IN THE SUPREME COURT OF FLORIDA

JOSHUA D. NELSON,

Appellant,

v. **Case No. SC10-540**
Lower Tribunal No. 95-CF-911A

STATE OF FLORIDA,

Appellee.
_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE TWENTIETH JUDICIAL CIRCUIT,
IN AND FOR LEE COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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STATEMENT OF THE CASE AND FACTS

Appellant Joshua Nelson was convicted of the first-degree murder of Thomas Owens and sentenced to death on November 27, 1996. The facts of the case are outlined in this Court's opinion affirming Nelson's convictions and death sentence. Nelson v. State, 748 So. 2d 237, 239-40 (Fla. 1999):

> The evidence presented at trial established the following facts. Nelson and Keith Brennan wanted to leave the city of Cape Coral. The two devised a plan to murder Tommy Owens and steal his car. Nelson and Brennan knew that Owens kept a baseball bat in his car. On the evening of March 10, 1995, Owens was lured under false pretenses to a remote street. Nelson and Brennan were able to convince Owens to exit his car, whereupon Nelson hit Owens with the bat. After a number of blows, Owens eventually fell to the ground. Nelson and Brennan tied Owens' legs and arms. Owens pleaded for his life, stating that the two could take his car. After a brief discussion, Nelson and Brennan concluded that to avoid being caught, they should kill Owens. Brennan attempted to slice Owens' throat with a box cutter. Owens was not unconscious when the attacks began and he begged Nelson to hit him again with the bat so as to knock him unconscious before the stabbing continued. Nelson did as Owens requested and Brennan continued to attack Owens with the box cutter. Nelson and Brennan also continued to strike Owens a number of times with the bat. The two eventually dragged Owens' body to nearby bushes, where Owens later died.
>
> Nelson and Brennan picked up Tina Porth and Misty Porth and the four left the city in Owens' car. After stopping in Daytona Beach, the four left the state and drove to New Jersey. At different times during the trip, Nelson and Brennan informed Tina and Misty that they had murdered Owens. Both Tina and Misty testified at trial.
>
> Nelson and Brennan were apprehended by law enforcement officers in New Jersey. Nelson gave a video- and audio-taped confession. In the confession,

Nelson detailed his account of the murder, both at the crime scene and at the place where the bat was recovered. The video-taped confession was played to the jury. Additionally, an analyst for the Florida Department of Law Enforcement testified that blood stains on Nelson's shoes, the box cutter, and a pair of underwear that the box cutter was wrapped in all matched Owens' DNA.

Nelson was found guilty of first-degree murder and robbery with a deadly weapon. At the penalty phase, the jury recommenced death by a twelve-zero vote. The trial court found three aggravators: (1) the murder was committed in the course of a robbery; (2) the murder was especially heinous, atrocious, or cruel (HAC); and (3) the murder was committed in a cold, calculated, and premeditated manner without any pretense of legal or moral justification (CCP). The trial court also found that one statutory mitigator (age of eighteen at the time of the crime) and fifteen nonstatutory mitigators [FN1] were established. The statutory mitigator was given great weight. The first nonstatutory mitigator was given substantial weight, and the remaining nonstatutory mitigators were given from moderate to little weight. The trial court concluded that Nelson failed to establish the following statutory mitigators: (1) that he acted under the effect of extreme emotional disturbance, (2) that he was an accomplice with minor participation, (3) that he acted under the domination of another person, and (4) that his capacity to appreciate the criminality of his conduct was impaired. The trial court followed the jury's recommendation and imposed the death penalty for the first-degree murder conviction. The trial court sentenced Nelson to 189 months in prison for the robbery conviction.

> [FN1] The following nonstatutory mitigators were presented during the penalty phase: (1) Nelson gave a voluntary confession, (2) Nelson was not the person who killed the victim, (3) death was caused by the codefendant Brennan, (4) Nelson suffered from a deprived childhood, (5) Nelson's childhood saddled him with emotional handicaps, (6) outside influences saddled Nelson with emotional handicaps, (7) Nelson suffered great situational stresses leading up to the

> time of the homicide, (8) Nelson was suffering emotional turmoil before and at the time of the homicide, (9) Nelson's anger stems from circumstances beyond his control, (10) Nelson suffered physical, mental, and sexual family abuse, (11) Nelson has no prior criminal convictions for violent felonies, (12) the homicide was committed for emotional reasons, (13) there was a conditional guilty plea subject to a life sentence which was refused by the State, (14) Nelson has potential for rehabilitation in prison, and (15) the death penalty as applied to Nelson is disproportionate.

Postconviction proceedings were initiated in January, 2001, with the filing of a "shell" motion for postconviction relief (1/17-85). Nelson's attorney filed a motion to withdraw which was granted on October 24, 2007, when attorney Michael McDonnell was appointed (6/580-83, 627-29, 637; 7/638-45). Nelson's current attorney, Baya Harrison, was ultimately appointed to the case on March 4, 2009, when McDonnell was permitted to withdraw (7/721-21; 8/730-31).

Nelson's final motion to vacate was filed on June 15, 2009 (9/777-837). The State filed a response (9/855-868), and a case management conference was conducted on August 20, 2009 (10/900-935). Thereafter, an evidentiary hearing was held on October 29, 2009 (10/1034-1109).

At the hearing, Nelson testified in his own behalf (10/1043-63), then presented the testimony of his postconviction investigator Stephen Holland (10/1064-82). The State presented

the testimony of trial counsel, Harold Stevens (10/1083-1103).

Joshua Nelson testified that in 1996 he and Keith Brennan were convicted of the 1995 murder of Tommy Owens (10/1043-44). Nelson was over eighteen years of age at the time of the murder, but Brennan was just under seventeen (10/1045). At that time, Nelson was living with his mother, who is now deceased, and his stepfather, Greg Percifield (10/1045). He recalled that his mother and Percifield were present in court at the beginning of his trial (10/1045).

Nelson stated that Percifield had become involved in his life when Percifield started dating Nelson's mother while Nelson and his mother lived in Indiana (10/1046-47). Percifield was a nice guy until he married Nelson's mother, but after the marriage Percifield was strict, violent and abusive to Nelson (10/1047). In addition, Percifield abused Nelson sexually for a year or two (10/1047). When Nelson told his mother the abuse stopped, but after a few weeks Percifield started pressuring Nelson again (10/1048-49).

According to Nelson, he had not been using drugs or alcohol on the night of the murder, but he had used drugs extensively before that time (10/1046). He had been involuntarily committed to the Southwest Florida Addiction Services; he ran away a couple of times and was ultimately returned home (10/1049).

Nelson testified that he wanted to testify at the penalty phase of his trial, but that he did not do so because he learned that the tattoo he had gotten after his conviction would be used against him (10/1048). He felt some remorse at the time, not strong, but slight, and he wanted to express it to the jury (10/1053-54). Nelson recalled that he testified at the guilt phase and told the jury about Percifield, about his history with illegal drugs, and about being sorry for the crime (10/1055, 1060). At the evidentiary hearing, he was not sure if there was any more that he would have said if he had testified at the penalty phase (10/1058-59).

Steve Holland testified about his investigation of Nelson's trial to assist collateral counsel Harrison (10/1064-82). He confirmed what the record reflected in terms of jury selection, witnesses, and issues discussed (10/1066-76). His investigation did not reveal any additional mental health, substance abuse information, or family background mitigation beyond that presented at trial (10/1077-78). He had attempted to locate Greg Percifield for Harrison, but was unable to find him (10/1067-68).

Trial counsel Hal Stevens testified that he was appointed to represent Nelson in 1995 (10/1084). Stevens has been an attorney since 1978, and has handled well over a hundred

criminal jury trials; he became board certified as a criminal trial lawyer in 1994 (10/1083-84, 1095). He sought and secured the appointment of co-counsel John Mills, mitigation specialist Cheryl Pettry, and mental health expert Dr. Sidney Merin to assist with his preparation for the guilt and penalty phases (10/1084-86). To the best of his knowledge, this was the first case in Lee County where funds were authorized for a mitigation specialist, and Ms. Pettry did extensive work on the case, gathering records and interviewing witnesses (10/1085-86).

Stevens recalled that Nelson's mother and Greg Percifield were initially cooperative with the defense team; they were concerned for Nelson and participated in the team's preparations (10/1086). Stevens was intending to use them as penalty phase witnesses (10/1086). However, once Stevens revealed in his opening statement that the defense would rely on the fact that Percifield had been sexually abusing Nelson, both the mother and Percifield fled; they "simply disappeared" (10/1086). The defense attempted to locate them but there was no further contact or cooperation from them (10/1086). Stevens knew that the mother had helpful, mitigating evidence to offer, such as admitting that she had added vodka to the milk in Nelson's baby bottle when he cried and discussing his exposure to alcohol and alcoholism (10/1097-98). Stevens was not sure if Percifield

would have anything to offer in the way of mitigation, as he denied the sexual abuse Nelson described, but Stevens was hopeful he could help (10/1097). Stevens was convinced that having the mother under subpoena would not have stopped her from absconding; Stevens knew the mother was completely controlled by Percifield, and she left despite knowing the defense was counting on her as a witness (10/1098-99).

Stevens confirmed that there had been a substantial delay between the guilt and penalty phases (10/1089). The defense needed additional time to bring witnesses from out of state, and they were still searching for Nelson's biological father, who was living in the woods near Orlando and ultimately did testify in mitigation (10/1089-90). The defense may have also needed more time for the mental health examination, and they wanted the jury to have some "cooling off" time after hearing very brutal, graphic evidence about the murder (10/1090). Stevens noted that, if he knew then what he knew now, he would have requested an instruction to the jury to avoid the media, but at the time he had no reason to believe that anything newsworthy would happen in the case (10/1090-92). Stevens did not know that Nelson would be getting a tattoo that read "Natural Born Killer" and when he learned about it, shortly before the beginning of the penalty phase, it "blindsided" the defense team; they were

very concerned about the prejudice in light of a popular movie at the time, very violent, with the same name (10/1091-94).

Following the hearing, the court accepted written post-hearing memorandum from the parties (10/948-1005). On March 18, 2010, the court denied Nelson's postconviction motion (11/1100-1131). The court found that Nelson had failed to demonstrate either deficient performance or prejudice by trial counsel on any basis, and that the State had not taken inconsistent positions with respect to the imposition of the death penalty on the two codefendants (11/1113-29). This appeal follows.

SUMMARY OF THE ARGUMENT

Nelson has failed to demonstrate any error in the lower court's denial of his motion for postconviction relief. The court below conducted an evidentiary hearing and properly concluded that trial counsel Harold Stevens did not provide ineffective assistance; neither deficient performance nor prejudice were shown. Nelson's claim as to jury selection is insufficient as Nelson has never identified any biased juror that sat on his case. Counsel's failure to secure sequestration for the nearly two months between the guilt and penalty phases was not unreasonable and any prejudice occasioned by Nelson's tattoo was self-created and cannot be attributed to Stevens. Counsel reasonably attempted to present Nelson's mother and stepfather as mitigation witnesses and is not responsible for the fact that they absconded in light of the defense claim of sexual abuse by Percifield. There is no possible prejudice since none of the asserted deficiencies by counsel changed the evidentiary support for any relevant sentencing factors.

The court also properly rejected Nelson's claim that the prosecution violated due process by adopting inconsistent theories with regard to sentencing. The court determined that the State did not take inconsistent positions and that no due process violation occurred.

ARGUMENT

ISSUE I

WHETHER THE TRIAL COURT ERRED IN DENYING NELSON'S CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL FOR FAILING TO SECURE AN IMPARTIAL JURY.

Nelson's first claim asserts that he was denied the effective assistance of counsel due to errors committed by his attorney during jury selection. Specifically, Nelson claims that his attorney, Harold Stevens, could have secured the excusal of three prospective jurors for cause, but because counsel failed to provide the relevant authority, the individuals sat on Nelson's jury, convicted him of murder, and recommended that a death sentence be imposed. Nelson also accuses Stevens of having failed to prevent the dismissal of prospective juror Sankis after Sankis admitted that he could not recommend imposition of the death penalty under any circumstances. As will be seen, Nelson's assertion of ineffective assistance of counsel on these bases was properly rejected.

Nelson did not seek an evidentiary hearing on this issue, but relied upon the trial transcript to prove his claim. Since the claim is fully based on the written record and pleadings, review is *de novo*. Walton v. State, 3 So. 3d 1000, 1005 (Fla. 2009); State v. Coney, 845 So. 2d 120, 137 (Fla. 2003). A

review of the record fully supports the lower court's ruling to deny this claim; the court properly found that Nelson failed to establish a valid basis for a cause challenge on the jurors at issue (11/1115).

According to Nelson, jurors Carlsen, Dolan, and Wotitzky all generally agreed with the statement that the death penalty should be imposed on anyone convicted of first-degree premeditated murder. While attorney Stevens moved to exclude these jurors, Nelson asserts that Stevens failed to provide case law supporting his motion, and consequently the trial court "superficially rehabilitated" the jurors by asking whether the jurors could follow the law (Brief, p. 36). In addition, Nelson notes that Stevens could have excused these prospective jurors peremptorily, but failed to do so, resulting in three jurors sitting for Nelson's trial that allegedly believed that death was the presumptively appropriate sentence for first-degree premeditated murder.

The record reflects that Nelson's jury was carefully selected and that no biased juror was seated. Nelson identifies responses from prospective jurors Dolan, Carlsen and Wotitzky, and claims these comments reflect that these individuals would support the death penalty for any first-degree murder conviction, and therefore they should have been excused and

should not have sat on Nelson's jury. Significantly, these responses were all offered before the jury had been instructed on the legal principles to be applied (DA. 14/162-63, 174-77).[1] When questioned, prospective jurors Dolan, Carlsen and Wotitzky all confirmed that they could follow the law and the court's instructions (DA. 14/175-77), and there is no indication that any juror felt so strongly in favor of a death sentence that he or she would disregard the law or the court's instructions when deliberating an appropriate sentence. As the court below found, the failure to exclude these jurors was not a result of counsel failing to cite the appropriate authority, but because they were not subject to a cause challenge as a matter of law (11/1115).

Nelson's claim of ineffective assistance of counsel must be determined in accordance with the standards set forth in Strickland v. Washington, 466 U.S. 668 (1984); in Strickland, the United States Supreme Court established a two-part test for reviewing claims of ineffective assistance of counsel, which requires a defendant to show that (1) counsel's performance was deficient and fell below the standard for reasonably competent counsel and (2) the deficiency affected the outcome of the proceedings. The first prong of this test requires a defendant to establish that counsel's acts or omissions fell outside the

[1] The designation "DA." is provided for record cites pertaining to the record in Nelson's direct appeal.

wide range of professionally competent assistance, in that counsel's errors were "so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." Strickland, 466 U.S. at 687, 690. Only a clear, substantial deficiency will meet this test. See Johnson v. State, 921 So. 2d 490, 499 (Fla. 2005). The second prong requires a showing that the "errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable," and thus there is a reasonable probability that, but for counsel's errors, the result of the proceedings would have been different. Strickland, 466 U.S. at 687, 695. The deficiency must have affected the proceedings to such an extent that confidence in the outcome is undermined. Johnson, 921 So. 2d at 500.

Proper analysis of this claim requires a court to eliminate the distorting effects of hindsight and evaluate the performance from counsel's perspective at the time, and to indulge a strong presumption that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 466 U.S. at 689. See generally Chandler v. United States, 218 F.3d 1305, 1313-19 (11th Cir. 2000), cert. denied, 531 U.S. 1204 (2001); Johnson, 921 So. 2d 499-500; Asay v. State, 769 So. 2d 974, 984 (Fla.

2000). Judicial scrutiny of attorney performance must be highly deferential. "It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable." Strickland, 466 U.S. at 689. The defendant bears the heavy burden of proving that counsel's representation was unreasonable under prevailing professional standards and was not a matter of sound trial strategy, and that prejudice resulted. Strickland, 466 U.S. at 689; Chandler, 218 F.2d at 1313; Johnson, 921 So. 2d at 500; Asay, 769 So. 2d at 984.

In this case, Nelson was represented by appointed counsel Harold Stevens and John Mills. Stevens was an experienced criminal defender, having been board certified as a criminal trial lawyer since 1994 (10/1083-84, 1085). When reviewing the performance of seasoned trial attorneys, the strong presumption of correctness ascribed to their actions is even stronger. Chandler, 218 F.3d at 1316.

Nelson has failed to establish either deficient performance or any possible prejudice in this case. He has not shown that all reasonable attorneys would have excused these prospective jurors, and he cannot show that any biased juror sat on his

case. Even if Nelson's current counsel would handle the jury selection issues differently, the fact that all of the jurors indicated they could be fair and follow the law provides a basis for finding that counsel's decision against striking particular jurors was a matter of reasonable strategy. See Evans v. State, 995 So. 2d 933, 942-943 (Fla. 2008) (rejecting IAC where counsel did not strike juror that clearly supported death penalty). Therefore, this claim was properly denied.

Nelson also claims that counsel performed deficiently in permitting the State to excuse prospective juror John Sankis, who was generally opposed to the death penalty but agreed with attorney Stevens that he could follow the law and could weigh and consider the aggravating and mitigating circumstances as instructed. According to Nelson, Sankis' later dismissal violated Witherspoon v. Witt, 469 U.S. 412 (1985), and had Stevens cited the Witherspoon case, the trial court would not have allowed Sankis to be dismissed from the jury pool.

Once again, no error has been shown. The record supports the trial court's explanation that prospective juror Sankis was dismissed because the parties were able to agree on a jury before Sankis came up for consideration (11/1116-17; DA. 14/179-180, 15/238-40, 247, 276-82, 301-03). Moreover, the dismissal of Sankis, after Sankis indicated that he could never recommend

a death sentence under any circumstances, could not have been avoided had Nelson's attorneys performed any differently; the record reflects that defense counsel attempted a reasonable rehabilitation, but Sankis continued to maintain that he could not vote to recommend a death sentence under any circumstances (DA. 15/298-300). Witherspoon does not permit any jurors to sit that cannot agree to follow the law. While Juror Sankis agreed to "consider" the relevant sentencing factors in recommending a sentence, he repeatedly and continuously acknowledged that he would not return a recommendation for imposition of the death penalty under any circumstances. Because that clearly is not the law in Florida, the record affirmatively demonstrates that Sankis would not be able to follow the law, and therefore his dismissal would have been required by Witherspoon.

Nelson claims prejudice due to Stevens' asserted deficiencies in jury selection based on having been tried by a jury that was "skewed in favor of the imposition of the death penalty" in violation of Nelson's right to a fair and unbiased jury (Brief, p. 40). This is insufficient to allege the necessary prejudice. In Carratelli v. State, 961 So. 2d 312, 324 (Fla. 2007), this Court explained that prejudice only occurs when a deficient performance in jury selection leads to a biased juror actually serving on the defendant's jury. The court below

repeatedly found that the record did not provide any indication that any of Nelson's jurors were biased (11/1115, 1116, 1117). As Nelson has not demonstrated any error in this finding, he has not made the necessary allegation or showing of prejudice under Carratelli.

The court below properly rejected Nelson's claim of ineffective assistance of counsel during the jury selection of his trial, and this Court must affirm the denial of this claim.

ISSUE II

WHETHER THE TRIAL COURT ERRED IN DENYING NELSON'S CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL FOR FAILING TO PROTECT NELSON FROM ADVERSE PUBLICITY.

Nelson's next claim asserts that his attorneys were constitutionally ineffective for failing to protect Nelson from adverse publicity with regard to a tattoo that Nelson obtained following his conviction for first-degree murder. The trial court denied this claim, finding that Nelson had not established deficient performance or prejudice (11/1125-27). As this claim was denied following an evidentiary hearing, the trial court's factual findings are reviewed with deference and the legal conclusions are considered *de novo*. Stephens v. State, 748 So. 2d 1028, 1033 (Fla. 1999).

Nelson claims that counsel failed to protect him by requesting that the jury be sequestered for the substantial break between the guilt and penalty phases or requesting that the court instruct the jury to avoid any media reports about the case over the break. As a result, when Nelson secured his "Natural Born Killer" tattoo in jail, it was reported in the media and several of his jurors became aware of the tattoo. In addition, the defense agreed that Nelson would not testify at the sentencing in exchange for the State avoiding the presentation of any evidence about the tattoo, and therefore,

according to Nelson, the jury never heard about Nelson's remorse over killing Tommy Owens.

The record reflects that the guilt phase jury verdict was returned on September 19, 1996, but the penalty phase did not begin until November 7, 1996 (DA. 7/527; 10/694).[2] This is consistent with a ruling entered prior to trial; the defense had requested funds to retain an additional mental health expert to develop mitigating evidence, but the trial judge was concerned about the amount of money taxpayers were being asked to expend for a penalty phase before Nelson had even been convicted (DA. 6/455-60, 474). The judge compromised by indicating he would provide a break before any penalty phase so that the defense could secure further mitigation after the conviction (DA. 6/459-60, 474). An order appointing Dr. Merin to evaluate Nelson was entered after the conclusion of the guilt phase, on September 27, 1996 (DA. 7/562-63), and Nelson was examined by Merin on October 23, 1996 and October 27, 1996 (DA. 8/613-14; 10/780).

Hal Stevens testified at the evidentiary hearing that the break in proceedings was welcomed by the defense (10/1089-90). They needed to bring witnesses down from Indiana, and they were still looking for Nelson's father, who lived in a tent in the

[2] Nelson's brief describes this as a three-week gap, until October 7, 1996 (Brief, p. 42); however, the trial record reflects that the penalty phase did not commence until November 7, 1996 (DA. 10/694).

woods near Orlando (10/1087, 1089). They were also still investigating mental health issues (10/1089-90). Importantly, however, the defense wanted the jury to have a cooling-off period after hearing the videotaped confession, which was very brutal, and Stevens hoped its impact would diminish over time (10/1090).

Nelson now claims that his defense team should have sought to have the jury sequestered over this break or secured an instruction cautioning the jury to avoid any possible media coverage over the break. Given the length of time between proceedings, sequestration was not a reasonable option. See Banda v. State, 536 So. 2d 221, 224 (Fla. 1988) (rejecting claim that jury should have been sequestered over the break between guilt and penalty phases). Stevens acknowledged at the hearing that he did not specifically request an admonishment against exposure to the media; he knew the jury had heard the most graphic, brutal evidence before convicting Nelson and the defense team was not expecting anything newsworthy to happen (10/1090-92). Stevens did not know or anticipate that Nelson would give himself a tattoo that read “Natural Born Killer” over the interim, and the defense team only learned of the tattoo by reading about it in the newspaper shortly before the commencement of the penalty phase (10/1091-92). The defense was

particularly concerned about prejudice because there had been a movie about that time called “Natural Born Killer” that was very violent and very popular (10/1094).

The direct appeal record reflects that the defense team took several measures attempting to alleviate any prejudicial effect. They filed a motion in limine to preclude the prosecution from mentioning the tattoo and also moved for mistrial based on publicity generated over the break between the guilt and penalty phases (DA. 8/588-593). A hearing was held on these motions on October 29, 1996 (DA. 8/627-664). Judge Nelson indicated that he would conduct a colloquy to determine if any jurors had been exposed to media accounts and whether anyone had formed any opinions or impressions in the case (DA. 8/640). The Court declined to provide an anticipatory ruling as to whether the State would be permitted to use the tattoo if Nelson testified about any remorse (DA. 8/657-58).

However, by the beginning of the penalty phase, the defense and the State had reached an agreement that the defense would not argue remorse in mitigation if the State did not bring out the tattoo (DA. 10/721-22). Hal Stevens testified at the evidentiary hearing to his opinion that this was a beneficial deal for the defense (10/1094). For one thing, they didn’t really have any compelling evidence of remorse; for another,

Nelson had already testified before the same jury in the guilt phase, and had indicated that he was sorry (10/1060, 1093-94; DA. 18/811-12). According to Stevens, Nelson understood and agreed with this strategy (10/1094).

The direct appeal record also reflects the inquiry conducted by the judge revealing that six of the jurors had heard or seen something about the case over the break between the guilt and penalty phases (DA. 10/742). These six, jurors Crawford, Dolan, Wotitzky, McFalls, Krause and Dennis, were then interviewed individually by the Court (DA. 10/742-753). Crawford related what he had read, which all pertained to the trial itself; there was no mention of the tattoo (DA. 10/742-43). Several jurors remembered something about a tattoo without recall as to who had it or what it said (DA. 10/746, 752). All six jurors indicated they could put aside anything they might have heard, follow the law, and render an impartial verdict on penalty (DA. 10/743, 744, 745, 746, 750, 752).

The only juror expressing any hesitation about his role was juror Krause (DA. 10/747-51). Krause admitted that the tattoo could possibly have an impact on him, and he was also affected by the fact that the defense had indicated they might be bringing in a psychologist (DA. 10/748). However, Krause understood the importance of putting everything else aside and

basing his verdict only on the evidence (DA. 10/750). When pressed about whether he would be able to do this, he noted that, as a teacher, he sometimes has to follow rules that he doesn't agree with, but he could do it because it was his duty (DA. 10/750-51).

The tattoo issue was explored again in a motion for new trial, which was heard several days before the Spencer hearing (DA. 11/944-978; 12/1017). One claim alleged that the tattoo had been discussed during deliberations, citing a newspaper article (DA. 11/944-46). The article attached to the motion indicated that the jury foreman said the tattoo did not factor into the deliberations and was not discussed until after the jurors had voted; according to the foreman, the tattoo did not hurt and did not help Nelson's cause (DA. 11/946). The foreman had also indicated that the confessions had been powerfully persuasive for guilt, and because they were substantiated by medical testimony, for penalty as well (DA. 11/946). The unanimous recommendation for the death penalty was returned after a little more than half an hour of deliberations, which the Court noted as an indication of how strong the evidence against a life sentence had been (DA. 11/969).

Nelson testified at the evidentiary hearing that he wanted to testify in the penalty phase, and he would have testified but

his attorneys advised him that the tattoo would be used against him (10/1048, 1057). Nelson gave himself the tattoo, thinking it a "smart move" at the time but now characterizing his reasons as "misguided" (10/1051, 1059). At the time, he felt some remorse, which he described as "just a slight feeling," both for the victim, Tommy Owens, and for his own predicament (10/1053, 1060). Nelson testified that his memory was bad and he did not recall a lot of the details from his trial (10/1061). Even in hindsight, he can't say why he got the tattoo, but recalls being confused at the time, not really understanding what was going on himself, or why he had committed the crime (10/1054, 1062). He acknowledged that he did express his sorrow to the jury when he testified at the guilt phase, and he could not identify anything he would have testified to differently if he had testified at the penalty phase (10/1058-60).

No ineffective assistance of counsel can be found on these facts. There was no evidence presented at the hearing to support any claim that counsel acted deficiently with regard to the break between the guilt and penalty phases, or the related tattoo issue. Nelson has faulted counsel for not seeking an instruction to the jury to avoid the media, but he has not demonstrated that all reasonable attorneys in Stevens' place would have requested such an instruction even though there was

no reason to believe at the time that any admonition was necessary.

Even if some possible deficiency occurred, Nelson could not establish that any prejudice resulted. The jury was polled individually and each juror confirmed that he or she would set aside any extrinsic knowledge and return a sentencing recommendation based entirely on the evidence produced in court (DA. 10/741-53). This Court routinely acknowledges that such assurances are presumptively accepted, and Nelson has not provided any basis to reject that conclusion in this case. See Overton v. State, 976 So. 2d 536, 573-574 (Fla. 2007) (assurances of impartiality despite knowledge of extrinsic information demonstrates jury impartiality), Rolling v. State, 695 So. 2d 278, 286 (Fla. 1997) (discussing that although not dispositive, assurances from prospective jurors that they are impartial despite any extrinsic knowledge support the presumption of a jury's impartiality).

As Nelson has not shown any deficient performance or prejudice based on his counsel's acts or omissions with regard to this issue, this claim was properly denied, and this Court must affirm the denial of relief.

ISSUE III

WHETHER THE TRIAL COURT ERRED IN DENYING NELSON'S CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL FOR FAILING TO PRESENT NELSON'S MOTHER AND STEPFATHER AS PENALTY PHASE WITNESSES.

Nelson next asserts that he received ineffective assistance of counsel because his attorneys did not subpoena his mother and stepfather to be penalty phase witnesses. The trial court denied this claim, finding that Nelson had not established deficient performance or prejudice (11/1121-22). As this claim was denied following an evidentiary hearing, the trial court's factual findings are reviewed with deference and the legal conclusions are considered *de novo*. Stephens, 748 So. 2d at 1033.

The record confirms that Nelson's attorneys performed competently in penalty phase. The defense team presented seven witnesses, and offered extensive testimony regarding Nelson's drug and alcohol history, his dysfunctional upbringing, and the findings of a well-respected mental health expert (DA. 10/776-855). A careful review of the penalty phase transcript refutes Nelson's claim that his attorneys committed unreasonable acts or omissions in presenting his case in mitigation. In addition, given the nature and circumstances of this offense, any additional mitigation offered in postconviction would not be sufficient to outweigh the aggravating factors, and Nelson

cannot show any reasonable probability of a different result had the penalty phase been conducted in the manner suggested by Nelson's current counsel.

Nelson testified at the guilt phase of his trial that he was born to alcoholic parents, and he witnessed domestic abuse and violence between his mother and father (DA. 18/795-96). After his father left them, his mother had a number of boyfriends that physically abused Nelson (DA. 18/796). Nelson often stayed with relatives on weekends and holidays (DA. 18/796-97). Sometimes his aunts gave him money or he made money by selling candy at school, but he always gave it to his mother and she used it to buy herself cigarettes (DA. 18/797-98). He attended several different schools and ultimately moved to Florida in 1990 with his mother and stepfather, Greg Percifield (DA. 18/799). Nelson thought they moved to Florida because Percifield had stolen money from a motorcycle gang (DA. 18/799). Percifield used to beat Nelson, then started sexually abusing him (DA. 18/800-01). The sexual abuse lasted two or three years; Nelson told his mother, but the abuse continued (DA. 18/800-01, 809-10). Nelson told the jury that, on the morning of Tommy's murder, Percifield had approached him for sex but Nelson had refused (DA. 18/809). Nelson's mom became involved and she kicked Nelson out of the house (DA. 18/809-10).

In the penalty phase, Dr. Sidney Merin reiterated Nelson's description of his childhood, characterizing Nelson's home life as "markedly dysfunctional" (DA. 10/784), with "a very disturbed type of family" (DA. 10/806). The defense also called another six witnesses to provide background mitigation: James Allen Nelson, Nelson's father (DA. 10/808-13); Heather Timm, Nelson's half-sister (DA. 10/814-20); Patricia Bennett, Nelson's aunt (DA. 10/821-29); Tammy Long, another aunt (DA. 10/830-42); Reba Oiler, another aunt (DA. 10/843-48); and Donna Walker, the mother of one of Nelson's friends in Pine Island (DA. 10/849-54). Nelson's father specifically recalled that, when Nelson was a baby, they put liquor in his bottle when he had colic (DA. 10/810).

The sentencing order reflects that the trial judge found three nonstatutory mitigating circumstances based on the evidence of Nelson's background presented at the penalty phase: Nelson suffered from a deprived childhood to the detriment of his personal development; Nelson's childhood and upbringing saddled him with emotional handicaps; and the bad family abuse by his parents including physical, mental and sexual abuse (DA. 12/1092-94). Each of these factors was given moderate weight (DA. 12/1093-94).

At the postconviction evidentiary hearing, Nelson testified

that Greg Percifield came into his life when Nelson and his mother lived in Indiana (10/1046). Percifield and Nelson's mother met and dated, and their relationship quickly turned serious and they got married (10/1046). According to Nelson, Percifield was initially nice but that after the marriage he became mean and violent (10/1047). The violence stopped but then Percifield started sexually abusing Nelson (10/1047). The abuse lasted for about a year and a half to two years, and made Nelson feel very angry and alone (10/1047). When Nelson told his mother about the abuse, she scolded Percifield and it stopped for a few weeks, but then Percifield started pressuring Nelson again (10/1048-49). Nelson recalled that he told the jurors about Percifield when he testified at the guilt phase of his trial (10/1055-56). Steve Holland testified that his investigation did not reveal any additional family background information beyond what had been presented at trial (10/1078).

Hal Stevens testified that he secured the appointment of a mitigation specialist before trial (10/1084). At the time, it was not a common practice to have such a specialist appointed; Stevens thought this might be the first case in Lee County to authorize such funds (10/1085). The specialist, Cheryl Pettry, was a big help to the defense team, gathering school records and other background material (10/1084-85). The direct appeal

record reflects that Stevens returned to court several times prior to trial in order to secure additional investigatory funds for Pettry's continuing work (DA. 2/42-46, 48; 3/75-76; 4/396, 411-12; 6/451, 453-510, 513-14). Stevens also talked to Nelson, his mother, and his stepfather at great length in an attempt to develop background mitigation (10/1085-86). The mother helped Stevens find aunts and other mitigation witnesses (10/1102).

Stevens testified that Nelson's mother and Greg Percifield initially gave every appearance of being cooperative; Nelson and his mother were very close, and she and Percifield were concerned about Nelson and had extensive contact with the defense team prior to trial (10/1086). Stevens intended them both to be penalty phase witnesses, but once he gave his guilt phase opening statement, asserting that Percifield had been sexually abusing Nelson (DA. 15/336), the couple fled (10/1086). The defense used the contact information they had and continued to try to locate them, but Mr. and Mrs. Percifield had "simply disappeared." (10/1086, 1100). Stevens did not have them under subpoena, but did not believe a subpoena would have stopped their flight (10/1098). Nelson's mother was "dominated" by Percifield and her absconding when she knew they wanted her to testify was a sign to Stevens that she would not testify favorably (10/1098-99). Before she left, Stevens intended for

her to testify; she had helpful, mitigating evidence to offer, including testimony about how Nelson's parents put vodka in the milk in his bottle when he cried (10/1097-98). Stevens would have liked to have used Greg Percifield to corroborate Nelson's testimony about the sexual abuse, but Stevens expected Percifield to deny the abuse, so Percifield was not necessarily expected to testify at the time that he fled (10/1097).

Once again Nelson has failed to demonstrate any ineffective assistance of counsel under Strickland. Nelson has not identified any acts or omissions which indicate Stevens' representation was deficient in any way. The defense team conducted a thorough investigation into mitigation and presented all of the witnesses available. The trial court found and weighed several nonstatutory mitigating factors based on Nelson's deprived upbringing. No additional family or background mitigating evidence that should have been presented at the penalty phase or weighed in the sentencing decision has been identified.

The only witnesses Nelson has specifically faulted counsel for failing to present are his mother and Greg Percifield. Stevens' testimony about them disappearing after the guilt phase opening argument was not rebutted; under the circumstances Stevens described, clearly the loss of the Percifields cannot be

attributed to any deficient performance by counsel. The court below specifically found that the fact that they absconded "cannot be attributed to any failure or omission of trial counsel, who attempted to locate them" (11/1122). Moreover, the only actual testimony which Nelson identifies that could have been presented - that Nelson's parents sometimes put liquor in his baby bottle - was presented to the jury through the testimony of Nelson's father, James (DA. 10/810). As again only cumulative evidence has been offered to supplement the background testimony offered at trial, no potential prejudice can be found in this case.

Nelson now claims that his trial attorneys could have secured the Percifields' presence with a subpoena, but he was unable to secure any testimony from Percifield at the evidentiary hearing. On these facts, Nelson has not established that he was provided ineffective assistance of counsel based on the failure to present evidence from his mother and stepfather in mitigation. This Court must affirm the denial of this claim.

ISSUE IV

WHETHER THE TRIAL COURT ERRED IN DENYING NELSON'S CLAIM OF NEWLY DISCOVERED EVIDENCE REGARDING CULPABILITY OF NELSON'S CODEFENDANT.

Nelson's last claim asserts that newly discovered evidence of the culpability of Nelson's codefendant, Keith Brennan, compels imposition of a life sentence. Specifically, Nelson submits that the State's motion for rehearing in Brennan's direct appeal, filed after this Court reduced Brennan's sentence to life, was a change of prosecutorial theory with regard to the relative culpability between the parties. As no evidentiary hearing was requested, the court below denied this claim summarily (11/1128-30). Accordingly, review is *de novo*. Walton, 3 So. 3d at 1005; Coney, 845 So. 2d at 137.

Nelson claims that he is entitled to a life sentence due to the State taking inconsistent positions in this prosecution, by asserting during the course of Brennan's direct appeal that Nelson was "in some ways, less emotionally mature" than his codefendant, Keith Brennan. According to Nelson, the State's failure to adopt this position at the time of Nelson's trial precluded it from offering the comment in the course of Brennan's direct appeal.

This claim was properly denied. As the court below found, the State has not taken any inconsistent position over the

course of prosecuting Nelson and Brennan for their crimes against Tommy Owens (11/1129). The assertion as to the relative emotional maturity between the codefendants was offered in a motion for rehearing filed after this Court reduced Brennan's death sentence to life imprisonment based on a finding that application of the death penalty to a defendant that was sixteen years old at the time of the murder was unconstitutional. Brennan v. State, 754 So. 2d 1 (Fla. 1999). The comment was made as part of a discussion on the Court's finding that conducting a proportionality review can be problematic when the defendant was only sixteen years old at the time of the crime. Such observation, supported by the evidence presented at the penalty phase, is a relevant part of any proportionality consideration and review of the comment in this context refutes Nelson's claim of inconsistent prosecution. See Marek v. State, 8 So. 3d 1123 (Fla. 2009) (recognizing due process may be violated when the State attributes specific acts to different defendants in different trials, or some other direct inconsistency).

In Farina v. State, 937 So. 2d 612 (Fla. 2006), the court rejected a claim of newly discovered evidence based on the fact that Farina's codefendant, his younger brother, had his death sentence reduced to a life sentence pursuant to the decision in

Brennan because the younger Farina was only sixteen at the time of the crime. This Court held that Farina could not show that the reduction of his brother's sentence would probably result in a life sentence for him at any retrial. The Court reasoned that, since the younger Farina's sentence reduction was required by law and not by any analysis of the relevant aggravating and mitigating factors, it could not compel any relief for the older Farina's death sentence. Although Nelson's claim of newly discovered evidence is based on the State allegedly taking inconsistent positions in the prosecutions and Farina's claim asserted that the new evidence demonstrated Farina's sentence was disproportionate, the reasoning of Farina applies equally well to defeat Nelson's current challenge purportedly based on newly discovered evidence.

Moreover, the due process bar to inconsistent theories in a criminal prosecution, to the extent any such bar has ever been recognized, is very limited. The United States Supreme Court "has never hinted, much less held, that the Due Process Clause prevents a State from prosecuting defendants based on inconsistent theories." Bradshaw v. Stumpf, 545 U.S. 175, 190 (2005) (J. Thomas, concurring). This Court subsequently held that Bradshaw did not recognize any new fundamental constitutional right subject to retroactive application.

Walton, 3 So. 3d at 1005-06. In United States v. Dickerson, 248 F.3d 1036, 1043-44 (11th Cir. 2001), the Eleventh Circuit held that due process was only implicated by inconsistent theories when the State was required to change theories in order to pursue the later prosecution. See also Fotopoulos v. Secretary, Dep't. of Corrections, 516 F.3d 1229, 1235 (11th Cir. 2008) (reversing district court finding of due process violation based on inconsistent theories of prosecution). As this claim fails both factually and legally, this Court must affirm the summary denial of this issue.

CONCLUSION

WHEREFORE, the State respectfully requests that this Honorable Court AFFIRM the trial court's order denying postconviction relief.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Regular Mail to Baya Harrison, Esquire, 310 North Jefferson Street, Monticello, Florida, 32344, this 10th day of December, 2010.

/s/ Carol M. Dittmar
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CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this brief is 12-point Courier New, in compliance with Fla. R. App. P. 9.210(a)(2).

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