirmed the FDLE results.

Counsel made strategic decisions not to call the experts as witnesses. Strategic decisions made by counsel which are reasonable under the norms of professional conduct do not constitute "ineffective assistance of counsel." *See Schwab v. State*, 814 So.2d 402 (Fla. 2002).

Reynolds has not shown prejudice. The testimony presented at the evidentiary hearing did nothing to discredit the State's witnesses. Even if trial counsel had hired those witnesses rather than the ones they hired for trial, it would not have changed the outcome. *See Branch v. State,* 952 So. 2d 470, 479 (Fla. 2006); *Whitfield v. State,* 923 So. 2d 375, 384 (Fla. 2005). Further, the DNA witness presented at the evidentiary hearing, Candy Zuleger, was unavailable to testify at the time of Reynolds' trial, and her testimony cannot be considered in postconviction proceedings. *Hildwin v. State*, 36 Fla. L. Weekly S234 (Fla. June 2, 2011); *Nelson v. State,* 875 So. 2d 579, 583 (Fla. 2004) ("if a witness would not have been available to testify at trial, then the defendant will not be able to establish deficient performance or prejudice from counsel's failure to call, interview, or investigate that witness."). *See also Melton v. State*, 949 So. 2d 994, 1003 (Fla. 2007). This claim fails for lack of proof.

In denying postconviction relief, the trial judge held:

> Claim A-II asserts that that the Defendant was prejudiced by counsel's failure to retain and call expert witnesses during the guilt phase. Counsel

retained several experts during trial preparation: Dr. Herkov, as noted above; Dr. Feegel, a forensic pathologist, to review photos of the wound on the Defendant's hand; Dr. Gary Litman as a consultant to review the DNA evidence and procedures; and Dr. Stuart James to review crime scene and blood spatter evidence. No written reports were prepared by Dr. Herkov, Dr. Feegel, or Dr. James because the results were not helpful, at best, or were unfavorable, at worst, and counsel worried that he could be obligated to turn over the unfavorable results if memorialized in written form during discovery. (EH 696). With regard to DNA evidence, counsel also retained Labcorp and ASTB Lab to review the testing done by FDLE, but their analyses either confirmed FDLE's findings or were inconclusive because there was insufficient sample size to analyze. (EH 894-87).

Trial counsel advised of the reasons for not presenting expert testimony from the retained experts. Dr. Herkov believed that the Defendant suffered from antisocial personality disorder, and that it was a classic case of that illness. Accordingly, he did not believe counsel would benefit from a second evaluation. The State's expert witness, Dr. Jeffrey Danziger, concurred with this diagnosis. (EH 826). He believes that the Defendant does not suffer from post-traumatic stress disorder, as diagnosed by Dr. Krisjun Olafsson, the Defendant's expert in this post-conviction proceeding. (829-30). Dr. Feegel opined that the shape of the wound on the Defendant's hand did not necessarily mean that it was a laceration caused by a burr in the door frame. Counsel decided that the jury could be convinced that the wound was caused by the burr in the door frame based on simple logic, rather than presenting an expert who would refute that premise. (EH 720-22). Dr. Litman was not hired to testify in court, as he was essentially used to educate the attorneys on the DNA testing procedures used and available. As noted above, counsel also had some of the items retested or reexamined, but the results were not helpful. Attorney Laurence testified that Frank Iennaco did an effective job rebutting the inferences made from the DNA evidence, so retaining a DNA expert for the defense was unnecessary.[4] (EH 865-67). While Attorney Laurence also testified that he would do it differently if he had it to do over again, that type of hindsight analysis is expressly contrary to the dictates of *Strickland*. Finally, Dr. James noticed in the photographs that there were scratches on the back of the Defendant's hands that could

be interpreted as defensive wounds. (EH 892-93). Based upon this observation, trial counsel declined to call Dr. James as a witness. The Court finds that each of these decisions was reasonable under the circumstances.

> [4]As argued at the hearing and in the written closing argument, the testimony of Candy Zuleger is essentially irrelevant because, in order to obtain relief for failure to call a witness at trial, the Defendant must show that the witness would have been available to testify. *Nelson v. State*, 875 So. 2d 579, 583 (Fla. 2004). Ms. Zuleger, at the time of trial, was employed by FD1..E and would not have been permitted to testify as a defense expert witness. Thus, she would not have been available to testify. Moreover, as the court noted at the hearing, her testimony was not particularly helpful to the Defendant, especially in light of the factual findings made above.

Furthermore, collateral counsel called a litany of experts to refute the opinions relied upon by counsel, in an attempt to prove that counsel did not act effectively. The fact that the Defendant has since secured more favorable experts does not mean that the original evaluations were insufficient. *Davis v. State*, 928 So. 2d 1089, 1 124 (Fla. 2005): *Carroll v. State*, 815 So. 2d 601, 618 (Fla. 2002). "Counsel is entitled to rely on qualified experts, even if those evaluations, in retrospect, were not as complete as others may desire." *Darling v. State*, 966 So. 2d 366, 377 (Fla. 2007). Counsel retained qualified experts in forming a defense strategy, but unfortunately, those experts' opinions were not helpful to the Defendant's case. Counsel was not obligated to shop for more experts to until finding ones that would be helpful to the Defendant's case.

(V10, R1651-52).

These findings are supported by competent substantial evidence. Reynolds has failed to prove deficient performance and prejudice.

## CONCLUSION

Based on the authorities and arguments herein, the State respectfully requests this Honorable Court affirm the order of the circuit court and deny all relief.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above has been furnished by U.S. Mail to: Melodee Smith, 101 N.E. 3rd Avenue, Suite 1500, Ft. Lauderdale, FL 33301, this ___ day of June, 2011.

Assistant Attorney General

## CERTIFICATE OF COMPLIANCE

This brief is typed in Times New Roman 14 point.

BARBARA C. DAVIS
ASSISTANT ATTORNEY GENERAL