IN THE SUPREME COURT OF FLORIDA

THEODORE RODGERS, JR.,

Appellant,

v. **CASE NO. SC11-2259**

STATE OF FLORIDA,

Appellee.
_____/

ON APPEAL FROM THE NINTH JUDICIAL CIRCUIT
IN AND FOR ORANGE COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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RESPONSE TO PRELIMINARY STATEMENT

On page 1 of his brief, Rodgers has set out a preliminary statement which primarily explains the citation form used. To the extent that the preliminary statement contains any assignments of error, they are denied.

The facts at issue in this proceeding are straightforward, the Circuit Court's order is comprehensive, and the controlling legal principles are clear. The State believes that oral argument is unnecessary, but defers to the preference of the Court. While the State understands that the Court often holds oral argument in capital cases, not all capital cases present issues worthy of oral argument. This is one of those cases.

RESPONSE TO STATEMENT OF THE CASE AND FACTS

The State does not accept the statement of the case and facts set out on pages 2-47 of the *Initial Brief.*

STATEMENT OF THE CASE

On October 26, 2006, this Court affirmed Rodgers' first degree murder conviction and death sentence for killing Teresa Henderson on February 14, 2001. Rodgers v. State, 948 So. 2d 655 (Fla. 2006). The United States Supreme Court denied Rodgers' Petition for Writ of Certiorari on October 1, 2007. Rodgers v. Florida, 552 U.S. 833 (2002). Rodgers filed a Florida Rule of

Criminal Procedure 3.851 motion on or about September 18, 2008. (V1, R165-200; V2, R201-212). The State answered Rodgers' motion on or about November 3, 2008. (V2, R224-294). Rodgers filed an amended motion on or about June 11, 2009. (V2, R347-400, V3, R401-429). The State answered the amended motion on or about July 29, 2009. (V3, R495-502). The post-conviction trial court conducted a Case Management Conference (Huff[1] hearing) on October 14, 2009, and evidentiary hearings on June 14-16, 2010 and December 20-21, 2010. (V6-8, R1-505; V9, R1-82). The collateral proceeding trial court entered its order denying post-conviction relief on October 18, 2011. (V5, R773-807). Rodgers filed a Notice of Appeal on November 16, 2011. (V5, R808-843).

PROCEDURAL AND FACTUAL HISTORY

For the facts underlying the offense, the State relies on this Court's summary as follows:

A. The Guilt Phase

> The testimony and evidence presented during the guilt phase of trial established the following. Theodore Rodgers, then sixty years old, was self-employed in Orlando, installing lawn irrigation systems and doing other plumbing work. On the morning of February 14, 2001, he took his stepson to a court appearance and then went to work on a plumbing job at a customer's (the Jacksons) home. After determining that he needed more supplies, Rodgers drove to the daycare business that his wife Teresa operated and where he stored some

[1] Huff v. State, 622 So. 2d 982 (Fla. 1993).

materials. As he walked down the interior hallway, his wife's ex-husband ran past him, wearing only a pair of pants and carrying his shirt and shoes. Rodgers confronted his wife, saying that he was leaving her. Then he loaded his supplies and returned to his earlier job.

Later, Rodgers drove to Kissimmee, where he met his longtime friend and occasional business partner James Corbett. Together they estimated a job for a potential client. Rodgers acted normally and did not mention the morning's incident to Corbett. Afterwards, Rodgers drove to his mechanic's shop to discuss a problem with his work truck, and then called Verna Fudge, another longtime friend and former girlfriend. He wanted to talk to her about finding a place to stay, but she was working and told him to call later. Rodgers again returned to his customer's home to complete the job. The Jacksons, who had known Rodgers for many years, testified that he did not seem upset and was “just the same Ted [they had] always known.”

Rodgers went home and talked to Corbett on the phone about a job. Later, Rodgers called Corbett and said that he was going to kill his wife because he was “tired of her doing what she's doing”; he was “fixing to take care of this problem.” Rodgers drove to the daycare. Three young children present there witnessed what happened next. Teresa unlocked the door and admitted Rodgers. They argued and Rodgers slapped and kicked her and knocked her down. Then he walked into a back room of the daycare. Teresa tried to open the front door while talking on the telephone. Rodgers returned with a gun, fired several shots at her, and left.

Meanwhile, Tashunda Lindsey, the victim's daughter, was returning to the daycare after running an errand when she called her mother during the argument. Teresa screamed for help, and as Lindsey approached the daycare, she heard gunshots and saw Rodgers walk to his truck and drive away. She found her mother dying in the doorway of the center.

Rodgers drove to a pool hall, where he encountered two friends-Wendy Hammock and Cleveland Reed-sitting in a car. Rodgers told them, “I just shot my wife,” and asked to borrow Hammock's cell phone. He dialed a number and said, “James [Corbett], man, I did it. I killed Teresa. It's been nice knowing you. Thank you for everything you did. But I got to go.” He told Hammock and Reed that he killed Teresa because he caught her with another man. He added that he had to kill himself because he could not go to jail. Walking a short distance away, Rodgers shot himself in the head.

Teresa Henderson suffered abrasions to her face and blunt force injuries to her left arm and back, with the latter injuries consistent with being kicked. Gunshots fired into the back of her head and into her back caused her death. The gunshot wound to her head entered and exited above her left ear and damaged her brain. The other bullet entered her back and traveled downward through her body, penetrating the bronchus and lung, pulmonary artery and superior vena cava, and diaphragm and liver, and lodged in her mid-lower back near the spinal column.

Rodgers testified that he killed his wife accidentally in self-defense. According to appellant, after he finished the job for the Jacksons, he went home and discussed business with Corbett on the phone, but did not threaten to kill his wife. Rodgers then received a call from a woman in Rosemont requesting a job estimate. While he was en route to Rosemont, his wife called twice on his cell phone, but he refused her requests to go to the daycare to talk. On an impulse, however, he decided that he would go but did not tell her.

When he arrived, his wife was lying on a chair, and he saw that the children were in an adjoining room. He and his wife were talking, not arguing, when his wife walked toward him saying, “You all about to run me crazy.” She then fired a gun at him. He reached for the gun, and during their struggle over it, the gun fired several times. Realizing Teresa had been shot, Rodgers took the gun and left because he was “scared

and upset." He was not injured in the struggle. Rodgers denied telling Corbett, Hammock, or Reed that he killed Teresa, saying that he told them she was shot when they struggled over a gun.

B. The Penalty Phase

During the penalty phase, the State introduced Rodgers's 1963 conviction for robbery and his 1979 conviction for manslaughter, and two witnesses testified to the circumstances of the latter conviction, where Rodgers killed his live-in girlfriend.

Dr. Eric Mings, a psychologist, testified for Rodgers, describing Rodgers's difficult youth and inadequate education as one of eight siblings in a family of poor sharecroppers in rural Alabama during the days of segregation. He also described Rodgers's adult life and opined that Rodgers had an IQ of 69 and was mentally retarded. Several other witnesses testified on Rodgers's behalf, including his daughter, two nieces, two former girlfriends, his older brother, and a childhood friend.

Dr. Greg Prichard, a clinical psychologist, examined Rodgers for the State. Although he acknowledged that Rodgers had received little formal education, Prichard found that Rodgers functioned normally in life. Based largely on the results of adaptive skills tests, Prichard concluded that Rodgers was not mentally retarded.

Pursuant to Rodgers's motion for determination of mental retardation, the trial court held a combined Spencer[1] and mental retardation hearing. Dr. Mings again testified for Rodgers. Two court-appointed, independent experts testified that Rodgers was not mentally retarded.

> FN1. Spencer v. State, 615 So. 2d 688 (Fla. 1993) (requiring additional evidentiary hearing be held after the jury makes a sentence recommendation, to afford the defendant, defense counsel, and the State an

> Opportunity to be heard and present additional evidence).

C. The Sentencing Order and Mental Retardation Determination

The trial court issued a single order addressing mental retardation and sentencing. As to mental retardation, the court concluded that Rodgers is not mentally retarded under section 921.137, Florida Statutes (2003). With regard to sentencing, the order reported that the jury unanimously found the prior violent felony conviction aggravator and recommended death in an eight-to-four vote. The court found the prior violent felony conviction was established and afforded it "extremely great weight." As to mitigation, the court found one statutory mitigator—"any other factor in the defendant's background"—and nonstatutory mitigation.[2] The court concluded that the single aggravating factor outweighed the mitigating circumstances and sentenced Rodgers to death.

> FN2. "Using the defendant's terminology," the trial court found the following nonstatutory mitigation: (1) that if not legally mentally retarded, Rodgers was at best borderline (some weight); (2) that Rodgers was abandoned by his father (little weight); (3) that Rodgers had low bonding to school and no school transportation (very, very little weight); (4) that Rodgers was generous and kind to others (very little weight); and (5) that Rodgers had the love and support of and for his siblings (very, very little weight). Rodgers v. State, 948 So. 2d 655, 662 (Fla. 2006).

EVIDENTIARY HEARING TESTIMONY

At the conclusion of the direct appeal, Rodgers commenced post-conviction proceedings under section 3.851 of the Florida Rules of Criminal Procedure. The trial court held evidentiary

hearings on June 14-16, 2010, and December 20-21, 2010. (V6-8, R1-505; V9, R1-82).

The Defense Team

A team of attorneys and support staff represented the defendant at trial. Junior Barrett and George Couture began representing Rodgers subsequent to his arrest. Gerod Hooper was also assigned to represent Rodgers at trial. Junior Barrett and Rowana Williams handled the guilt phase of trial and George Couture and Gerod Hooper handled the penalty phase of trial. The elected Public Defender and the Chief of the Homicide Division supervised the team's preparation for trial and were intricately involved the case. The attorneys were assisted by Jeff Lee and various other support staff. (V6, R32-34; V7, R194, 195, 234, 250).

At the time of trial, Junior Barrett was an assistant public defender with fourteen years of experience. He left the public defender office in 2004 and worked in private practice. He is currently employed with the Office of Regional Counsel. During ten of his fourteen years of experience, Mr. Barrett handled capital cases to include capital sexual battery cases. He has also attended several death penalty continuing legal education seminars. (V7, R303-306).

Rowana Williams had been an attorney for thirteen years at

the time of Rodgers' trial. (V7, R336-339). She spent seven years as an assistant public defender, three years in private practice, and another three years back with the public defender's office before getting involved in Rodgers' trial. As an assistant public defender, she worked primarily in capital sexual battery cases and had gotten involved with capital murder cases prior to assisting with Rodgers' trial. (V7, R338).

George Couture was an assistant public defender at the time of Rodgers' trial and had been practicing law for ten years. His first job as an attorney was with the Capital Collateral Representatives[2] office. He joined the Public Defender's Office in Orlando after spending time as a Federal Defender in California. Prior to Rodgers' trial, Mr. Couture had worked on more than a dozen capital cases. (V7, R185-186). In addition to "hands-on" and "in-house training," he attended death penalty seminars every year. (V7, R184-85, 191).

Gerod Hooper was an assistant public defender at the time of trial and had been an attorney for over twenty-three years, thirteen of which were in the State of Florida as an assistant public defender in three different circuits. (V6, R12-16). In addition to Florida, he is (and was at the time of trial)

[2] Capital Collateral Representatives office is the predecessor to Capital Collateral Regional Counsel office.

admitted to practice in the states of New Jersey and New York, as well as their corresponding federal district courts. He has experience in both criminal prosecution and defense. Rodgers was Mr. Hooper's ninth capital case—all eight prior capital cases had reached the penalty phase. In addition to "hands-on" training, he attended one or two death penalty seminars every year. The seminars include training sessions that discuss neuropsychological testing, *i.e.*, PET[3] scans, and testing as it relates to identifying brain damage. (V6, R11, 29, 31, 65, 66).

Gerod Hooper

Mr. Hooper was assigned to Rodgers' case a few weeks before the start of trial in 2003. (V6, R29-30, 31, 53). The defense team met every week and then more frequently as the trial date drew closer. (V6, R32-3). Mr. Hooper assisted George Couture in preparing for the penalty phase. (V6, R34). Mr. Hooper's responsibilities included discussing theory for the penalty phase with defense expert Dr. Mings. Mr. Hooper also discussed the penalty phase with members of Rodgers' family. (V6, R30-1). Junior Barrett and Rowana Williams handled the guilt phase of trial. (V6, R32). Mr. Hooper did not have any involvement in the guilt phase. (V6, R34, 35, 36).

Mr. Hooper recommended that Rodgers wear jail clothing at

[3] Positron Emission Tomography.

the penalty phase. In Mr. Hooper's opinion, his closing argument would have a greater impact on the jury if the veniremen saw Rodgers dressed in jail clothing. A client wearing jail clothes may also have shackles that are visible to the jury, which, in Mr. Hooper's opinion, plays "beautifully into the penalty phase closing." (V6, R43). Mr. Hooper's trial strategy includes telling juries that life without the possibility of parole is a horrible life. Clients that receive a life sentence in lieu of the death penalty will never be able to make a decision for themselves, "including what to wear." (V6, R96). Mr. Hooper wants a jury to see a client "exactly" as he will be seen for the rest of his life. (V6, R97). Rodgers did not question Mr. Hooper's advice. (V6, R36, 38, 39). In addition, when the trial court questioned Rodgers about his jail clothing, Rodgers indicated he was fine with Mr. Hooper's advice. (V6, R44-5).

Mr. Hooper felt very strongly that Rodgers was mentally retarded despite the trial court's determination that Rodgers did not meet the criteria. (V6, R41). Rodgers "definitely had a mental deficit" which Mr. Hooper believed "was in the mild to moderate mental retardation zone." (V6, R46, 52). If Rodgers did not understand something, Mr. Hooper explained it further. (V6, R49).

Mr. Hooper was not aware of a statement made by Rodgers'

co-defendant in Rodgers' 1963 robbery case. However, if the statement mitigated Rodgers' role in the robbery, Mr. Hooper would have presented it at Rodgers' penalty phase. (V6, R57-8, 98). However, in Mr. Hooper's opinion, evidence of the 1963 crime could have shown the jury that Rodgers showed "an early onset of having trouble." (V6, R99). In addition, in Mr. Hooper's opinion, the 1963 crime was not a significant aggravating factor for the jury but "di [sic] minimis." (V6, R100).

Mr. Hooper hired mental health expert Dr. Eric Mings to evaluate Rodgers. (V6, R59). Mr. Hooper said, in Dr. Mings' opinion, Rodgers was mentally retarded. (V6, R60). Mr. Hooper said Dr. Mings testified at great length regarding his opinion that Rodgers suffered from mental retardation. (V6, R98). Mr. Hooper did not ask Dr. Mings if Rodgers suffered from organic brain damage. (V6, R60).

Mr. Hooper did not recall if Dr. Mings administered a complete neuropsychological examination to Rodgers. (V6, R62). Mr. Hooper relies on the mental health expert's determination of the psychological tests that need to be conducted for his clients. (V6, R60, 63, 68).

Mr. Hooper was aware that Rodgers had shot himself in the head after he murdered his wife. (V6, R71, 93). However, the

bullet entered through Rodgers' mouth and exited through his cheek. Rodgers did not sustain a brain injury. (V6, R71).

Mr. Hooper hired Michael Gamache, Ph.D., to evaluate Rodgers subsequent to the penalty phase but prior to the Spencer[4] hearing. (V6, R73). After he interviewed Rodgers, Dr. Gamache sent Mr. Hooper a letter that indicated Rodgers had self-reported head injuries earlier in his life. (V6, R75-6). However, Dr. Gamache did not recommend further testing. (V6, R78-9). If Dr. Gamache or Dr. Mings had recommended further testing, Mr. Hooper would have had it conducted. (V6, R79, 93-4). Dr. Gamache "confirmed" what Dr. Mings had reported. (V6, R89).

Mr. Hooper's trial strategy is to present credible experts he trusts who testify with an "honest opinion." (V6, R88, 89).

Mr. Hooper's defense strategy for Rodgers relied heavily on a mental retardation claim, **which he knew was an absolute bar to execution; organic brain damage is not**. (V6, R90). Although he presented evidence of mental retardation, Mr. Hooper did not present evidence of any type of brain damage. (V6, R80-1).

Mr. Hooper said one of the criteria for a mental retardation claim requires presenting evidence that the condition existed prior to age eighteen. If cognitive deficits

[4] Spencer v. State, 615 So. 2d 688 (Fla. 1993).

resulted in a neurological injury that occurred after age eighteen (such as Rodgers shooting himself in the head) then mental retardation was precluded as a defense. (V6, R90-1, 93).

George Couture

Mr. Couture[5] and Rowana Williams interviewed Rodgers on numerous occasions prior to trial. (V7, R194). Mr. Couture's involvement in the guilt phase was "minor." (V7, R203). The defense team met regularly to discuss case strategy. (V7, R203). Mr. Couture did not recall the specific efforts that were made that determined the gun Rodgers used to murder his wife actually belonged to Willie Odom.[6] (V7, R198). Mr. Couture said this fact was important to both the guilt and penalty phases as it supported the defense's argument that the murder was not planned and premeditated—"it was a crime of opportunity" and Rodgers "was under emotional distress." (V7, R199). It was the defense's strategy to show the murder was "a domestic dispute that got completely out of hand." (V7, R200). Mr. Couture could not recall any witness testifying at trial that Rodgers brought the

[5] In preparation for the evidentiary hearing, Couture reviewed his trial notes, trial transcripts, Dr. Mings' deposition and Mings' file. (V7, R251).

[6] Odom was not called as a witness because the defense team could not locate him at the time of trial. (V7, R200).

gun to his wife's home prior to the murder.[7] (V7, R276).

Mr. Couture did not recall if the team discussed the child witnesses or discussed hiring an expert in the field of child witness testimony. (V7, R204, 209, 278). Nonetheless, it was not his practice to hire a child witness expert. (V7, R279).

Mr. Couture reviewed the statute pertaining to mitigating factors "numerous times." He discussed mitigating factors with the mitigation specialist and also discussed them with his team. (V7, R218).

Mr. Couture recalled Rodgers wore jail clothes during the penalty phase. He discussed the clothing with Mr. Hooper but could not recall if he and Rodgers also talked about it. (V7, R219, 220, 228). Mr. Couture would have discussed the matter with the court if he felt Rodgers did not understand the court's inquiry into the matter. (V7, R279).

Of all Rodgers' attorneys, Mr. Couture spent the most time with him. He saw Rodgers every week. (V7, R221). If Rodgers did not understand something, Mr. Couture explained it to him several times in several ways in order to ensure Rodgers understood him. (V7, R223).

Mr. Couture said it was the defense team's strategy to

[7] The State never argued or suggested that Rodger brought the gun to the daycare.

mitigate Rodgers' prior convictions of manslaughter and robbery "as much as we could." Mr. Couture filed a pre-trial motion to exclude evidence of the prior manslaughter conviction because "it would be extremely prejudicial . . . for the jury to hear it." (V7, R229, 231). Mr. Couture was not aware of a statement made by a co-defendant in the prior robbery; however, if he had known about the statement, Mr. Couture would have presented it to show Rodgers "may not have had any involvement" and it would have helped mitigate Rodgers involvement as well. (V7, R232, 234).

Mr. Couture hired mental health expert Dr. Mings to evaluate Rodgers. (V7, R236, 242). Mr. Couture could not recall if he asked Dr. Mings to conduct a full neuropsychological battery of tests. (V7, R257, 262). Mr. Couture does not request complete neuropsychological testing on all of his clients. (V7, R281-82). If he suspects organic brain damage exists in a client, Mr. Couture advises his expert of his concerns. (V7, R282). After evaluating Rodgers, Dr. Mings did not prepare a written report; however, Mr. Couture and Dr. Mings verbally discussed Dr. Mings' findings. Dr. Mings would have told Mr. Couture if further testing was necessary. (V7, R243). Mr. Couture trusted Dr. Mings "implicitly. If he told me more testing was required . . . I would have requested funding from

my office to - - for more testing." (V7, R260). Mr. Couture said that after reviewing CAT[8] scans, x-rays and the radiologist's report, Dr. Mings determined that Rodgers did not suffer any brain damage as a result of his self-inflicted gunshot wound to his head. (V7, R257-58, 259, 283). The radiologist[9] also assured Mr. Couture that the wound did not cause a traumatic brain injury. (V7, R258). Mr. Couture did not recall requesting a PET scan for Rodgers. (V7, R265). **Mr. Couture knew that mental retardation is an absolute bar to execution—brain damage is not. (V7, R288)**.

Junior Barrett

Junior Barrett was lead counsel on Rodgers' case during the guilt phase. (V7, R300, 307, 323). He was assisted by Rowana Williams. (V7, R307). Mr. Barrett did not assist with the penalty phase; Mr. Hooper and Mr. Couture handed the penalty phase. (V7, R323, 325). The attorneys in the major crime unit of the public defender's office met frequently to discuss Rodgers' case. (V7, R307-08, 323). There was no discussion about hiring a child witness expert because both Mr. Barrett and Ms. Williams had experience with effectively deposing and examining child

[8] Computed Axial Tomography.

[9] The radiologist's name was not revealed nor did he testify at trial. (V7, R258).

witnesses. (V7, R308, 310). Mr. Barrett deposed the child witnesses; he did not have any concerns about their legal competence to testify. (V7, R330).

Mr. Barrett said it was important to prove that the murder weapon belonged to Willie Odom, the victim's ex-husband.[10] (V7, R311). The defense team theorized that Odom gave the gun to the victim so she could "kill Mr. Rodgers." (V7, R312). Mr. Barrett said it was the defense's theory that the victim called Rodgers and "lured" him to her home. (V7, R317). However, Rodgers' cell phone records only indicated he received phone calls, not **who** had made the calls. (V7, R329). Rodgers claimed that after he had arrived at the victim's home, a struggle with the gun had ensued, and "the weapon went off more accidental than self-defense." (V7, R317, 318). The defense's intention was to use Rodgers' testimony to negate premeditation and prove that the shooting was an accident during the struggle over the weapon. (V7, R317, 318).

Proving Odom's ownership of the gun would have assisted in any argument that Rodgers did not bring a weapon to the victim's house. (V7, R312). Odom was listed as a defense witness but

[10] During Odom's pre-trial deposition, he admitted ownership of the murder weapon but stated that it had disappeared sometime during his marriage to the victim. (V7, R311-12, 325-26). Odom also admitted he was at the victim's home earlier in the day on the day she was killed. (V7, R326).

could not be located the time of trial.[11] (V7, R313). The defense did attempt to enter records that indicated the gun was registered to Odom; however, the trial court sustained the State's objection to admitting the records without proper authentication. (V7, R314, 315, 317). Mr. Barrett did not recall any attempts to obtain official documents from the Bureau of Alcohol, Tobacco, and Firearms that documented the history and ownership of the gun. (V7, R315). Nonetheless, the State did not suggest or argue to the jury that Rodgers brought the gun to the victim's house nor did the State suggest or argue that Rodgers was the owner of the gun. (V7, R326).

Rowana Williams

Rowana Williams assisted Junior Barrett with Rodgers' guilt phase. Mr. Barrett was lead counsel and Ms. Williams was second chair. Gerod Hooper and George Couture handled the penalty phase. (V7, R336, 339-40).

Ms. Williams did not recall any team discussions about consulting a child witness expert. Ms. Williams saw Rodgers' phone records and spoke to him about the calls Rodgers claimed the victim made to him. (V7, R342). Ms. Williams did not recall introducing evidence of the murder weapon's ownership. (V7,

[11] After closing arguments had concluded and the jury had been sent out, Assistant State Attorney Linda Burdick told Barrett that Odom was in the hospital. (V7, R315, 330).

R346). Ms. Williams said presenting evidence of Odom's ownership of the gun "would have helped Mr. Rodgers' case in the jury's eyes . . ." even though the victim's neighbor (James Corbett) "testified . . . against Rodgers" at trial. (V7, R348, 349).

Expert Testimony Regarding Brain Damage

Dr. Joseph Wu

Joseph Wu, M.D., is the clinical director of the University of California Irvine Brain Imaging Center and Director of the Neuro-Cognitive Clinic. (V9, R4). The brain imaging center assesses neuropsychiatric conditions by using PET scans. (V9, R4). PET scans assess brain function. (V9, R8, 12). By utilizing PET scans, Dr. Wu specializes in assessing conditions such as traumatic brain injury, Alzheimer's disease, Parkinson's disease, Schizophrenia, Depression, and addiction. (V9, R5, 9).

Dr. Wu said that Rodgers' PET scan results indicated an abnormality in the frontal lobe of his brain;[12] the front part of Rodgers' brain was not as active as the back part. (V9, R20, 23, 24, 25). Dr. Wu compared the results with another scan of an age match male, normal control.[13] (V9, R23). The abnormality is a

[12] Wu said he has consulted on about 50 cases regarding PET scans. (V9, R5).

[13] The control group Wu utilized was a group of 20 individuals ranging in age from 20 to 65, located in the community near the University of California Irvine's medical school. The normed

typical pattern as seen in a "head trauma and/or a psychiatric condition such as Schizophrenia or Bipolar Disorder." (V9, R25). The PET scan results also indicated an abnormality in the frontal pole and inner cingulate part of Rodgers' brain, consistent with head trauma. (V9, R26-7).

Dr. Wu said the frontal lobe of the brain regulates impulse control. (V9, R27). When there is an injury to the frontal lobe, the ability to regulate one's impulse is impaired. (V9, R28). Frontal lobe injuries are associated with increased risk of substance abuse, depressive disorders, impulse disorders, and attention deficit disorder. A person's ability to regulate aggression can be impaired. (V9, R29, 30). In Dr. Wu's opinion, Rodgers suffers from an abnormality in the frontal lobe and right parietal lobe parts of his brain. (V9, R32). Dr. Wu said these injuries affect "the proper inhibition and regulation of impulses such as anger and aggression." (V9, R33).

Dr. Wu did not have any of Rodger's medical history before he observed the administration of the PET scan and evaluated the results. (V9, R33). In Dr. Wu's opinion, a gunshot wound to the

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person Rodgers was compared to was approximately 61 years old. According to the Florida Department of Corrections website, Rodgers was born on June 16, 1940, and was approximately 70 years old when the PET scan was performed. See http://www.dc.state.fl.us/ActiveInmates/detail.asp?Bookmark=1&From=list&SessionID=222528969. (V9, R37-8).

head could have caused the brain damage. (V9, R33).

Dr. Wu utilizes a subjective visual interpretation to interpret PET scans **which has not been evaluated by a governing body of any sort**. (V9, R33, 34-35). Although Dr. Wu was not aware of any prior testing results, he generally is not involved in a case unless neuropsychological testing indicates a problem. (V9, R36).

Dr. Wu said it is not common to use PET scans as an assessment for traumatic brain injury. PET scans are used predominately for cancer studies. (V9, R41, 51). The average PET scan center does not perform many head trauma cases. (V9, R51). Further, the PET scan is not a "100 percent test that would indicate a person definitely has brain damage." Neurological testing, together with PET scans, increases the confidence for a clinical diagnosis of brain damage.[14] (V9, R42, 45). "PET scans are corroborative tools." (V9, R43). Dr. Wu said that "scientific literature has indicated frontal lobe injuries are associated with increased risk of impairment and the ability to properly regulate impulses such as aggression or anger." (V9, R47). However, Dr. Wu could not say if the neurological testing conducted on Rodgers corroborated his finding of brain damage

[14] Published peer-reviewed studies indicate that ninety percent of patients with brain imaging abnormalities also had neuropsychological testing deficits. (V9, R46).

after he reviewed the PET scan results. He said, “I don’t know what the [neurological] testing showed.” (V9, R49).

Dr. Lawrence Holder

Lawrence Holder, M.D., specializes in radiology with a sub-specialty in nuclear medicine. (V9, R56, 57). Dr. Holder has utilized PET scans for about nine years as part of his regular practice in a clinical setting. (V9, R58, 64, 66). PET scans are typically used to determine if dementia, epilepsy, or post-operative or post-therapeutic masses, tumors or scars exist. Scans are occasionally used to determine if a traumatic brain injury exists or whether the area of physiologic abnormality is larger than the area of anatomic abnormality. (V9, R68-9).

Dr. Holder reviewed Rodgers’ PET scans[15] which utilized the “continuous performance test.”[16] Dr. Holder said the continuous performance test is not used in any clinical practice but rather

[15] Dr. Holder has reviewed about 1,000 PET scans. Approximately ten percent of those cases focused on the brain. (V9, R67). Dr. Holder said whole body scans are used for oncology rather than neuro-studies. Dr. Holder reviewed about 500 whole body scans that also scanned the brain. (V9, R63, 67). However, only 3 or 4 of Dr. Holder’s cases involved a determination of traumatic brain injury. (V9, R69, 70). In addition, Dr. Holder has reviewed about 5 of the same Florida cases as Dr. Wu. (V9, R71, 75).

[16] Dr. Holder explained that the continuous performance test is a general term “in which during the uptake phase of the tracer, after the tracer is injected and before it’s imaged, there’s always a period of time.” (V9, R59).

as a research tool. The PET scan is “research oriented not used clinically.” (V9, R59-60). Dr. Holder said there is no generally accepted continuous performance type test that is used in clinical practice. (V9, R60).

In Dr. Holder’s opinion, Rodgers’ PET scans did not reveal any abnormality. “It’s a normal examination.” (V9, R61). Dr. Holder explained that there is always some minimal difference between the right and left sides of the brain which is contrary to Dr. Wu’s assessment. (V9, R61). Subtle variations are normal variations. (V9, R62). In addition, as in Rodgers’ case, older people have more activity in the back part of the brain rather than the frontal area. Dr. Holder explained that younger people have a little more activity in the frontal area than the parietal area which is the mid area. As a person ages, that tends to equalize, between the ages of 30 to 45. Then, as a person gets older, there is more activity in the back part of the brain. In addition, visual stimulation may also trigger more activity in the back of the brain. (V9, R63). In Dr. Holder’s opinion, there was nothing that indicated any abnormality in Rodgers’ brain, “It’s all within normal limits.” (V9, R63-4).

Dr. Holder said the continuous performance testing has no standards in place and is not a generally accepted test. (V9, R73).

Dr. Harry Krop

Dr. Harry Krop, a forensic psychologist, evaluated Rodgers in August 2009. (V6, R102, 107). Dr. Krop reviewed prior mental health reports from Dr. Gamache, Dr. Teresa Parnell, and Dr. Jacquelyn Olander, in addition to raw data prepared by Dr. Henry Dee, who had since passed away. Dr. Krop also reviewed Dr. Mings' notes and prior testimony from the penalty phase. In addition, he reviewed Rodgers' scores from tests Dr. Mings administered in 2002.[17] (V6, R108-09, 163, 164). Dr. Krop also reviewed Dr. Gregory Prichard's notes and his deposition. (V6, R108).

Dr. Krop interviewed Rodgers and administered several tests which included the Wechsler Test of Adult Reading "WTAR", the Test of Memory Malingering "TOMM", the Wisconsin Card Sorting Test, the California Verbal Learning Test-Second Edition, and the Booklet Category Test. (V6, R110-12). These tests focused on frontal lobe/executive functioning. (V6, R116).

[17] Rodgers achieved a full scale IQ score of 69 on the WAIS-III administered by Dr. Mings and a full scale IQ score of 78 on the IQ test administered by Dr. Dee. (V6, R144). Dr. Krop did not offer an explanation as to any significance of the nine point difference between the two full scale IQ scores except to say it is essentially an increase in verbal functioning over a five to six year period "based either on a structured environment or further practice with those type of skills." (V6, R145).

Dr. Krop said the tests Dr. Mings administered to Rodgers in 2002 were not adequate to identify evidence of brain damage. (V6, R113, 115-16). Dr. Mings administered the WAIS-III, which assesses intellectual functioning, the Wechsler Memory Scale-III, which assesses memory capabilities, and the Woodcock Johnson, which measures levels of achievement in reading and writing. (V6, R113). These tests were sufficient to make a determination of mental retardation. (V6, R114).

The results Rodgers achieved from the tests Dr. Krop administered were consistent with the test results Rodgers achieved with Dr. Mings' administration which showed "borderline to low average memory abilities." Rodgers put forth "maximum effort" on the tests. (V6, R118). Rodgers' test result on the TOMM indicated he was highly motivated to do well. (V6, R119). Rodgers performed poorly on the Wisconsin Card Sorting Test and the Categories Test, which, in Dr. Krop's opinion, indicated Rodgers has frontal lobe impairment. (V6, R121, 166).

In Dr. Krop's opinion, according to the DSM-IV-TR,[18] Rodgers has a cognitive disorder-NOS (not otherwise specified), which is "some type of brain damage." In Dr. Krop's opinion, Rodgers had

[18] American Psychiatric Association: *Diagnostic and Statistical Manual of Mental Disorders*, Fourth Edition, Text Revision. Washington, DC, American Psychiatric Association, 2000.

this brain damage in 2001 when the murder occurred. (V6, R122, 133, 156). Dr. Krop could not attribute Rodgers' deficits to any medical disorder. (V6, R151, 152, 168). However, in Dr. Krop's opinion, Rodgers would be more likely to "use poor judgment, to not reason things through." (V6, R124). As a result of brain damage, Rodgers would have difficulty with problem-solving, reasoning, judgment, and impulse control. (V6, R125, 172-73).

Dr. Krop said the finding of any type of neuropsychological deficit should trigger a referral for further neurological testing. (V6, R138). In his opinion, Rodgers should have been tested further for neuropsychological issues. (V6, R143, 162).

Dr. Krop said that any brain damage or deficit that occurs as a result of an injury after reaching age eighteen precludes a diagnosis of mental retardation. (V6, R161).

Dr. Krop was aware that Rodgers held several jobs that included food service and operating an irrigation business. (V6, R166-68). Rodgers' cognitive disorder would not prevent him from performing those duties. (V6, R170). In addition, Dr. Krop knew that Rodgers had attempted suicide after murdering his wife and, as a result, had surgery for his injury. (V6, R168). However, in Dr. Krop's opinion, Rodgers is not mentally retarded. (V6, R146).

Child Witness Expert

Sherrie Bourg Carter,[19] Psy.D., is a psychologist who specializes in the area of child witness testimony. (V8, R356, 357). Dr. Carter reviewed the police report, charging affidavit, audio statements, depositions, and trial testimony of the child witnesses. In addition, she reviewed the trial testimony of Detective Chiota, the officer who interviewed the children. (V8, R361).

Dr. Carter said there are certain standards to abide by when interviewing a child witness. (V8, R365). The interviewer asks the child what he/she allegedly witnessed and then assesses if any influences affected the child's statement. This includes checking other sources of information "that might be affecting the child's memory." The interviewer needs to follow proper protocol on how to conduct the interviews. (V8, R365).

Dr. Carter said Detective Chiota asked the three child witnesses—M., T.J., and R., if they knew the difference between "the truth and a lie." (V8, R368-69, 399). In Dr. Carter's opinion, ascertaining that the children knew the difference was not sufficient to show that the children were competent to

[19] The State objected to the admissibility of Dr. Carter's testimony but reserved its specific objections and arguments for closing argument. (V8, R362-63).

testify. In her opinion, police asked "developmentally inappropriate" questions. (V8, R400, 402, 463). In addition, the children may not have understood "the meaning of taking an oath, the consequences of telling lies in court, what the consequences may be." (V8, R369, 442-43, 448-49).

Dr. Carter reviewed the colloquies that occurred between the child witnesses and law enforcement personnel.[20] In Dr. Carter's opinion, the questions were insufficient to determine whether or not the children understood the difference between the truth and a lie. (V8, R372-74). In addition, the children were not asked if they understood the obligation to tell the truth and were not told the consequences if they did not do so. (V8, R375-77). Further, in Dr. Carter's opinion, the presence of another person in the room (in this instance, Yolanda Gray) is a "don't" because "children are more suggestible than adults and more easily influenced than adults by authority figures." (V8, R378). Although police indicated it was proper protocol to interview the children in the presence of a parent, Dr. Carter was unaware of any literature that indicated this was a requirement. (V8, R470-71). She was unaware of any literature that required interviewing the children in their home, as well.

[20] The children's interviews concluded at 10:25 p.m. (Marquis); 10:40 p.m. (T.J.); and 10:53 p.m. (Raveen) on the day of the murder.

(V8, R471). Dr. Carter would have recommended that the defense team request a competency hearing for the children prior to trial. (V8, R473).

In Dr. Carter's opinion, she could have provided sample questions to the defense team that could have been used for cross-examination of the interviewing officers. (V8, R471-72). She participated in numerous trials where her sample questions had been asked of the witnesses. (V8, R472). With respect to the children's testimony at trial, Dr. Carter may or may not have recommended a challenge to their answers, depending on the questions that were asked. In Dr. Carter's opinion, "attorneys don't us - - aren't able to figure that out. Not that they're stupid. It's just that they're ignorant of the issues that brought about the answer." (V8, R475). Dr. Carter noted, however, that **trial counsel did question the children in such a manner that revealed inconsistencies in their depositions and trial testimony**. (V8, R490). Dr. Carter could not say whether or not the children's testimony would have changed if some of their answers had been challenged by the defense. (V8, R475). However, based upon her training and expertise, Dr. Carter would have analyzed each child's testimony for significant inconsistencies. (V8, R489-90).

Dr. Carter said it is inappropriate to ask "why"[21] questions of child witnesses because they are "a challenge for young children to answer." In Dr. Carter's opinion, it is difficult for children to understand the mind-set of *why* someone else would do something. (V8, R383, 477). Children need to be given rules before they are questioned. (V8, R384, 387). In several instances, during their initial police interviews, Dr. Carter noted that the children were told to give an answer or were improperly asked leading questions. (V8, R387, 391-92, 401, 404, 407). **However, some of the leading questions police asked related to undisputed facts of the case and were not inappropriate**. (V8, R450-53, 457-61).

Dr. Carter said the children's interviews should not have been conducted in their home because the home's atmosphere cannot be controlled, *i.e.*, other people's presence or background noise. (V8, R391). In Dr. Carter's opinion, young children do not understand "relationships or relatedness." (V8, R401). In addition, the children should not have been interviewed together. (V8, R408-09). Dr. Carter said when witnesses "talk together about what happened, their memory can be influenced by what they hear someone else saying." (V8, R409,

[21] Law enforcement asked one of the children, "**Why** did he [Rodgers] kick her?" (V8, R383).

456, 485. 487). In Dr. Carter's opinion, "jurors don't always necessarily understand . . . factors that can influence a statement, a child's statement." (V8, R455). Dr. Carter said it was possible that the children did not influence each other's testimony. (V8, R456).

Dr. Carter has "**never seen a perfect child witness interview** . . . [in] 20 years." In her opinion, **it is important to look at the complete interview as well as assessing the events of what happened before the interview took place**. (V8, R416, 450).

In Dr. Carter's opinion, it was unclear as to whether or not the child witnesses 1) understood the difference between the truth and a lie; 2) understood their obligation to tell the truth; or 3) had an adequate understanding of an oath, based upon the questions police asked them. (V8, R418, 419-20, 424, 425, 426-27, 444). However, **Dr. Carter did not attempt to interview the children to determine whether or not they understood their obligation to tell the truth or if they understood taking an oath**. In Dr. Carter's opinion, "The questioning was insufficient to form an opinion as to whether they could or couldn't" understand the consequences of a lie or know the difference between the truth or a lie. (V8, R445). However, even if the children did not understand an oath to tell

the truth, they still could have done so. (V8, R448). Dr. Carter said sometimes children will say "I don't know" to avoid talking about something they do not want to talk about. (V8, R464). However, if children are given proper guidelines[22] before being interviewed, then that response "decreases." (V8, R464). Dr. Carter said it is best not to force a child to answer in order to avoid inaccurate or wrong information in a legal case. (V8, R466).

Dr. Carter said she does not utilize a "quantum of proof" to determine competency of a testifying witness. "It's the judge's determination to determine if a witness, any witness, a child or an adult, is competent." (V8, R446, 447). **Dr. Carter did not talk to any of the attorneys that conducted the children's depositions or discuss the attorneys' observations and opinions on the children's competency**. (V8, R467). Dr. Carter did not question the fact that the children were in the room when the victim was murdered. (V8, R468). In addition, Dr. Carter did not know whether or not the children were competent. (V8, R481). Further, **Dr. Carter never met the children, did not**

[22] Dr. Carter said proper guidelines include telling a child "If you don't understand a question, you can ask me to say it in a different way and I will. If you don't understand a question, then you can tell me you don't understand. Don't just answer if you don't understand. And if you don't know the answer to a question, it's okay to say I don't know." (V8, R464-65).

have any information concerning their levels of intelligence, and did not talk to anyone concerning the children's ability to observe and recollect the events they witnessed at the time of the murder. (V8, R497).

SUMMARY OF ARGUMENTS

This Court should affirm the trial court's denial of post-conviction relief. The trial defense team's[23] strategic decision to present a mental retardation sentencing case rather than a "brain damage" sentencing case was constitutionally effective. Even if the defense team's strategic decision was deficient under the Strickland standard, Rodgers did not suffer prejudice and cannot carry his burden of proof.

Even assuming Rodgers had "brain damage," such evidence would not have affected the outcome of the case. Trial counsel reasonably relied on the opinion of a qualified expert who opined that Rodgers did not suffer from brain damage. Trial counsel's performance was not deficient simply because Rodgers later found an expert with an opinion that more favorably serves his current claim. Furthermore, trial counsel was not required pursue every "theory in the alternative" in order to effectively defend Rodgers' case.

[23] Counsel for Rodgers during the trial's guilt and penalty phase will be referred as "defense team" or "trial counsel."

Neither was trial counsel required to present the jury with everything discovered or challenge every shred of the State's evidence. In fact, the latter course of action could have been detrimental to Rodgers' case. Defense investigations sometimes reveal more damaging evidence about a defendant, or, at the least, they sometimes reveal nothing at all. Any possible mitigation suggesting that Rodgers had brain damage or that a brain abnormality could have affected his cognitive function and impulse control is completely contradicted by the Defendant's own actions. The potential "brain damage" mitigation evidence is inconsistent with Rodgers' own testimony. Rodgers testified that his wife was the initial aggressor, that she attacked him and was shot when they struggled over the gun. However, Rodgers did not lose control of his emotions and attack his wife when he caught her and her ex-husband in an affair. He left the daycare, admitted to his friend that he was going to kill his wife, returned after several hours and shot her in the back, and then admitted the murder to two other friends. Rodgers would have lost all credibility with the jury to then argue conversely that he was unable to control his impulses and that he acted-out with unbridled anger.

There was no requirement for trial counsel to consult a "child witness expert" in order to properly cross examine the

child witnesses at trial. The trial court properly found that the children who testified were competent witnesses. Trial counsel had extensive experience questioning child witnesses. The trial court and counsel observed the demeanor of the eight, nine, and ten year-old child witnesses in court. The children were questioned on whether they understood the meaning of the truth and a lie and whether they would tell the truth. The children demonstrated an ability to intelligently perceive and recall facts. Rodgers even points out that in determining whether the children could distinguish between the truth and a lie, "most eight year-olds can."

Furthermore, the children's testimony is corroborated by other facts in evidence. Rodgers contends that trial counsel was deficient for failing to cross examine the children on every minute inconsistency in their testimony. However, such an attack on child witnesses would have likely agitated the jury and harmed Rodgers. Nonetheless, during cross examination in the presence of the jury, trial counsel revealed several inconsistencies in the children's testimony. Finally, Rodgers' argument regarding the credibility of the children's testimony fails to account for a fundamental principle of American jurisprudence—the trier of fact is the ultimate arbiter of witness credibility.

The fact that Willie B. Odom owned the gun would not have impacted the outcome of the trial and Rodgers is procedurally barred from asserting this claim under the guise of ineffective assistance of counsel. This claim would be more properly styled as a claim of abuse of the trial court's discretion regarding the admissibility of evidence, or, in the alternative, ineffective assistance of appellate counsel for failure to raise the abuse of discretion claim on direct appeal. Trial counsel subpoenaed Odom to testify but Odom was unavailable during the trial.[24] Trial counsel attempted to introduce documentary evidence of the gun ownership but could not overcome the hearsay objection and the trial judge kept the documents out. Trial counsels' actions met the standard under Strickland and the issue was preserved for appeal. Rodgers could have, should have, but did not raise the abuse of discretion claim on direct appeal, nor did he raise the ineffective appellate counsel claim in a state habeas petition contemporaneous with this appeal and is therefore procedurally barred from doing so now.

Even if Rodgers had properly raised the issue on direct appeal, the evidence of the gun's ownership would not have

[24] It was later discovered that Willie B. Odom was in the hospital during trial. (V7, R312-317).

affected the outcome of the trial because Rodgers' theory regarding the gun ownership was completely inconsistent with undisputed material facts of the case; the victim was shot in the back and back of her head. The location of the victim's fatal wounds completely contradicts Rodgers' self-defense or accident theory. Additionally, the State never argued or inferred that Rodgers owned the gun or that he brought the gun to the daycare when he murdered his wife.

Rodgers knowingly and voluntarily waived his right to be "dressed out" during the penalty phase of trial. Even if his waiver was inadequate, he suffered no prejudice because he was no longer presumed innocent during the penalty phase. Rodgers cites to no case law which requires a trial judge to conduct a hearing on the voluntariness of every event that occurs during a trial. Even still, the trial court in this case conducted an adequate colloquy into Rodgers' choice of clothing during the penalty phase. Rodgers contends that there is no showing in the record that he understood the meaning of the word "attire" in the judge's colloquy. However, Rodgers has failed to cite to any authority that would require the court to have a "vocabulary lesson" with the defendant to ensure that he understood each word used in the colloquy. Rodgers has also failed to establish that the disputed word "attire" is not a commonly understood

word, even for people of “low intelligence.” Rodgers’ claim is refuted by the record which shows that he personally waived his right to be “dressed out” in civilian clothing rather than jailhouse garments.

Rodgers had a discussion with his attorney about what clothing he would wear during the penalty phase. Rodgers’ penalty phase attorney explained his strategic reasoning for preferring the jailhouse garments at sentencing and trial counsel’s strategic decisions are virtually unchallengeable. The trial court went through an appropriate colloquy with Rodgers regarding his choice of clothing and his right to be “dressed out” in civilian attire. Rodgers indicated to the court that he was satisfied with the way he was dressed at the penalty phase.

INEFFECTIVE ASSISTANCE OF COUNSEL – THE LEGAL STANDARD

The standard for claims of ineffective assistance of counsel is set forth in Strickland v. Washington, 466 U.S. 668 (1984). As recognized in Wike v. State, 813 So. 2d 12, 17 (Fla. 2002), to establish a claim that defense counsel was ineffective, a defendant must prove two elements. First, Rodgers 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 Rodgers by the Sixth Amendment of the United States Constitution. Second, Rodgers must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so egregious as to deprive Rodgers of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, neither the conviction nor the death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

In order to establish deficient performance under Strickland, Rodgers "must show that counsel's representation fell below an objective standard of reasonableness" based on "prevailing professional norms." 466 U.S. at 688; see also Wike, 813 So. 2d at 17. In order to establish the prejudice prong under Strickland, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." 466 U.S. at 694; see also Wike, 813 So. 2d at 17.

Failure to establish either prong results in the claim's denial. Ferrell v. State/Crosby, 918 So. 2d 163, 170 (Fla. 2005), quoting Strickland, 466 U.S. at 687. "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." Strickland, 466 U.S. at 689. A defendant fails to establish the prejudice prong by failing to advance any argument concerning prejudice. As such, he is not entitled to relief under Strickland, and this Court need not reach the deficiency prong.[25] See Whitfield v. State, 923 So. 2d 375, 384 (Fla. 2005) ("[B]ecause the Strickland standard requires establishment of both [deficient performance and prejudice] prongs, when a defendant fails to make a showing as to one prong, it is not necessary to delve into whether he has made a showing as to the other prong."), quoting Stewart v. State, 801 So. 2d 59, 65 (Fla. 2001); see also Sweet v. State, 810 So. 2d 854, 863-64 (Fla. 2002) (declining to reach deficiency prong based on finding that there was no prejudice).

[25] However, in the interest of protecting its judgment in the future, this Court may wish to issue a finding as to both prongs of Strickland.

ARGUMENT

ISSUE I: TRIAL COUNSELS' STRATEIC DECISION TO PRESENT A MENTAL RETARDATION SENTENCING CASE RATHER THAN A "BRAIN DAMAGE" SENTENCING CASE WAS CONSTITUTIONALLY EFFECTIVE AND RODGERS DID NOT SUFFER PREJUDICE

A. TRIAL COUNSEL WAS CONSTITUTIONALLY EFFECTIVE

Trial counsel was constitutionally effective in choosing to pursue the mitigation theory that Rodgers was mentally retarded rather than "brain damaged."[26] Even assuming Rodgers had brain damage, it would have no effect on the outcome of the case. It is reasonable for trial counsel to rely on the opinion of a qualified expert. Buzia v. State, 82 So. 3d 784, 791-792 (Fla.

[26] Rodgers contends that it is undisputed among the experts that he suffered from brain damage. (*Initial Brief* at 72). Rodgers misinterprets the expert testimony. The expert from trial, Dr. Mings, informed the defense team during his consultation that Rodgers did not suffer from any brain damage as a result of his self-inflicted gunshot wound to the head, which occurred after the murder. (V6, R257-260). Dr. Mings also advised that he saw no reason to conduct further testing. At the post-conviction evidentiary hearing, Dr. Wu testified that Rodgers suffers from a frontal lobe abnormality that he classified as brain damage and that the abnormality would affect Rodgers' executive functioning and impulse control. (V9, R20, 28). Dr. Krop testified that Rodgers has a cognitive disorder not otherwise specified (NOS) but would not definitively use the term "brain damage" in his testimony. (V6, R117). Dr. Krop also testified that the cognitive disorder would affect Rodgers' executive functioning and impulse control (which was the only factor about which any two experts agreed regarding Rodgers' mental health). Dr. Holder testified that Rodgers' PET scans were normal and that it is normal to see variations in the functioning of the various regions of the brain. (V9, R61). Four different experts had four separate opinions regarding Rodgers' mental health.

2011) (forensic psychologist found a brain abnormality but defendant had no history or indication of cognitive impairment and expert did not recommend further neurological testing, trial counsel was reasonable in relying on experts recommendation), citing Darling v. State, 966 So. 2d 366, 377 (Fla. 2007) ("Even if the evaluation by [a mental-health expert], which found no indication of brain damage to warrant a neuropsychological workup, was somehow incomplete or deficient in the opinion of others, trial counsel would not be rendered ineffective for relying on [the expert's] qualified...evaluation."). Counsel's performance is not deficient simply because the defendant found an expert with an opinion that more favorably serves his current claim. Card v. State, 992 So. 2d 810, 818 (Fla. 2008) ("This Court has repeatedly held that counsel's entire investigation and presentation will not be rendered deficient simply because a defendant has now found a more favorable expert."). Furthermore, defense counsel is not required to kick over every stone in his investigation of the case nor was he required to pursue every "theory in the alternative" in defense of the accused. Rompilla v. Beard, 545 U.S. 374, 382-383 (2005) ("Before us, trial counsel and the Commonwealth respond to these unexplored possibilities by emphasizing this Court's recognition that the duty to investigate does not force defense lawyers to **scour the**

globe on the off chance something will turn up; reasonably diligent counsel may draw a line when they have good reason to think further investigation would be a waste")(emphasis added), citing Wiggins v. Smith, 539 U.S. 510, 525 (2003) (further investigation excusable where counsel has evidence suggesting it would be fruitless). Neither is the defense required to present the jury with everything discovered or challenge every shred of the State's evidence. Strickland, 466 U.S. at 699 (counsel could "reasonably surmise...that character and psychological evidence would be of little help"). Burger v. Kemp, 483 U.S. 776, 794 (1987) (limited investigation reasonable because all witnesses brought to counsel's attention provided predominantly harmful information).

In Buzia, the defendant had a brain abnormality that caused seizures, yet he did not suffer from seizures. 82 So. 3d at 791. Bruzia's behavioral history showed no patterns of impulse control or violence and he was steadily employed, to include holding managerial positions. Id. Similar to the defendant in Buzia, any brain damage that Rodgers may have did not affect his behavior or ability to control his actions. Dr. Wu testified that he found abnormalities in the frontal lobe of Rodgers' brain and that such abnormalities affect the ability to regulate impulse such as violent and aggressive behavior. (V9, R27-30).

Notwithstanding the fact that Rodgers' post murder self-inflicted gunshot wound to his head may have caused the brain damage Dr. Wu reported, even if Rodgers' brain damage existed prior to his attempted suicide it would not have affected the outcome of the case. Albeit Rodgers has now committed two violent homicides—the 1979 manslaughter of his girlfriend and the premeditated murder of his wife in the instant case—he does not have a history of impulse control and aggressive behavior. In fact, his actions on the day he murdered his wife suggest the exact opposite. The circumstances surrounding the murder completely contradict any notion that his purported brain damage affected his cognitive function. In both the 1979 manslaughter and this 2001 murder Rodgers claimed self-defense and alleged the victim was the aggressor; not that he suffered from and inability to control his impulses and aggression.

Rodgers caught his wife in the midst of an extramarital affair—a situation likely to spark an emotional response, especially from someone who is supposed to be unable to control his emotional faculties. However, after witnessing his wife's infidelity and her lover-ex-husband in half-naked flight from the scene, Rodgers calmly and collectively departed the daycare and went about the business of his day. Witnesses who observed him throughout the day reported that Rodgers did not display any

sense of anger, aggression or emotional outrage; he was “just the same Ted they knew and [he] did not seem upset or angry”. (V7, R1023-1024) Rodgers told his neighbor that he was going to kill his wife, but then continued about his day’s work, interacted with other people, and contemplated his actions for several hours with calculated aforethought. He did not declare his intent to kill his wife in a fit of unbridled rage like a madman unable to master his behavior. He was, in fact, in complete control of his competent, calculated thoughts and actions. Any possible mitigation suggesting that Rodgers’ brain damage could have affected his cognitive function and impulse control is completely contradicted and dismantled by his own actions.

Furthermore, like the defendant in Buzia, Rodgers was regularly employed, to include holding supervisory positions in the food service industry. Rodgers worked for Morrison’s Cafeteria for nineteen years and rose from a dishwasher to the head chef on the kitchen staff. At the time of the murders, Rodgers ran an irrigation business with a business partner, installing lawn irrigation systems and performing other plumbing and maintenance work. Rodgers drove himself to and from jobsites, provided prospective customers with price estimates, performed the work, and settled transactions for completed jobs.

He did all of this either individually or in concert with his business partner.

Finally, Rodgers' trial counsel made the strategic decision to pursue mental retardation as mitigation in sentencing and forgo brain damage as a theory because mental retardation is an absolute bar to execution, whereas brain damage is not. The fact that counsel made such a strategic decision presumes that trial counsel was effective. Downs v. State, 453 So. 2d 1102, 1108 (Fla. 1984) (ruling that an attorney's strategic choices are "virtually unchallengeable").

For the reasons set out in Buzia, Darling, and Card, defense counsel was reasonable in relying on his expert's opinion and not pursuing anything further regarding Rodgers' brain damage and Rodgers fails to establish the first prong of the Strickland test. Any evidence of Rodgers' purported brain damage would not have affected the outcome of the proceedings.

B. EVEN IF TRIAL COUNSEL WAS INEFFECTIVE, RODGERS DID NOT SUFFER PREJUDICE

For the same reasons articulated above, even assuming trial counsels' actions fell below the prevailing professional norms for not further exploring brain damage as mitigation, it did not prejudice Rodgers because the result would have been no different and the evidence would have been as detrimental as it

would have been beneficial to Rodgers' case. This Court has previously held that "failure to present mental health mitigation evidence coupled with damaging or harmful information does not necessarily result in prejudice." Douglas v. State/Tucker, ---*So.* 3d---, 37 Fla. L. Weekly S13, (Jan. 5, 2012), citing Wong v. Belmontes, 130 S. Ct. 383, 390 (2009) (the reviewing court must consider all the evidence, good and bad, when evaluating prejudice), citing Strickland, 466 U.S. at 695–696; see also Jones v. State, 998 So. 2d 573, 585 (Fla. 2008) (finding no prejudice where available mental health mitigation, which included information that defendant suffered from antisocial personality disorder and negative character traits, proved to be a "double-edged sword" that was "more harmful than helpful"); Reed v. State, 875 So. 2d 415, 437 (Fla. 2004) ("An ineffective assistance claim does not arise from the failure to present mitigation evidence where that evidence presents a double-edged sword."); Clisby v. Alabama, 26 F.3d 1054, 1056 (11th Cir. 1994) (claim that counsel was ineffective for failing to present additional expert testimony when his appointed expert did not have testimony favorable to defense's sentencing theory).

In Douglas, the mental health expert diagnosed the defendant with a personality disorder "characterized by self-

centeredness, a lack of empathy, problems with restraint and inhibitions, and violent behavior with little regard for the well-being of others." 37 Fla. L. Weekly S13. "Dr. Miller . . . described [Douglas] as a 'dangerous man' who was prone to act excessively and violently in response to minor incidents . . . . [and] could overreact and get exceptionally angry if rejected sexually." Id. During collateral proceedings, the trial court in Douglas found the fact about sexual rejection "particularly significant in light of . . . testimony at trial that [Douglas] . . . beat the victim because she 'disrespected him' and . . . because the victim wouldn't have sex with 'black boys'". Id.

In Clisby, the first court appointed expert testified regarding the defendant's antisocial personality disorder and substance abuse, but "offered little in the way of mitigating evidence." 26 F.3d at 1055. At a rehearing, a second expert testified that the defendant's antisocial personality disorder, boarder-line intelligence, and substance abuse created a "synergy" effect that made the defendant "dangerously impulsive." Id. at 1056. The Eleventh Circuit found,

> [T]he weakness of Clisby's argument is apparent when we examine the evidence considered so crucial by Clisby and his expert: Clisby's low IQ and alcohol and drug abuse. First, Beidleman [the second expert] conceded that Clisby is not even mildly retarded. Second, counsel knew that Clisby had used drugs and alcohol; but, as a tactical matter, counsel

> specifically avoided relying on this evidence before the jury. Precedents show that many lawyers justifiably fear introducing evidence of alcohol and drug use . . . . Clisby argues that Beidleman's "synergy" theory changes the equation. We disagree. In this case, the sentencing judge heard . . . about Clisby's antisocial personality; Clisby testified, giving the judge an opportunity to gauge roughly his intelligence; and finally, the judge knew that Clisby had used alcohol and drugs. Sentencing courts need no experts to explain that "antisocial" people—people who by common definition have little respect for social norms or the rights of others—tend to misbehave if they abuse drugs and alcohol. Nor must an expert explain that less intelligent people sometimes make bad decisions. Id.

Similar to the trial court's finding in Douglas, during collateral proceedings in the instant case the court found that Rodgers had no trouble controlling his impulses, as suggested by the brain damage evidence, and he returned after hours of solemn contemplation to follow through with his previously declared intent that he was going to kill his wife. Not only is the potential mitigation evidence concerning Rodgers' frontal lobe brain damage contradicted by his behavior on the day of the murder, it is squarely at odds with Rodgers' version of the events. As the post-conviction court noted, Rodgers testified that his wife was the initial aggressor, that she attacked him with the gun and was shot in the ensuing struggle over the weapon. To then argue that he was unable to control his impulses and that he acted-out with uninhibited anger would have

diminished Rodgers' credibility in the eyes of the jury. Because the evidence would have done as much harm to Rodgers' credibility with the jury as it would have benefited his case in mitigation on sentencing, Rodgers suffered no prejudice from trial counsel's failure to present brain damage evidence. Therefore, Rodgers fails to establish the second prong in Strickland.

In Clisby, even though the mitigation evidence sought was not presented to the jury, the trial judge heard the evidence the defense elicited from the second expert (Beidleman), therefore the result would have been no different. In the case at bar, the post-conviction court made a similar finding regarding the "brain damage" evidence sought by Rodgers. The court noted that the experts disagreed as to whether Rodgers actually suffered from a brain abnormality and the effects of the alleged brain abnormality was not consistent with Rodgers' version of events or his actions the day of the murder.

Finally, regarding this issue, Rodgers claimed that his sought-after "brain damage" evidence would have had an impact on this Court's proportionality analysis on direct appeal. (*Initial Brief* at 75). Rodgers drew attention to the fact that three Justices dissented based on Rodgers' "mental health issues." Id. While one dissent focused on mental health

mitigation as it applied to the case being a single aggravator, the remainder of the issues in dissent concerned the harmless error analysis of the Confrontation issue from the penalty phase. See Rodgers, 948 So. 2d at 677-680 (Anstead, J., concurring in part and dissenting in part), but see Id. at 675-676, 680 (Quince & Pariente, JJ., concurring in part and dissenting in part). Of the three dissenting Justices, only one took issue with the Majority's mental health mitigation analysis, and at the end of the day, the Majority came down on the side that favored the conviction and death sentence. And lest there be any concern regarding the proportionality of the instant case, this Court used Rodgers as precedent in the proportionality analysis of its recent opinion in McMillian v. State, ---*So.* 3d---, 37 Fla. L. Weekly S429 (June 28, 2012), citing Rodgers, 948 So. 2d at 655 ("death sentence for defendant who caught his wife cheating and fatally shot her in the head later that day . . . one aggravator—prior violent felony, based on a 1963 robbery and a 1979 manslaughter conviction—outweighed five nonstatutory mitigators, including that the defendant had borderline intelligence at best").

ISSUE II: A "CHILD WITNESS EXPERT" WAS NOT REQUIRED TO EVALUATE THE CHILDREN'S COMPETENCY AND CROSS-EXAMINE THEM AT TRIAL

The children who testified at trial were competent witnesses and trial counsel cross-examined the witnesses in accordance with the prevailing professional norms. There was no need for trial counsel to consult a "child witness expert." Butler v. State/Tucker, ---So. 3d---, 37 Fla. L. Weekly S513 (July 12, 2012) (counsel's failure to employ an expert to evaluate the competency of the child witness did not fall below the prevailing professional norms).

In Florida, a child witness's competence is measured by intelligence rather than age, and whether the child possesses a sense of [the] obligation to tell the truth." Floyd v. State, 18 So. 3d 432, 443-445 (Fla. 2009); citing Lloyd v. State, 524 So. 2d 396, 400 (Fla. 1988); Bell v. State, 93 So. 2d 575, 577 (Fla. 1957). When evaluating a child's competency, the trial court should consider: "(1) whether the child is capable of observing and recollecting facts; (2) whether the child is capable of narrating those facts to the court or to a jury; and (3) whether the child has a moral sense of the obligation to tell the truth." Floyd, 18 So. 3d at 433-444. The trial court has the discretion to determine whether a child witness is competent to

testify. Lloyd, 524 So. 2d at 400. Cf. Hunter v. State, 660 So. 2d 244, 248 (Fla. 1995) (when there are "conflicting opinions from the experts on the issue of competency, it [is] within the sound discretion of the court to resolve the dispute"). It was reasonable for trial counsel to not "challenge the qualification of the witnesses or otherwise attack the children's competency" to testify. Floyd, 18 So.3d at 444. In Floyd, the defense counsel had the opportunity to observe the demeanor of the two child witness at a pretrial deposition. Id. The children clearly and consistently answered questions about their relationships with the victim and the defendant, their memories of the murder, and their abilities to relate the event truthfully. Id. "It was reasonable for trial counsel to rely his observations during the deposition to conclude that [the children] were capable of [observing and recalling facts], capable of narrating those facts, and had a moral sense of the obligation to tell the truth." Id. Furthermore, the children in Floyd demonstrated their intelligence by answering the court's "quiz" on the alphabet and simple mathematics. Both children indicated that they would tell the truth. Id. Furthermore, the Floyd trial court noted that the children's testimony was not the linchpin of the State's case and despite some inconsistencies or discrepancies, their testimony was corroborated by other facts.

Id.

In the Lloyd case, a six year old child who witnessed his mother's murder was competent to testify at trial based primarily on the trial court's observations of him on the stand. The trial court found that the child was sufficiently intelligent, capable of expressing himself concerning the facts and he understood the requirement to tell the truth. 524 So. 2d at 400. The defendant in Lloyd made similar claims to Rodgers' in the case at bar, specifically, that children of tender age are incapable of clearly distinguishing reality from fantasy. This is analogous to the claim by Rodgers that the children who testified against him cannot distinguish between a fact they perceived and a fact about which someone told them. (*Initial Brief* at 8). This Court rejected that argument in Lloyd when it found the trial court thoroughly and carefully evaluated the child's competency to testify based on the standard of intelligence and obligation to tell the truth. The trial court in Lloyd also pointed out that, despite some inconsistencies, the child's testimony was supported by other facts and evidence.

The children who testified in the instant case were questioned at trial in the presence of the presence of the jury as follows:

(Direct Examination of R.T.)

THE COURT: You have to answer out loud.

THE WITNESS: I do. (in response to the administration of the oath).

THE COURT: You may proceed.

MS. DRANE BURDICK: May I use the podium?

THE COURT: Yes, you can use it.

Q: Can you tell us your name?

A: R . . . T . . .

Q: How old are you?

A: Ten-and-a-half.

Q: Ten. Do you go to school?

A: Yes.

Q: Where do you go to school?

A: Ivy Lane Elementary.

Q: What grade are you in?

A: Fourth. . . .

Q: . . . and when you came in the courtroom, the lady asked if you would tell the truth. Do you remember that?

A: Yes.

Q: Do you know the difference between telling the truth and telling a lie?

A: Yes.

Q: Is it good to tell the truth or is it good to tell a lie?

A: It’s good to tell the truth.

Q: What happens if you tell a lie?

A: You get in trouble.

Q: Okay, you promised that you would tell us the truth about everything that you could remember today, right?

A: Yes.

(DAR[27] V5, R668-670)

(Direct Examination of T.T.)

THE COURT: You have to answer yes or no.

THE WITNESS: Yes.

THE COURT: You may proceed.

Q: What’s your name?

A: T . . . T . . .

Q: How old are you . . . ?

A: Nine. . . .

Q: Do you go to school?

A: Yes.

Q: Where do you go?

A: Ivy Lane Elementary.

Q: And what grade are you in at Ivy Lane?

A: Third.

[27] DAR references the Direct Appeal Record and volume number.

Q: Do you watch lawyers or judges on TV?

A: Yes.

Q: Who is your favorite judge on TV?

A: Judge Mathis.

Q: . . . and the lady that you just saw asked if you would promise to tell the truth, do you remember that?

A: Yes.

Q: Do you know the difference between telling the truth and telling a lie?

A: Yes.

Q: Is it good to tell the truth or to tell a lie?

A: Tell the truth?

Q: What happens if you tell a lie?

A: Huh?

Q: What happens if you tell a lie?

A: Get in trouble.

Q: What happens to the persons in Judge Mathis's courtroom who tell a lie?

A: Get in trouble.

Q: So you are going to promise to tell us the truth about everything today, right?

A: Yes.

(DAR V5, R696-698)

(Direct Examination of M.T.)

THE COURT: Lean forward in the chair. You may proceed.

Q: Can you tell me your name?

A: M . . . T . . .

Q: How old are you?

A: Eight.

Q: Do you go to school?

A: Yes.

Q: Where do you go to school?

A: Ivy Lane Elementary.

Q: What grade are you in at Ivy Lane?

A: Third. . . .

Q: Okay, did you ever watch TV with lawyers and judges?

A: Yes.

Q: Do you have a favorite judge?

A: Yes.

Q: Who is you favorite judge?

A: Judge Mathis.

Q: Now, in Judge Mathis's court, if somebody tells a lie, what happens to them?

A: They go to trial and then they go to jail.

Q: Do you know the difference between telling the truth and telling a lie?

A: Yes.

Q: Is it good to tell the truth?

A: Yes.

Q: Is it good to tell a lie?

A: No.

Q: What happens if you tell a lie?

A: I get in trouble.

(DAR V5, R725-727).

In the case at bar, the children were examined in accordance with the rule in Floyd. The trial court and defense counsel observed the demeanor of the eight, nine, and ten year-old child witnesses in court. The children were taken to task on whether they understood the difference between the truth and a lie and whether they would tell the truth. The children demonstrated an ability to intelligently perceive and recall facts. Rodgers even points out that in determining whether the children could distinguish between the truth and a lie, "most eight[28] year-olds can." (*Initial Brief* at 78). Furthermore, despite some inconsistencies in the children's testimony, their version of the events is corroborated by undisputed material evidence. The children testified that the defendant and victim were fighting, Rodgers was "hitting and kicking the victim,"

[28] The youngest witness at Rodgers' trial was eight years old.

that he went to the back room, returned and shot the victim several times. Bruising on the victim's body was consistent with her being kicked, she had gunshot wounds that entered from the back of her head and back (completely inconsistent with Rodgers' self-defense claim), and Rodgers left the daycare and admitted to friends that he had killed his wife.

Rodgers contends that trial counsel was deficient for failing to cross examine the children on every minute inconsistency in their testimony. However, such a vehement attack on a child witness can be disenchanting to the jury and harmful to the defendant. Id. As this Court in Floyd held, "Indeed, an attorney who aggressively questions a distressed child runs a high risk of alienating jurors, something which a capital defendant should avoid." Id. Furthermore, inconsistencies in a child witness's testimony do not cast doubt on the child's competency to testify. See Lloyd, 524 So. 2d at 400 (holding that the inconsistencies in various statements were nothing more than what one could expect from a child of five or six years of age and were not so egregious as to require the total rejection of the testimony).

Rodgers also incorrectly claims that the children did not express their understanding of the moral obligation to tell the truth. Rodgers misinterpreted the rule in Floyd and appears to

claim that the children are required to literally say "I understand my moral obligation to tell the truth," or words to that effect. Floyd requires no such literal statement. Id. (where a child witness was qualified after she "promised to tell the truth"), citing Baker v. State, 674 So. 2d 199, 200–201 (Fla. 4th Dist. Ct. App. 1996) (finding no abuse of discretion where the trial court qualified a six-year-old child after the child demonstrated that she knew her age, where she went to school, where she went to church, and the colors of clothing; the child established that she possessed a sense to tell the truth; and the child stated that she knew it was wrong to lie). The third prong in Floyd is intended to ensure the trial court examines the child witness's understanding of the difference between the truth and a lie and whether they understand they should tell the truth. The trial court in the case at bar fulfilled both of these requirements. The trial court can accomplish the third Floyd prong in a myriad of ways.

This Court has previously rejected the argument that a "child witness expert" is required to properly evaluate and qualify a child to testify. Butler, 37 Fla. L. Weekly at S516 (July 12, 2012). In Butler, the defendant argued that trial counsel was deficient for failing to employ a "child witness expert" to evaluate whether a six year old child was competent

to testify. In Butler's post-conviction hearing, the trial court pointed out that "[the child's] testimony may have been affected by the bias of the adults around her, but found that these issues went toward the credibility of her testimony, not toward whether she was competent to testify as a matter of law." Id. (emphasis in original). In the case at bar, Dr. Cater testified about the inconsistencies in the children's testimony and the fact that their testimony could have been affected by things they heard from other people rather than things they actually perceived themselves. Similar to Butler, these are issues that affect the children's credibility, not their competency to testify as a matter of law. Just like in Butler, trial counsel for Rodgers cross examined the children, in the presence of the jury, on several inconsistencies in their testimony.

Rodgers' argument that a "child witness expert" was required to properly evaluate and qualify the child witnesses is analogous to the failed argument in Floyd that a separate "competency hearing" was required to voir dire and qualify the child witnesses. It is entirely adequate for the trial court to examine the child witness's competence to testify prior to his or her direct examination. See Glendening v. State, 536 So. 2d 212, 216 (Fla. 1988) (child witness questioned on voir dire at the beginning of her videotaped testimony); Bennett v. State,

971 So. 2d 196, 198 (Fla. 1st Dist. Ct. App. 2007) (trial court conducted a competency examination on the morning of the trial). Furthermore, even if the "child witness expert" could have been helpful to defense counsel's preparation, defense counsel is not required to consult and expert just because such an expert exists and **may** offer some theory in assistance. See Rompilla, 545 U.S. at 382-383; Wiggins, 539 U.S. at 525, (emphasis added).

Finally, Rodgers' argument regarding the credibility of the child witness testimony fails to account for a fundamental principle of American jurisprudence——the trier of fact is the ultimate arbiter of witness credibility. Perry v. New Hampshire, 132 S. Ct. 716, 723 (2012) ("juries are assigned the task of determining the reliability of the evidence presented at trial"), citing Kansas v. Ventris, 556 U.S. 586, 594 ("Our legal system . . . is built on the premise that it is the province of the jury to weigh the credibility of competing witnesses."); see also Holmes v. South Carolina, 547 U.S. 319, 330 (2006) ("And where the credibility of the prosecution's witnesses or the reliability of its evidence is not conceded, the strength of the prosecution's case cannot be assessed without making the sort of factual findings that have traditionally been reserved for the trier of fact and that the South Carolina courts did not purport to make in this case").

While it is within the trial court's purview to ascertain a child witness's competence to testify in accordance with the factors set out in Floyd, it is within the ambit of the jury as the determinative assessor of the children's credibility to decide whether they believe the children, coupled with the other evidence of guilt, or Rodgers' claim of self defense. That trial counsel decided not to impeach the child witnesses on certain inconsistencies at trial is a tactical or strategic decision that is virtually unchallengeable, Downs, 453 So. at 1108 (ruling that an attorney's strategic choices are "virtually unchallengeable") and entirely reasonable. See Lloyd, 524 So. 2d at 400. The mere existence of inconsistencies in a witness's testimony does not presume that it is tactically wise to highlight them to the jury. Id.

ISSUE III: THE GUN'S OWNERSHIP WOULD HAVE HAD NO IMPACT ON THE OUTCOME OF THE TRIAL AND RODGERS IS PROCEDURALLY BARRED FROM LITIGATING THIS CLAIM UNDER THE GUISE OF INEFFECTIVE ASSISTANCE OF COUNSEL

Rodgers claims counsel was ineffective for failing to prove the murder weapon belonged to another person. During post-conviction proceedings, the trial court held that "Evidence that the firearm belonged to [Willie B.] Odom would not have changed the outcome of trial." The court went on further to summarize how the evidence contradicted Rodgers'

testimony and theory of the case.

> The evidence demonstrated that after discovering his wife half-dressed and her ex-husband leaving the daycare carrying his shirt and shoes, Defendant told his friend James Corbett that he was going to kill his wife. He returned to the daycare later that day and the children testified that Defendant and the victim argued and he began hitting and kicking the victim. According to the children, Defendant went to the back room, returned with a gun, and shot the victim several times. After leaving the daycare, Defendant told friends that he killed his wife because she was having an affair. The bruising on the victim's body was consistent with her being kicked and **she had gunshot wounds that entered from the back of her head and back**. The victim's injuries were consistent with the children's account of the events and inconsistent with Defendant's version that the victim tried to shoot him but was shot in a struggle over the gun." (Trial Tr. Vol. VI, 799-804, 826)(emphasis added).

The evidence is undisputed that Rodgers shot the gun. The purpose for which Rodgers wanted to introduce evidence of the ownership of the gun was squarely at odds with the other evidence in the trial. Whomever the gun belonged to is not relevant.

Furthermore, this claim is improperly styled as an ineffective assistance of counsel claim. Trial counsel attempted to introduce evidence of the gun ownership and was denied by the trial judge and events out of the control of both the State and defendant. (V9, R312-317). The owner of the gun, Willie B. Odom, was deposed pre-trial, subpoenaed for

trial, but unavailable to testify because he was hospitalized. (V9, R312-317). Trial counsel attempted to enter documents into evidence that indicated Odom was the owner of the gun but could not overcome the hearsay objection and the trial judge kept the documents out. (V9, R312-317). Trial counsel made reasonable, constitutionally effective efforts to introduce the evidence and preserved the issue for appeal. The analysis regarding the admissibility of the documentary evidence should be articulated as a claim of abuse of discretion by the trial judge regarding the admissibility of the documentary evidence of the gun ownership. Rodgers should have, could have, but did not raise that issue on direct appeal and is therefore procedurally barred from doing so now. See Rodgers, 948 So. 2d at 662. The claim cannot be resurrected under the guise of ineffective assistance of trial counsel. Furthermore, any claim of ineffective assistance of appellate counsel for not raising the abuse of discretion issue on appeal should have and could have been raised in a state habeas petition contemporaneous with this appeal and Rodgers failed to do so. Fla. R. App. P. 9.142(b)(4)(B). The ineffective assistance of appellate counsel issue is also procedurally barred.

Claims that were or could have been brought on direct appeal are procedurally barred in post-conviction proceedings.

This Court has consistently held that a claim that could and should have been raised on direct appeal is procedurally barred. Miller v. State, 926 So. 2d 1243, 1260 (Fla. 2006); Davis v. State, 928 So. 2d 1089, 1126 (Fla. 2005); Duckett v. State, 918 So. 2d 224 (Fla. 2005); Robinson v. State, 913 So. 2d 514 (Fla. 2005).

Additionally, it is inappropriate to use a different argument to re-litigate the same issue. Willacy v. State/McDonough, 967 So. 2d 131, 141 (Fla. 2007); Israel v. State/McNeil, 985 So. 2d 510, 520-521 (Fla. 2008). A procedurally barred claim cannot be considered under the guise of ineffective assistance of counsel. See Freeman v. State/Singletary, 761 So. 2d 1055, 1067 (Fla. 2000) (holding that claims that could have been raised on direct appeal cannot be re-litigated under the guise of ineffective assistance of counsel); Rodriguez v. State/Crosby, 919 So. 2d 1252, 1262 (Fla. 2005). Whereas here, trial counsel did all they could do, the ineffective assistance of counsel claim is no more than pretense that has no legal or factual basis.

ISSUE IV: RODGERS KNOWINGLY AND VOLUNTARILY WAIVED HIS RIGHT TO "DRESS OUT" DURING THE PENALTY PHASE OF TRIAL

Rodgers claims the trial judge erred in dealing with Rodgers' choice of courtroom attire for the penalty phase.

Rodgers intelligently and voluntarily waived his right to appear "dressed out" in civilian clothing. Even if his waiver was inadequate, he suffered no prejudice because the he was no longer presumed innocent during the penalty phase.

While Rodgers claims the waiver of his right to "dress out" was not knowing and voluntary, he cites to no case law which requires a trial judge to conduct a hearing on the voluntariness of every event during a trial. Even still, the trial court in this case conducted a colloquy into Rodgers' state of dress at sentencing. The cases to which Rodgers does cite regarding a defendant's right to be presented to the jury in clothing that is not "jail garb" are distinguishable and non-determinative to the issue at bar.

Rodgers cites Estelle v. Williams, 425 U.S. 501 (1976), in support of his claim. While Estelle stands for the rule that a defendant has a right to be presented to a jury "not in jailhouse clothing," the United States Supreme Court in Estelle decided the issue based on the defendant's guilt phase "presumption of innocence" rather than sentencing phase mitigation. 425 U.S. at 507-508. The Court in Estelle also ruled that it was defense counsel's obligation to object to the jailhouse clothing. Id. The Court then went further in its ruling and pointed out numerous instances where a defendant may

appear before the jury in jail clothing whether by preference, lack of prejudice, or strategic decision by counsel. Id. ("when, for example, the accused is being tried for an offense committed in confinement . . . the jury would learn of his incarceration anyway . . . [there is] no prejudice . . . from seeing that which is already known") (internal quotation marks and citations omitted); ("instances frequently arise where a defendant prefers to stand trial before his peers in prison garments. The cases show, for example, that **it is not an uncommon defense tactic to produce the defendant in jail clothes in the hope of eliciting sympathy from the jury.**") (internal quotation marks and citations omitted) (emphasis added). When taken in its entirety, the ruling in Estelle stands for the exact opposite of what Rodgers claims.

Rodgers also cites to Deck v. Missouri, 544 US 622 (2005), in support of his claim. However, Deck is distinguishable and non-determinative of the issue at bar. In Deck, the United States Supreme Court dealt with the issue of a trial court **forcing** a defendant to wear jail garments and be shackled during the penalty phase of a capital case without articulating any findings that justified the restrains and clothing. 544 U.S. at 634 (emphasis added). The Due Process violation occurs only when the defendant was forced to wear the garments and shackles and

thus the burden does not shift to the State to show the error was harmless absent such an involuntary requirement by the trial court. Id. When the defendant voluntarily appears before the jury in jailhouse clothing, there is no error. Rodgers voluntarily appeared in jail garments.

Rodgers points to Ashley v. State, 614 So. 2d 486, (Fla. 1993), which is also distinguishable. In Ashley, the defendant pleaded no contest to a third degree felony without receiving notice that the state intended to seek a sentencing enhancement by categorizing the defendant as an habitual offender. Id. The trial court did not properly confront this issue in its plea colloquy with the defendant and this Court ruled that the colloquy was inadequate under those circumstances. Id. Rodgers' circumstances are completely different. The defendant in Ashley pleaded to a charge without proper notice of the maximum punishment that he faced; in the case at bar, Rodgers was well aware of his choice of attire at the sentencing phase and the jailhouse clothing played an active role in trial counsel's sentencing theory. There was nothing unwitting about the decision to have Rodgers appear in jailhouse clothing. Additionally—while certainly not binding on this Court—the First District Court of Appeals' decision in Waters v. State, is not applicable here either. 779 So. 2d 625 (Fla. 1st Dist. Ct. App.

2001). Waters simply stands for the principal that a defendant has raised a facially colorable claim of ineffective assistance of counsel when trial counsel "failed to object to [the defendant's] appearance in jailhouse garb." Id. This is entirely different from a defense counsel's strategic decision to purposely have the defendant appear in jailhouse garb because it plays a part in counsel's sentencing argument strategy—as is the case here with Rodgers. And, as it applies to Estelle, Deck, Ashley, and Waters, this Court has previously ruled that defense counsel's strategic decisions are essentially immune from the distorted critique of hind-sight. Downs, 453 So. 2d at 1108 (an attorney's strategic choices are "virtually unchallengeable").

When Rodgers entered the penalty phase with the same jury that found beyond a reasonable doubt he had committed First Degree Murder, he was stripped of the cloak of innocence he enjoyed in the guilt phase of trial. Rodgers entered the sentencing phase with red in his ledger and was in no position to pretend otherwise. Felker v. Thomas, 52 F.3d 907, 911-912 (11th Cir. 1995) ("A defendant does not arrive at the penalty phase of a capital proceeding with a clean slate, and there is no point in pretending otherwise . . . it is entirely reasonable for an attorney to conclude that there is little to be gained and much to be lost by "fighting the hypothetical" and

pretending that his freshly convicted client is not guilty in the eyes of the sentencing jury").

Rodgers' claim does not negate the fact that the trial court specifically advised him that it would ensure he was "dressed out" if that is what he wanted. The following dialogue occurred between the trial court, Rodgers and his counsel during the penalty phase of trial:

> THE COURT: Let the record reflect that the defendant is present, along with counsel, assistant state attorney. I noticed that the defendant is not dressed out.
>
> MR. HOOOPER: That's correct, your honor.
>
> THE COURT: And that's the way you want him dressed?
>
> MR. HOOPER: Yes. The jury has found him guilty of first degree murder. Since they realize the only option, other than death, is life imprisonment without parole, possible parole, there is really no point in having him dressed out.
>
> THE COURT: You understand that if you want him dressed out, I would have him dressed out?
>
> MR. HOOPER: We appreciate that.
>
> THE COURT: And Mr. Rodgers, do you have any problems with being dressed in your current attire?
>
> THE DEFENDANT: No.
>
> THE COURT: Is that a yes or a no, sir?
>
> THE DEFENDANT: No.
>
> THE COURT: Okay. All right.

(SR, V1, R5).

Rodgers' claim is refuted by the record which shows that he personally waived his right to be "dressed out" in civilian clothing rather than jailhouse garments. Rodgers had a discussion with his attorney about what clothing he would wear during the penalty phase. Rodgers' penalty phase attorney explained his [virtually unchallengeable], Downs, 453 So. 2d at 1108, tactical reasoning for preferring the jailhouse garments for sentencing. The trial court went through an appropriate colloquy with Rodgers regarding his choice of clothing and his right to be "dressed out" in civilian attire. Rodgers indicated to the court that he understood his rights and was satisfied with the way he was dressed for sentencing. Rodgers has failed to establish that his choice of clothing at the penalty phase was not voluntary.

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: **Andrea M. Norgard**, Norgard and Norgard, P.O. Box 811, Bartow, Florida 33831, this _____ day of July, 2012.

Mitchell D. Bishop
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CERTIFICATE OF COMPLIANCE

This brief is typed in Courier New 12 point font.

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