IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Appellant,

v.

MICHAEL PETER FITZPATRICK,

Appellee.
_____/

CASE NO. SC11-1509
L.T. No. 97-482 CFAES
Death Penalty Case

POST-CONVICTION APPEAL FROM THE CIRCUIT COURT
OF THE SIXTH JUDICIAL CIRCUIT
IN AND FOR PASCO COUNTY, FLORIDA

REPLY BRIEF OF APPELLANT

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SUMMARY OF THE ARGUMENTS IN REPLY

The trial court erred in finding trial counsel rendered ineffective assistance at the guilt phase. The "last thing" that trial counsel wanted was to give the State his own DNA expert to say, ". . . yes, that's Michael Fitzpatrick's DNA." The post-conviction detection of a miniscule number of sperm heads on the victim's underwear was confirmed as *Fitzpatrick's* DNA. The post-conviction DNA experts agreed with the FDLE analyst at trial -- they could not determine when the tissue (obtained during the autopsy from the victim's right hand fingernail clippings) was deposited. The jury was informed of an extended timeline for the presence of sperm in the victim. As to ARNP Hall, trial counsel's tactical decision cannot constitute deficient performance where ARNP Hall was qualified to give an expert opinion. Any attempt to re-litigate the sufficiency of the evidence is procedurally barred. As to the penalty phase, when a defendant prevents his trial counsel from presenting mitigating evidence, he cannot argue on collateral review that he was prejudiced by the failure to present that evidence. See, *Schriro v. Landrigan*, 550 U.S. 465, 475 (2007). Moreover, the additional mitigation presented in post-conviction was largely cumulative and unremarkable. There is no reasonable probability of a different result.

ARGUMENTS IN REPLY

ISSUE I

THE POST-CONVICTION COURT ERRED IN FINDING TRIAL COUNSEL INEFFECTIVE AT THE GUILT PHASE.

The State relies on the arguments set forth in its Initial Brief and adds the following reply to Fitzpatrick's Answer Brief. The State's reply follows the same sequence of sub-headings utilized in CCRC's Answer Brief.

Forensic Evidence Regarding the Victim's Underwear (AB at 35-36)

CCRC points out that Dr. Johnson testified, in post-conviction, that it would be fairly common for one lab to miss sperm. At trial, FDLE analyst McMahan agreed that although the presumptive tests and testing on the cuttings from the underwear did not get anything reacting for semen, McMahan testified "that doesn't necessarily mean there's no sperm there." (DA V19/1118).

In post-conviction, Dr. Ragsdale noted that there was a large amount of semen on the vaginal swabs, but the amount detected on the victim's underwear by BODE was "very small, miniscule." (PCR V19/580). To the best of Dr. Ragsdale's knowledge, no one was using the scraping technique "at that point in time" [at trial]. (PCR V19/575).

BODE's post-conviction testing confirmed that the sperm detected on the victim's underwear (located primarily on the side straps of the garment) matched Fitzpatrick's DNA. However,

at the time of trial, the "last thing" that trial counsel wanted was to give the State his own DNA expert to say, ". . . yes, that's Michael Fitzpatrick's DNA." (PCR Add. V1/131; Add. V2/158). In trial counsel Eble's assessment, if additional DNA retesting just reinforced the State's expert, then "there was harm." (PCR Add. V2/159). In short, at the time of trial, trial counsel was not going to risk giving the State more evidence of Fitzpatrick's DNA. Trial counsel's reasoned strategic decision is unassailable under *Strickland*.[1]

CCRC also highlights the prosecutor's rebuttal closing argument (AB at 32-33) which included that

> She did not have her panties on after she was raped. If she had–and again, underlying the amount of seminal fluid that was found in her body, the fact that there was that much by itself...the law of gravity indicated that if she's on her feet, it's going to drip out. It's just that indelicate, but it's true.
>
> There is no semen in her panties. Her panties were removed. She had sex, and she never put them back on, because they were around her waist. If she had had sex before these wounds were inflicted upon her body, there would be A, less semen in her than there was. Or B, semen in her panties. And you don't have either one of them. Whoever stabbed her had sex with her right then and there, and that is him.

(DA V21/1448).

In post-conviction, Dr. Williamson recognized the likelihood of contamination on the folded underwear. (PCR

[1]*Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052 (1984).

V17/281). Dr. Williamson also noted that normally, "you would focus on the crotch area" or those areas that had tested positive. (PCR V17/277). BODE's detection of an insignificant number of sperm heads located inside the crotch area of the victim's underwear does not materially undermine the State's ultimate arguments at trial -- including that, due to gravity, if Laura Romines had put the underwear back on after Fitzpatrick had sex with her [which, according to Fitzpatrick's final-tailored statement, was [only on the day before Laura Romines was found stabbed, bleeding and naked], there would have been (A) less semen in her than there was or (B) semen [in the crotch] of her panties. Notably, CCRC does not dispute that:

> (1) According to Dr. Williamson, when analyst Weitz took the underwear out of the evidence bag, the underwear was folded on itself; the underwear appeared to have been cut open so that the waistband was no longer intact and it appeared to be completely covered in blood. (PCR V17/276). If the underwear had been folded when the stain was wet, the sperm heads could have transferred onto different areas of the garment. (PCR V17/281).
>
> (2) Dr. Williamson testified that most ejaculate contains up to "millions of sperm." (PCR V17/279). However, on the crotch area of the underwear, where sperm might be prevalent due to gravity, only the following specs were located: On area 3, the interior front center region, above the crotch, only 1 sperm head was located. On area 4, the interior crotch, only 1 sperm head was located. On area 11, the exterior crotch, only 1 sperm head was located. (PCR V17/261-262; 279). Dr. Williamson could not tell when the sperm was deposited on the underwear or how long

it was there. (PCR V17/279-280).

(3) BODE analyst Gardner could not tell when the semen was deposited, under what circumstances, or how long it had been on the underwear. (PCR V19/565-566).

The post-conviction detection of a miniscule number of sperm heads – confirmed as Fitzpatrick's DNA – on the victim's blood-soaked underwear, a garment that was yanked up above her waist when she was found nearly naked, stabbed and bleeding, does not undermine the State's theory at trial, nor exonerate Fitzpatrick, nor implicate anyone else in the sexual assault and murder of Laura Romines. Fitzpatrick failed to demonstrate any deficiency of counsel and resulting prejudice under *Strickland*.

DNA from the Victim's Fingernails (AB at 36-41)

Laura Romines had an itinerant and vagabond lifestyle; she carried her belongings, including her clothes, in garbage bags. (DA V16/681; V17/804; V17/808). Laura Romines was found in the early morning of August 18, 1996, [nearly] nude, and bloody with her throat slit. When she was examined at the hospital, she had, among other things, a fungus infection and she also appeared to have had a case of a sexually transmitted disease called "crabs." (DA V15/530; 539-540; 553). Laura Romines died on September 5, 1996, eighteen days after she was found, and her autopsy was conducted on the day she died.

This sub-claim relates solely to the victim's right-hand fingernail clippings taken at the autopsy. At trial, defense counsel Eble sought to introduce the testimony of FDLE analyst Robin Ragsdale that there was evidence of the DNA of another, unknown person in the tissue from the right-hand clippings. (DA V19/1235-1236). Trial counsel proffered the testimony of Dr. Ragsdale. (DA V19/1230-1240). Dr. Ragsdale admitted that she had "no way of knowing how old the tissue is that's under the nail." (DA V19/1240). The trial court found that "the proffer of the evidence is of a nature that it would be irrelevant and immaterial in its composition ... for the reason that the proffered evidence is inconsequential and does not lead to any conclusion of any kind." *Fitzpatrick v. State*, 900 So. 2d 495, 521 (2005). Inasmuch as defense counsel previously raised this evidentiary issue at trial, counsel cannot be deemed ineffective for failing to convince the court to rule in the defendant's favor. See, *State v. Lewis*, 838 So. 2d 1102, 1119-1120 (Fla. 2002), citing *Swafford v. State*, 828 So. 2d 966 (Fla. 2002).

CCRC now alleges that "missing relevancy" was provided through expert testimony in post-conviction and concludes that because there was blood and sand under the victim's fingernails, the tissue "was deposited around the time of the crime." (AB at 37; 39). However, Fitzpatrick's DNA experts did not reach this

conclusion. In post-conviction, Dr. Johnson conceded that she could not tell when the tissue was deposited and "neither can the other analyst." (PCR V16/182-183). Dr. Williamson could not tell when the debris was deposited or how long it had been there. (PCR V17/272).

Moreover, on direct appeal, this Court assumed, without deciding, that the testimony regarding the fingernail tissue was relevant, but that any error in its exclusion was harmless:

> **Assuming, without deciding, that the testimony with regard to the fingernail scrapings was relevant, we conclude that any error in its exclusion was harmless. See *DiGuilio*, 491 So.2d at 1135. The proferred testimony did not establish any material conclusion due to the expert's inability to accurately determine how long the DNA had been under the victim's fingernails.** The proffered evidence also failed to eliminate Fitzpatrick. The tissue from the unknown person could have been explained through the trial testimony of Dwayne Mercer, who testified that when he was with the victim at the crime scene she squeezed his arm and her fingernails went into his flesh. Moreover, the DNA obtained from the victim's vaginal swabs was consistent with Fitzpatrick's. Finally, the defense stressed to the jury the possibility that the perpetrator was someone other than Fitzpatrick. The defense argued that four individuals named Steve lived at Water's Edge Apartments, some of whom were never accounted for; that the victim held up two fingers when questioned whether the victim knew the people that attacked her; and that Howard was a possible suspect based on Cindy Young's testimony. [FN9] Therefore, the testimony was minimal at best, inconclusive, and would have been inconsequential. After an examination of the entire record, this Court concludes that any error resulting from exclusion of the evidence was harmless. See *id.*

Fitzpatrick, 900 So. 2d at 521 (e.s.)

To the extent CCRC arguably attempts to re-litigate this evidentiary claim, it is procedurally barred in post-conviction. Further, even with the elimination of Dwayne Mercer, it still cannot be shown *when – where – why - or how* - the unidentified tissue was transferred to the victim's right hand fingernail clippings. As a result, the unidentified DNA still remains irrelevant. And, even if arguably deemed relevant, any alleged error remains harmless. See, *Fitzpatrick*, 900 So. 2d at 521.

Because this Court has already held that the exclusion of the DNA testimony (regarding the unidentified right-hand fingernail tissue) was harmless error, Fitzpatrick cannot establish prejudice in his claim of ineffective assistance of counsel. See, *Conde v. State*, 35 So. 3d 660, 664 (Fla. 2010); See also, *Overton v. State*, 976 So. 2d 536, 568-569 (Fla. 2007) ("conclusory assertion that if the hair does not belong to Overton or the victims, *it must belong to a person who committed or participated in the crime, is far too tenuous because there is no way to determine when, why, where, or how* the hairs attached to the tape. . .") Again, Fitzpatrick failed to demonstrate any deficiency of counsel and resulting prejudice under *Strickland*.

Motile vs. Intact Sperm (AB at 41-44)

In this sub-claim, CCRC relies, primarily, on the post-

conviction testimony of Dr. Johnson and Dr. Spitz in an attempt to extend the time period for when Fitzpatrick's still-intact sperm might have been deposited in the victim's vagina. However, CCRC's extended timeline theory necessarily assumes the acceptance of an underlying predicate - that Fitzpatrick's claim of "consensual" sex was accepted by the jury, which it was not.

Dr. Johnson relied, in part, on an article by J. E. Allard, published in 1997, which was mentioned at trial and which described *post-mortem* studies. However, the SAVE exam swabs were obtained from Laura Romines at approximately 8:00 a.m. on August 18, 1996 -- when she was still alive. Dr. Johnson also relied, in part, on an article by Collins and Bennett published in 2001. An excerpt of this article, read by Dr. Johnson, concerned living victims and reported "the average time for loss of motility is two to three hours after intercourse. In the living victim, motile sperm – spermatozoa are generally not seen after 12 hours." (See also, AB at 42).

Dr. Johnson also read an additional excerpt from the Collins and Bennett article which concluded, "[t]he first sign spermatozoa degeneration is the loss of tail which occurs after approximately 16 hours in the vagina." (PCR V16/160). In post-conviction, Dr. Ragsdale disagreed with this conclusion, based on her own experience as well as the published literature. Dr.

Ragsdale personally had done testing on spermatozoa and her own experience mirrored the Willott and Allard article which concluded that the majority of the sperm will lose the tail early on; the majority will have lost it by 16 hours. (PCR V18/421-422). Based on the amount of spermatozoa with tails that FDLE analyst McMahon recorded in her notes, Dr. Ragsdale opined, in post-conviction, that "this semen had been deposited in the vaginal canal probably no longer than six to eight hours prior to, probably not collection, but probably when Ms. Romines was found, because after that she was immobile." (PCR V18/434).

At the time of trial, attorney Eble conducted independent research at the USF library on the range of timing on the sexual contact and also consulted expert witnesses on the DNA and timing of the sexual contact (including Dr. Litman, a DNA expert, and Dr. Feegle, an M.D. who was a former medical examiner and also an attorney). Attorney Eble cross-examined both FDLE analyst McMahan and ARNP Rita Hall at trial and obtained an extended timeline for the presence of sperm in the victim. ARNP Hall admitted that she had known sperm to be found as much as five days after intercourse, although that was "the far extreme." (DA V15/544). In the 24 to 72-hour range, she agreed that one would usually find sperm heads and very few tails, because the tails disappear first. (DA V15/545).

Dr. McMahan made slides from the vaginal swabs and found "many to some heads with some intact, which means that they had tails." (DA V19/1093; 1127-1128). According to Dr. McMahan, the longest that the sperm could have been deposited in the victim's vagina was 15 hours; that 15 hours was at the "top end" for "having tails." (DA V19/1096; V19/1127). The more active the female was after the sperm was deposited, the more likely the sperm would be drained from her body, making for less sperm being there and less with tails. (DA V19/1133).

When defense counsel asked, "[i]sn't it true that the longest time recorded for spermatozoa is 120 hours, and for those with tails the record is 26 hours," Dr. McMahan replied that "[t]he record may be, but once you pass 12 hours, the number of sperm with tails drops off very rapidly." (DA V19/1129). Dr. McMahan admitted that there are numerous factors involved in the breakdown of sperm and calculating a time period is not an exact science. (DA V19/1126, 1131). The breakdown of sperm depends upon a lot of factors, including the environment, whether it's acidic or neutral, the presence of white blood cells, bacteria, temperature, deterioration, and whether the male produces deformed sperm. (DA V19/1131). Dr. McMahan also agreed that the time frame was only an estimate. (DA V19/1133). In short, at trial, the jury was informed of an extended

timeline and the range of conditions affecting the deterioration of sperm. Again, as the Supreme Court noted in *Harrington v. Richter,* 562 U.S. ––––, 131 S. Ct. 770, 788-792 (2011), "*Strickland* does not enact Newton's third law for the presentation of evidence, requiring for every prosecution expert an equal and opposite expert from the defense." Fitzpatrick failed to demonstrate any deficiency of counsel and resulting prejudice under *Strickland*.

Contamination of the Anal Swab (AB at 44-46)

Next, CCRC relies on the post-conviction testimony of Dr. Johnson and Dr. Spitz to argue that the anal swab could have been contaminated by drainage from the vaginal area or contamination of the swab during collection.

Again, this defense theory was previously addressed by defense counsel at trial. Defense counsel Eble cross-examined ARNP Hall at trial about the fluid she observed and the possibility for drainage from the vaginal area. (DA V15/538). On cross-examination, SAVE examiner Hall admitted that the whitish fluid could have been seminal fluid and it could be vaginal fluid; she could not tell whether it was seminal fluid or vaginal fluid. (DA V15/538; 540). ARNP Hall agreed that the wetness in the anal area could have been drainage from her vaginal area. (DA V15/551-552). In light of this testimony

presented at trial, Fitzpatrick failed to demonstrate any deficiency of counsel and resulting prejudice under *Strickland*.

Rita Hall Testifying Outside Her Area of Expertise (AB at 46-49)

In this sub-claim, CCRC relies on Dr. Spitz' multiple criticisms of ARNP Hall, as allegedly testifying outside her area of expertise.[2] Dr. Spitz discounted to near irrelevance ARNP Hall's testimony and eyewitness observations of the victim's injuries.

At trial, ARNP Hall testified that Laura Romines' breasts were a deep purple color, and there was a penetrating wound in the breast area that Hall could not identify if it was a stab wound or a bite mark. (DA V15/529; 552). The trauma report by Dr. Breen at St. Joseph's Hospital also noted injuries to the

[2]Rita Hall is an Advanced Registered Nurse Practitioner [ARNP]. She has a master's degree in nursing from the University of South Florida, licensed in the State of Florida as an advanced registered nurse practitioner, and is certified as a Sexual Assault Nurse Examiner [SANE] in both adults and pediatrics. (PCR V18/465). ARNP Hall has been a licensed nurse in Florida since 1986, and prior to that she was licensed in Michigan, Indiana and the Virgin Islands, first as a nurse and then as a nurse practitioner. (PCR V18/466). ARNP Hall developed the protocol for Pinellas County and the State of Florida for collecting evidence following a sexual assault. (PCR V18/466-467). ARNP Hall has conducted well "over a thousand" SAVE exams. (PCR V18/468). She has testified as an expert witness "well over 50 times" in Pinellas, Pasco and Hillsborough counties. (PCR V18/468). ARNP Hall has had more than a hundred hours of training on collecting evidence and she has also taught nurses and physicians on the collection of evidence following a sexual assault. ARNP has taught the protocol in Pinellas, Hernando, Manatee, Marion and Pasco counties. (PCR V18/467-468).

victim that appeared to be “bite marks.” (PCR V17/364). Based on the photographs alone, Dr. Spitz insisted that the wound on the victim’s breast, characterized by ARNP Hall as a penetrating wound, was not a penetrating wound at all. (PCR V17/340; 367; 369; 370). Dr. Spitz was resolute. According to Dr. Spitz, the wound appeared to be only an abrasion; he would characterize it only as a “more superficial wound.” (PCR V17/369-370).

With regard to Dr. Spitz’ criticism of the reference to a cigarette burn, ARNP Hall testified at trial that “I cannot say it was a cigarette burn. I’m just saying that compared to cigarette burns that I’ve seen, this is what it appeared. It was round, it was very raw on the edges, more like a cigarette burn would leave.” (DA V15/552-553).

Next, CCRC quotes from Dr. Spitz’ critique of ARNP Hall’s testimony regarding the quantity of fluid observed in the victim’s vaginal vault. As to Dr. Spitz’ comment on whether the fluid was “in fact indicative of sexual contact,” Fitzpatrick does not dispute that there was DNA evidence matching Fitzpatrick to the source of the semen recovered from Laura Romines.

As to Dr. Spitz’ criticism of ARNP Hall’s discussion of the victim’s vaginal area and anal area as a “deeper pink and in some places red,” ARNP Hall admitted that she could not tell if

the sex was forced or not. (DA V15/547-548).

Trial counsel Eble believed that ARNP Rita Hall previously had testified as an expert witness and was qualified to give her opinion, as an expert witness, both at the time of trial and today. See, § 90.702; § 90.703, Fla. Stat. Trial counsel's tactical decision cannot constitute deficient performance where ARNP Hall was qualified to give an expert opinion. Counsel was not ineffective for failing to make a meritless objection. See, *State v. Gerry*, 855 So. 2d 157, 164 (Fla. 5th DCA 2003) (Nurse practitioner may testify to the physical findings observed on examination of child victim of alleged sexual abuse and explain why, given the nature of the abuse alleged, physical injury may not be observed on examination); See also, *Leyja v. Oklahoma,* 2010 WL 1881462 (W.D. Okla. 2010) (unpublished) (noting that many state appellate courts have addressed a similar issue, and virtually all appear to uphold a trial court's finding that a sexual assault nurse examiner is qualified under state law to testify as an expert. *Id.*, citing *Velazquez v. Virginia*, 557 S.E.2d 213, 218 (Va. 2002) (qualification as an expert on the causation of injuries in the context of an alleged sexual assault); *Pearce v. State*, 686 S.E.2d 392, 399–400 (Ga. Ct. App. 2009) (qualification in the field of sexual assault examinations and the child sexual abuse accommodation syndrome); *People v.*

Claudio, 2010 WL 597083 (Cal. Ct. App. 2010), remanded on other grounds, (unpublished) (qualification to discuss vaginal penetration); *Newbill v. Indiana*, 884 N.E.2d 383, 398 (Ind. Ct. App. 2008) (qualification to discuss physical findings related to allegations of forced sexual activity); See also, *Brown v. Howerton*, 2012 WL 640660, 12 (M.D. Tenn. 2012) (unpublished) (Pediatric nurse practitioner was qualified to offer expert opinion testimony in the areas of pediatric nursing and sexual assault examinations); *Lewis v. Busby,* 2011 WL 1344308, 4-5 (C.D. Cal. 2011) (unreported) (Registered nurse who specialized in sexual assault testified as expert witness); *Wiggins v. Thaler,* 2010 WL 5093943, 4-5 (N.D. Tex. 2010) (unpublished) (Finding, *inter alia*, that credentials of trained sexual assault nurse examiner were "more than sufficient to qualify" her as an expert and noting that even if trial counsel objected to her qualifications or testimony, the objection likely would have been overruled. As a result, trial counsel was not ineffective for failing to make a meritless objection.); *Burkett v. Curtain,* 2009 WL 6657800 (W.D. Mich. 2009) (unpublished) (Registered nurse was qualified to testify as an expert in the area of sexual assault examination); See also, *Dailey v. State*, 594 So. 2d 254, 258 (1991) (detective's testimony that it was highly likely a sexual battery occurred was admissible because it "was

helpful in consolidating the various pieces of evidence found at the crime scene"). Fitzpatrick failed to demonstrate any deficiency of counsel and resulting prejudice under *Strickland*.

Elements of the Offense and Aggravating Factors (AB at 49-52)

Next, CCRC cites to the post-conviction testimony of Dr. Spitz, who concluded that the evidence did not establish a forced sexual contact. In short, Dr. Spitz disagrees with the jury, the trial judge, and this Court. The apparent attempt to re-litigate the sufficiency of the evidence[3] to sustain Fitzpatrick's convictions, which were affirmed on direct appeal, and the aggravating factors, which likewise were upheld on direct appeal, is procedurally barred in post-conviction.

Dr. Spitz' obvious disagreement with the significance of the evidence[4] supporting Fitzpatrick's convictions and the aggravating factors does not undermine confidence in the outcome

[3]When the State rested its case, trial counsel moved for a judgment of acquittal, which the trial court denied. (DA V19/1137-1145). Trial counsel renewed this motion after he presented his case at the guilt phase and the State put on its rebuttal witness. (DA V20/1288-1289). Trial counsel also filed a written Renewed Motion for Judgment of Acquittal on April 9, 2001 (DA V6/1041-1045), which the trial court heard on September 7, 2001. (DA V9/1507-1526, 1545-1566).

[4]See also, *U.S. v. Bowman*, 267 Fed. Appx. 296, 299, (C.A. S.C. 2008) (unpublished) (Rejecting, as procedurally barred, Bowman's challenge to his guilty plea to distribution of a controlled substance resulting in the death of another person. However, based upon a reading of the autopsy and toxicology reports, Bowman's post-conviction expert, Dr. Daniel Spitz, "found no evidence" that drugs caused or contributed to victim's death and, instead, opined that victim died from cardiac arrhythmia.)

of this case. On direct appeal, this Court emphasized that "Fitzpatrick was the last person seen with Romines alive three hours before she was discovered on the side of the road, there was DNA evidence matching Fitzpatrick to the source of the semen recovered from Romines, and evidence revealed that Romines had what was likely a forced sexual encounter two hours before her death [sic - before her rescue]. Moreover, Fitzpatrick denied his involvement with Romines only to change his story when confronted with DNA evidence. In addition, Fitzpatrick attempted to secure false blood samples. Finally, Fitzpatrick was never again seen in possession of a knife he was known to carry after the murder." *Fitzpatrick v. State*, 900 So. 2d 495, at 507-508 (Fla. 2005).

The Victim's Statements (AB at 52-58)

Trial counsel did seek to exclude the victim's responses at the hospital (DA V15/567-568), and this evidentiary issue was litigated on direct appeal. See, *Fitzpatrick,* 900 So. 2d at 515. Nevertheless, CCRC argues that if trial counsel had obtained an expert, such as Dr. Spitz, "the jurors would have more medical testimony to consider in weighing the reliability" of Laura Romines' [head-shaking] statements in light of the impact of the medications. (AB at 57). In other words, CCRC recognizes that the victim's inconsistent "statements" at the

hospital still would have been admissible as impeachment evidence at trial.

Furthermore, although the victim initially stated that she was attacked by someone named "Steve," the direct evidence presented at trial exonerated Steve Kirk and identified Fitzpatrick as the assailant; the DNA evidence on the semen taken from the victim excluded Steve Kirk and identified Fitzpatrick's DNA as a match. Again, Fitzpatrick failed to demonstrate any deficiency of counsel and resulting prejudice under *Strickland*.

ABA Guidelines (AB at 58-59)

Here, CCRC refers to the ABA guidelines and quotes an excerpt from the trial court's order which states, in pertinent part, "[h]is decisions were not tactical . . . as to whether Mr. Eble had ever filed such pretrial motion, his response was simply "If it wasn't filed, then it wasn't."[5] (AB at 59).

[5]Curiously, the post-conviction court failed to address the many pre-trial motions that trial counsel did file and fervently litigated. For example, on September 8, 2000, trial counsel filed a "Motion to Suppress Statements of the Accused." (DA SR/2471-2373). On September 14, 2000, trial counsel filed a "Motion in Limine to Determine Admissibility of Statements of the Accused." (DA SR/2464-2475). A hearing on the motions was held before the presiding trial judge on October 19-20, 2000. (DA V10/1594-V11/1622). On November 27, 2000, trial counsel filed a Motion to Suppress Tangible Evidence Obtained from the Accused. (DA V6/948-950). This motion dealt with the blood drawn from Fitzpatrick and the DNA results, and was also based on evidence that came in at the October 19-20 suppression

The trial court's conclusion disregards (1) that in assessing the reasonableness of counsel's performance under *Strickland*, courts must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance and (2) that "*Strickland* . . . calls for an inquiry into the objective reasonableness of counsel's performance, not counsel's subjective state of mind." *Harrington v. Richter,* 562 U.S. ––––, 131 S. Ct. 770, 790 (2011); See also, *Mendoza v. State*, 87 So. 3d 644, 653 (Fla. 2011) ("The ABA Guidelines are not a set of rules constitutionally mandated under the Sixth Amendment and that govern the Court's *Strickland* analysis . . .").

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hearing. (DA V11/1888-1889). On September 14, 2000, trial counsel filed a *motion in limine* to determine the admissibility of statements made by Laura Romines. (DA V5/853-854). A hearing on the motion was held on September 14, 2000. (DA V8/1414-1474). The trial court ruled that the statements Laura Romines made to Lieutenant Arnold and others were admissible as "excited utterances," and that statements Laura Romines made at the hospital were admissible as impeachment. (DA V8/1471-1474). At trial, when the State began to put on testimony regarding the interview with Laura Romines in the hospital, trial counsel renewed his objections. (DA V15/567-568). On July 27, 2000, trial counsel filed a Motion to Suppress and/or in Limine to Prohibit Out of Court and In Court Identification of the Accused by Albert J. Howard. (DA V4/726-727). On September 5, 2000, trial counsel filed a Motion to Suppress and/or in Limine to Prohibit Out of Court and In Court Identification of the Accused #2, which related to the identification by Melanie Yarborough. (DA V4/731-732). A hearing on the motion relating to Howard's identification was held on September 14, 2000; a hearing on the motion relating to Yarborough's identification was held on November 3, 2000. (DA V11/1824-1887).

The Postconviction Court's Remarks (AB at 59-69)

Lastly, CCRC quotes extensively from the trial court's oral remarks made at the end of the post-conviction evidentiary hearing. However, as former Justice Barkett noted more than 25 years ago, "much is said at hearings by many trial judges which is intentionally discarded by them after due consideration and is deliberately omitted in their written orders." See, *Boynton v. State*, 473 So. 2d 703, 706-07 (Fla. 4th DCA 1985), decision approved, 478 So. 2d 351 (Fla. 1985), *cert. denied*, 475 U.S. 1029, 106 S. Ct. 1232 (1986); See also, *Jacques v. Jacques*, 609 So. 2d 74, 75-76 (Fla. 1st DCA 1992) (quoting *Boynton).* The lower court's written order is set forth in the State's initial brief and is the subject of this appeal. Based on the foregoing arguments and authorities, the trial court erred in finding trial counsel ineffective at the guilt phase.

ISSUE II

THE POST-CONVICTION COURT ERRED IN GRANTING A NEW PENALTY PHASE ON THE BASIS OF INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL.

In addressing the IAC/penalty phase claim, Fitzpatrick quotes extensively from the trial court's oral remarks. See, AB at 74-79. Once again, as former Justice Barkett long ago recognized, "much is said at hearings by many trial judges which is intentionally discarded by them after due consideration and is deliberately omitted in their written orders." See, *Boynton, supra.* The post-conviction court's written order is set forth in detail in the State's initial brief and it is the proper subject of this appeal.

Fitzpatrick's answer brief, like the post-conviction court below, overlooks that it was Fitzpatrick who restricted defense counsel's mitigation investigation. In doing so, the post-conviction court's decision runs contrary to precedent which recognizes that defense counsel should not be faulted for following the wishes of a competent client. See, *Cummings-El v. State*, 863 So. 2d 246, 252 (Fla. 2003) (concluding that counsel was not ineffective in limiting mitigation investigation where defendant was adamant about not wanting his family to "beg for his life" and the defendant understood the consequences of his decision not to present such mitigation); *Rodriguez v. State*,

919 So. 2d 1252, 1263 (Fla. 2005) (finding counsel did not render ineffective assistance in part because trial counsel testified that the defendant "did not want his family involved and refused to offer information that would have helped in the presentence investigation.").

In this case, Fitzpatrick received exactly the penalty phase he desired. He cannot fault trial counsel for failing to present evidence when he himself directed counsel not to present on his behalf. See generally, *Mora v. State*, 814 So. 2d 322, 332 (Fla. 2002) and *Boyd v. State*, 910 So. 2d 167, 190 (Fla. 2005). Moreover, although CCRC alleges that "[t]here is a reasonable probability . . . that Fitzpatrick would have agreed to allow his counsel to present mitigation on his behalf" (AB at 88), Fitzpatrick failed to testify in post-conviction and thus, that assertion remains alleged, but unsupported in post-conviction.

When a defendant prevents his trial counsel from presenting mitigating evidence, he cannot argue on collateral review that he was prejudiced by the failure to present that evidence. See, *Schriro v. Landrigan*, 550 U.S. 465, 475, 127 S. Ct. 1933, 1941, (2007) ("If Landrigan [instructed his lawyer not to present mitigating evidence], counsel's failure to investigate further could not have been prejudicial under *Strickland*.").

Moreover, although CCRC admits that the trial court considered all statutory mitigating factors, as well as many non-statutory mitigating factors (AB at 73), CCRC does not address the mitigating factors found by the trial court. The trial court gave "great weight" to the following mitigating circumstances: (1) Fitzpatrick's good family background (DA V7/1169; V12/2018-2019); (2) Fitzpatrick's role as a surrogate father to his girlfriend's children (DA V7/1172-1173; V12/2021-2022); (3) Fitzpatrick's long-term relationships with three women showed that he was not a "sex-starved maniac[,]" and this crime seems more of an aberration than as a common course of conduct (DA V7/1174; V12/2022-2023); and (4) the loyalty of Fitzpatrick's family and friends showed him to be "generally a friendly, warm, considerate person." (DA V7/1174-1175; V12/2023). Nor does CCRC address that the trial court gave "moderate weight" to the following mitigation: (1) Fitzpatrick was doing well at his job (DA V7/1170; V12/2019); (2) Fitzpatrick "had a long history of alcoholism and drug addiction and was apparently making strides to combat it" (DA V7/1170-1171; V12/2019-2020); (3) Fitzpatrick's mental problems, including a suicide attempt in 1995, and "in 1995 a diagnosis of adjustment disorder with depressed mood and situational depression and alcohol and marijuana dependency" (DA V7/1171-

1172; V12/2020-2021); and (4) Fitzpatrick's remorse. (DA V7/1173-1174; V12/2022).

In post-conviction, CCRC presented mitigation testimony from Fitzpatrick's mother, Mary Lewis, as well as Robert Smith, Ph.D. With regard to Mrs. Lewis, much of her presentation arguably dilutes the defense case, because it shifts the focus away from Fitzpatrick and onto Mrs. Lewis' remote family history. See also, *Hodges v. State*, 885 So. 2d 338, 349, fn. 6 (Fla. 2004) (noting that records offered in post-conviction included a mixture of those related to Hodges and other members of his family and conditions that may or may not relate to other family members cannot be attributed to Hodges by simply co-mingling records). And, as to Dr. Smith's testimony regarding multi-generational indicators for an increased likelihood of substance abuse, the testimony, both at the time of sentencing and in post-conviction, agreed that, by 1996, Fitzpatrick was focused on his sobriety and had achieved more stability in his life.

In *Robinson v. Moore*, 300 F.3d 1320, 1345-48 (11th Cir. 2002), the rejection of prejudice was affirmed where (1) the new mitigation did not reveal any statutory factors; (2) the new mitigation did not reduce the weight of the aggravating factors; and (3) the jury had heard some of the same mitigation. See

also, *Rutherford v. Crosby*, 385 F.3d 1300, 1315-16 (11th Cir. 2004) (finding this Court's rejection of prejudice reasonable where (1) jury had heard some evidence of defendant's mental and emotional state from penalty phase witnesses and other possible non-statutory mitigation; (2) evidence would have come at a cost, with some damaging testimony; and (3) it was a brutal case with strong aggravating factors); See also, *Wong v. Belmontes*, 130 S. Ct. 383, 386-91 (2009) (reversing the Ninth Circuit for finding prejudice by ignoring the mitigation evidence already presented, the cumulative nature of the new evidence, the negative information that would have been presented had the new evidence been presented and the aggravated nature of the crime).

Fitzpatrick failed to demonstrate both deficient performance and resulting prejudice under *Strickland*. Based on the arguments set forth in the State's Initial Brief and the instant Reply Brief, the State respectfully submits that the trial court's order – finding trial counsel rendered ineffective assistance at the penalty phase – should be reversed.

CONCLUSION

WHEREFORE, based on the foregoing arguments and authorities, Appellant requests this Court reverse the post-conviction court's order.

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 Mark S. Gruber, Assistant CCRC, Office of the Capital Collateral Regional Counsel, Middle Region, 3301 Corporex Park Drive, Suite 210, Tampa, Florida 33619-1136 this 10th day of August, 2012.

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).

COUNSEL FOR THE STATE OF FLORIDA