IN THE SUPREME COURT OF FLORIDA

CASE NO.: SC12-1204

RICHARD ALLEN JOHNSON,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

****

ON APPEAL FROM THE CIRCUIT COURT OF THE NINETEENTH JUDICIAL CIRCUIT, IN AND FOR ST. LUCIE COUNTY, FLORIDA, (Criminal Division)

****

ANSWER BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

Appellant, Richard Allen Johnson, was the defendant at trial and will be referred to as the "Defendant" or "Johnson". Appellee, the State of Florida, the prosecution below will be referred to as the "State." References to the records will be as follows: Direct appeal record - "R" or "T"; Postconviction record - "PCR"; Postconviction transcripts - "PCT"; any supplemental records will be designated symbols "SR", and to the Appellant's brief will be by the symbol "IB", followed by the appropriate page number(s).

STATEMENT OF THE CASE AND FACTS

On March 7, 2001 Richard Allen Johnson ("Johnson") was indicted for First Degree Murder, Kidnapping, and Sexual battery using great force for the death of T. H. on February 15, 2001. He was separately charged by information with robbery which was consolidated with the first case on June 7, 2004. The trial began on June 7, 2004 and resulted in guilty verdicts. [R. 625-27]. The penalty phase trial began on June 21, 2004 and concluded with a juror recommendation for death by a vote of 11 to 1. [R. 656].

The court held a Spencer hearing on July 15, 2004. It held the final sentencing hearing on August 9, 2004 and sentenced Johnson to death. He

appealed his conviction and sentence, raising thirteen issues; the Florida Supreme Court affirmed both. Johnson v. State, 969 So.2d 938 (Fla. 2007). Subsequently, on April 21, 2008 certiorari review was denied. Johnson v. Florida, 128 S. Ct. 2056, 2008 U.S. LEXIS 3517(2008).

On direct appeal, the Florida Supreme Court found:

> The victim in this case is [T.H.]. Johnson met [T.H.] on the evening of February 14, 2001, at a nightclub in Port St. Lucie. After Johnson and [T.H.] spent several hours together at the club, she accompanied Johnson to a residence he was sharing with others, including Johnson's roommate, John Vitale. [T.H.] and Johnson had several drinks at the club and left with a bottle of rum Johnson purchased. [T.H.]'s brother and a friend, who were also at the club, followed in another car. [T.H.] and Johnson began drinking from the bottle on the drive to Johnson's residence. At the house, Johnson and his guests had mixed drinks and played pool for several hours. [T.H.]'s brother and friend left after Johnson assured them he would get [T.H.] home. In the early morning hours of February 15, Vitale agreed to drive [T.H.] home to Vero Beach. Johnson, who did not have a driver's license, also went along. [T.H.] was ambivalent about returning home. The threesome went to Savannas State Preserve, a park where Johnson and [T.H.] had consensual sex while Vitale waited a short distance away. Afterward, [T.H.] remained uncertain whether she wanted to go home, so Vitale returned to the house in Port St. Lucie.
>
> There an argument ensued. A neighbor, Catherine Shipp, heard a woman screaming. When Shipp opened her front door a few minutes later, she heard the woman say, "I want to go home. Just let me go." Shipp saw Johnson and Vitale outside the car, holding the car doors to prevent [T.H.] from exiting. According to Shipp, [T.H.] ultimately got out of the car. Johnson grabbed her from behind, picked her up, and took her inside the house. The woman kicked her feet, grabbed the door frame, and yelled, "I don't want to go in and clean up."

> The commotion involving [T.H.] awoke other residents in the house where Johnson and Vitale were living. Thomas Beakley shared a bedroom with his girlfriend, Stacy Denigris, next to the bedroom Johnson shared with Vitale. Beakley heard a woman scream and then cry, and awoke Denigris, who left the room to check on the noise. Awakened by Beakley, Denigris heard a girl cry and say that she wanted to go home. Denigris opened the bedroom door to see a woman with brown hair holding onto the door frame of Johnson's bedroom. Johnson grabbed the woman from behind and yanked her into the bedroom. Denigris then saw Vitale in the garage, where the pool table and seating area were located, spoke to him there for a few minutes, and returned to bed.

Vitale, who had agreed to plead guilty to accessory to murder for a twenty-two-year sentencing cap, testified for the State. He stated that [T.H.] was loudly demanding to go to the bathroom and be taken home at the point when Johnson pulled her into his bedroom on the morning of February 15. The house then became quiet, and Vitale lay on the couch. Johnson eventually emerged from the bedroom and went into the bathroom. Vitale looked into the bedroom and saw that [T.H.] appeared to be sleeping. Johnson came out of the bathroom, found Vitale in the garage, and told him that [T.H.] was "gone." Asked what he meant, Johnson said he had broken her neck. Vitale testified that Johnson eventually told him that it takes longer to break someone's neck than he thought, and--over defense objection--that [T.H.] said as she was being strangled that she wanted to see her children.

Acting together, Johnson and Vitale wrapped [T.H.]'s body in a deflated air mattress and placed it in the trunk of Vitale's car. The two men attempted to enlist the help of Johnson's friend, Shane Bien, in disposing of the body at sea. Bien allowed Johnson to call boat rental businesses and gave Johnson a fishing pole so it would appear they were fishing as they disposed of the body. According to Bien, Johnson said he'd killed a woman who was "the most annoying person he had

ever met" and who "had tried to stab him with an object." Johnson showed Bien the outline of a body wrapped in an air mattress in the trunk of Vitale's car.

Using money from [T.H.]'s purse, Johnson and Vitale purchased a large cooler, concrete blocks, a chain, and a padlock. They returned to the Savannas State Preserve, where they submerged the body in several feet of water. A fisherman discovered the body three days later.

Medical examiner Charles Diggs testified that [T.H.] died of strangulation in which the killer used both a ligature and a bare hand. Diggs testified that a strangulation victim starts to lose consciousness within fifteen to thirty seconds and that death occurs within three to four minutes. [T.H.] also had a superficial premortem cut on her scalp that was consistent with a knife wound, and bruises on her forehead and chin. There was also a postmortem laceration of her perineum, including the uterus, bladder, and vulva. Diggs could not rule out marine life as the cause of the damage to the perineum, although he said that marine animals will usually attack more than one area of the body. No semen was discovered in what remained of [T.H.]'s vagina or uterus. Her blood alcohol level was .186, of which .04 to .06 could have been the result of decomposition.

Johnson and Vitale were both arrested within days of the discovery of [T.H.]'s body. Vitale, questioned first, incriminated Johnson. Confronted with Vitale's statement, Johnson stated that he was drunk and lost his mind when [T.H.] was killed. He then said that he and [T.H.] were having sex and she was not fighting him, but "I put my hand on her neck and she died." Asked when he realized she was dead, he stated, "When we stopped having sex, when I got up and I said get up, and she didn't get up." Johnson adamantly denied mutilating [T.H.]'s body.

Testifying in his own behalf at trial, Johnson stated that Vitale, who acknowledged at trial that he is gay and admitted being in love with Johnson, argued with [T.H.] throughout the evening and morning

of February 14-15. When Johnson, [T.H.], and Vitale ultimately returned to the house after their trip to the Savannas park, all three were arguing. Johnson grabbed her to calm her down and pulled her into the room to keep from disturbing others sleeping in the house. He said that he and [T.H.] then had consensual sex and he passed out for about an hour, discovering she was dead only when he awoke. Johnson said that in his statement to police, he meant that he had placed his hand in the area of her neck during sex, but did not choke or kill her. He explained that when he said he lost control, he meant that he lost control of the alcohol, stating, "I couldn't control how I was spinning, how I was standing." He also stated that he meant that he discovered she was dead after he had passed out, not immediately after sex.

Johnson further testified that after learning [T.H.] was dead, he found and told Vitale. Johnson testified that Vitale responded by saying "you killed her," and discouraged him from calling the police. Johnson believed that he had killed [T.H.] until he read Vitale's statement, particularly Vitale's assertion that Johnson stated he broke [T.H.]'s neck, which Johnson stated was false. Johnson testified that he eventually came to believe that Vitale had killed [T.H.].

The jury found Johnson guilty of first-degree murder and concluded in an interrogatory verdict that its finding of guilt was based on both premeditated murder and felony murder. The jury also found Johnson guilty of kidnapping, sexual battery with great force, and theft of less than $ 300.

During the penalty phase, the trial court instructed the jury on three aggravating factors--that the murder was committed while Johnson was on felony community control, that the murder was committed during the commission of a sexual battery or kidnapping or both, and that the killing was especially heinous, atrocious, or cruel (HAC). The jury was instructed on the statutory mitigating factors that the murder was committed while the defendant was under the influence of extreme mental or emotional disturbance, and that the defendant's capacity to appreciate the criminality of his conduct or

conform his conduct to the requirements of law was substantially impaired. The jury also received instructions on numerous nonstatutory mitigators. By a vote of eleven to one, the jury recommended the death penalty.

At sentencing, the court found the same three aggravators on which the jury had been instructed, giving moderate weight to the community control aggravator and great weight to the others. The court rejected the two mental statutory mitigating circumstances and the age mitigator. The trial court found the statutory mitigator of no significant history of criminal activity, giving it moderate weight. The court found seven nonstatutory mitigators. 1 Finding that the aggravators outweighed the mitigators, the court sentenced Johnson to death for the murder and imposed consecutive sentences of thirty years for the kidnapping, life for the sexual battery, and sixty days for petit theft.

> 1 The trial court found the following nonstatutory mitigation: Johnson witnessed and suffered frequent physical and verbal abuse from his father (some weight); he had a history of extensive drug and alcohol abuse and was under the influence of alcohol at the time of the murder (moderate weight); he was sexually abused at a young age (some weight); he was a slow learner (no weight); he was able to show kindness to others (little weight); he exhibited good behavior in court (little weight); and he would adjust well to prison and would not commit further violent crimes (little weight).

Johnson, 969 So.2d at 943-946 (victim's name omitted).

After a case management hearing the trial court granted an evidentiary hearing on the following claims: whether trial counsel was ineffective for; failing to challenge the autopsy findings regarding the cause of death; failing to

investigate and challenge the state's timeline of the murder; failing to object to the medical examiner's characterization of the perineal wounds and use of the word "heinous"; failing to object to Vitale's comment that Johnson wanted to have sex with a sleeping woman; failing to request a limiting instruction on Vitale's testimony that T.H. asked for her children; failing to effectively cross-examine Vitale on varying accounts of T.H.'s behavior and that he never mentioned the perineal wounds until his third statement; for encouraging Johnson to communicate with Vitale; and for failing to investigate and to present mitigating evidence. A hearing was also granted on the claim that Vitale was an agent of the state who the State deliberately used to seek incriminating statements from Johnson, failed to disclose that information to the defense in violation of Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963) presented false or misleading testimony in violation of Giglio v. United States, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972), and withheld material information about the State's practice of using inmates as agents.

The evidentiary hearing was held between November 7, 2011 and November 10, 2011. The defense presented seven witnesses. Thomas Garland ("Garland") testified that he was one of Johnson's trial counsel. He had been practicing law for thirteen years when he was appointed on this case with the majority of his practice

consisting of criminal law. He had had lots of training for murder cases, was a certified expert in criminal law, had tried death penalty cases, and had attended death penalty seminars. Garland was appointed to Johnson's case on February 13, 2003) (ROA p. 403-05) He met with Albert Moore ("Moore"), who left the case, got his file, and discussed the issues in the case. He also met with Johnson and Stone who was the lead attorney. They agreed that Garland would be primarily responsible for the penalty phase although he would help investigate and prepare the guilt phase as well. The two attorneys kept each other apprised of their work and discussed strategy. (PCT p. 8-11, 44-45) He was not aware that Vitale was in contact with the State but was eventually made aware of some letters. (Id. p.12) Later, he understood that Vitale wanted a deal from the State which was typical in this type of case. Any communication from Vitale to the State could be used for impeachment. He first learned of the letters and the situation from Moore; the letters were by both Vitale and Johnson. Garland never encouraged the letter writing and many of the letters pre-dated his involvement in the case, including the one Stone sent to the prosecutors along with Vitale's "confession". (Id. p. 16-19)

Garland handled the medical examiner at trial. Pre-trial, he had Dr. Richard Wright ("Wright") appointed as a forensic expert in order to review the autopsy findings and to opine whether the post-mortem perineal wounds could have been

caused by marine life. He did so because he was not an expert in forensics and Wright was. He needed Wright to review the evidence, explain it to him, and see if there was anything helpful in it. Wright was not helpful in this case. Dr. Feagle had been appointed earlier but as far as Garland knew, he did nothing on the case. Garland gave Wright the reports and photographs and directed him to look at the wounds and cause of death. He only spoke with Wright. (Id. p.25-29, 48-52, 56-58) Garland's defense theory was that Vitale committed the crime. He was concerned about the wounds because they looked really bad and led to the idea that someone was trying to cover up forensic and DNA evidence. He had discussions with both Stone and Johnson about this issue. The defense theory was that it was caused by marine life although the wounds did look like cuts since the edges were mostly smooth. Wright told him that he could not say it was marine life because of those smooth edges. Diggs said that the wounds were cuts in his report, in his deposition, and at trial. Garland objected when the prosecutor used the word "cut" because it was leading the witness. Garland did succeed in getting Diggs to say that those wounds might have been caused by marine life, (Id. p. 30-34, 54-55) Ultimately, the wounds were not the central issue, who committed the murder was and the defense used Vitale's letters to point the blame on him. (Id. p. 55) Garland did not think Diggs's use of the word heinous was objectionable since it has its

own meaning; it means terrible. (Id. p. 56) Wright looked at the cause of death and the ligature marks on T.H.'s neck and could not challenge Diggs's conclusions. Furthermore, the defense was again that Vitale had killed her using the necklace he picked up in the driveway. The defense was not accident or rough sex so there was no need to actively challenge the cause of death. (Id. p. 59-61)

Stone and Garland had long strategy sessions on how to handle Vitale at trial. Garland recalled meetings at Stone's office and a three hour meeting at Stone's house focused on this problem. (Id. p. 35) Garland thought that Vitale was out to burn Johnson in any way that he could. (Id. p. 47) Garland did not ask for a limiting instruction when Vitale said that T.H. asked for her children when she was being strangled because he thought that would only serve to highlight the remark to the jury. He chose to let it alone rather than drawing more attention to it. (Id. p. 36) Vitale's comment about T.H. being asleep when they parked at the park was different from his deposition testimony but Garland did not think it significant. There was no issue of non-consensual sex in the park bushes. Vitale's testimony was that Johnson was going to wake her up and take her to the bushes. He thought Vitale looked like a liar at trial and did not think the jury credited his testimony. (Id. p. 38-39, 61-62, 78).

When Garland got on the case, Dr. Williams had already been appointed. After Garland discussed Williams's findings with him and then had Dr. Brugnoli appointed to do neuropsychological testing on Johnson. Brugnoli found nothing they could use in the penalty phase and he would not change his opinion without clear evidence of intoxication which they did not have. Garland made a strategic decision not to call him because he found no organic brain damage. (Id. p.39, 41, 72-73) Garland also assisted Williams in getting in contact with Johnson's family. He did not think a mitigation expert was necessary. He interviewed the family and they did not provide a lot of information. Garland found out about the issues with the parents abusing alcohol, the physical and sexual abuse of Johnson and his learning disabilities. (Id. p. 39-40, 63, 65-66, 71) Garland chose Williams to testify because he thought it would be more instructive to the jury. He testified about Johnson's background, mental health issues, substance abuse and about the dysthymic disorder with antisocial personality disorder. Williams testified that Johnson met the criteria for two statutory mental health mitigators. Williams and Johnson's sister testified about the physical and sexual abuse Johnson experienced. She as a very good witness. (Id. p. 74-77)

John Vitale ("Vitale") also testified at the evidentiary hearing. He was arrested with Johnson and made two statements to the police initially. Burns was

appointed after he did that. Burns only told him to be truthful; he never said that Vitale had to help the State. Burns apprised him of conversations he had with the prosecutors. (Id. p. 81-84) The letters were Johnson's idea and Vitale told Burns about them after it started. Vitale admitted that he wrote directly to the State when he could not get hold of Burns. (Id. p. 85-88) He did not send Johnson's letters to the State but held them for Burns. The prosecutors never responded to his letters and he never met with them without Burns. (Id. p.89-90) Vitale wanted to record Johnson's statements and it was his idea to wear a wire but nothing ever came of his idea. (Id. p. 92)

Johnson's sister Danielle Blount Fernandez ("Fernandez") also testified. She said that Stone called her and told her she was going to testify at the penalty phase. She had a twenty minute conversation with him in his office. She spoke with him a couple of times on the telephone and saw him twice more in his office but never discussed what she was going to testify about. She never got a letter from either counsel. Neither counsel prepared her for her interview with Williams which lasted an hour and a half. Nor did the attorneys prepare her for the deposition taken by the State although Garland accompanied her at that. (PCT p. 5-7) As a child, she lived with Johnson and her two other brothers, Christopher and David, in Stuart with their parents. Her mother worked long hours at Publix and her father

worked construction during the day and tended bar at night. The kids took care of themselves when the parents were gone. Their father was physically and verbally abusive to their mother, getting into weekly fights with her in front of the children. Their father was an alcoholic. When their mother had to work at night, their father would take them to the bar with him while he worked. 8-9) They had relatives living near by but they did not go over there much after their cousin Dean sexually abused Johnson and Fernandez at one time over the course of a month. Their home environment was volatile, hostile, and unpredictable. Their father physically abused Johnson weekly. Their parents separated a month after they moved the family to Ft. Pierce. Their mother started seeing Pat Kent who also physically abused the children. He was with them for two years. Their mother worked three jobs and started drinking heavily. She fought with Pat. Johnson avoided Pat all the time, either hiding in his room or staying away from the house. (Id. p. 10-12) Johnson suffered from night terrors since he was small. He would fall asleep at school at times and would awaken screaming. Fernandez would be called to calm him down. He had a speech impediment and went to speech classes. Their mother never stressed education and never helped them with their homework. She ended her relationship with Pat over the way he treated Johnson. She then married Frank who dislike Johnson, calling him stupid. Their mother continued drinking when

she was not working and argued with Frank. (Id. p. 13-14) Johnson did poorly at school and dropped out after the 9th grade. He left home and used drugs. He supported himself by doing odd jobs. Fernandez conceded that she testified at trial about the home situation, the sexual and physical abuse, their mother's drinking, the night terrors, the poor school performance, the speech class, the drug abuse, and Johnson's difficulty maintaining a job at trial. She admitted that she testified to essentially the same things now as she did then. (Id. p. 19-23)

Albert Moore was initially the second chair on Johnson's case. His work was limited to discovery and motion writing. He was aware of letters from Vitale but he did not encourage Johnson to write. He never wants his clients communicating with anyone about their cases. He did not know that Vitale was in direct contact with the State. (PCT p. 5-7) Vitale's contact with the State could have been used to impeach him at trial. (Id. p. 9) He discussed alternative strategies with Stone on how to approach the case. He did not know that Burns was in contact with the prosecutors on behalf of Vitale. He did not know that Vitale was working for the state. If he had he could have used the letters to impeach him and would have counseled Johnson to cease communications. He had no information one way of the other that Vitale actually was a state agent. (Id. p. 10-14) Moore withdrew as Johnson's counsel on November 22, 2002. (ROA p 383-84)

Psychologist Jethro Toomer testified that Johnson suffers from depression, personality disorder, and substance abuse. (Id. p. 32-33) He diagnosed him with a borderline personality disorder, learning disorders, post-traumatic stress disorder ("PTSD") and substance abuse disorder based on the totality of the data he was presented with. (Id. p. 35-36) He believed that Johnson qualified for two statutory mitigators: severe emotional and mental disturbance and an inability to conform his behavior to the law. (Id. p. 42) Non-statutory mitigation is present in Johnson's lack of a stable home life as a child, the ferocity of the physical and sexual abuse he suffered, and his upbringing. (Id. p. 44-45) He did not discuss the crime with Johnson. (Id. p. 48) Toomer acknowledged that Johnson did not have all the criteria necessary for a borderline personality disorder as listed in the DSM-IV but contended that it was not necessary given his theory based on Johnson's history. (Id. p. 52-55) Although he did no neuropsychological testing himself, Toomer believes that Johnson shows "soft signs" of brain damage. He did acknowledge that Dr. Brugnoli did do the testing and found no brain damage. Toomer did not question those findings. (Id. p. 55) Toomer also acknowledged that Dr. Williams had diagnosed Johnson with a personality disorder, substance abuse disorder, depression, and with PTSD as a factor. (Id. p. 56, 62-63) Williams testified to the same statutory and non-statutory mitigators that Toomer did and Toomer added

nothing new. (Id. p. 57) Williams also told the jury about Johnson's intoxicated state the night of the crime. (Id. p. 58)

Thomas Burns ("Burns"), Vitale's attorney, also testified. He told how he had ongoing negotiations with the prosecutors for reduced exposure for Vitale. He told the them that there were letters between Vitale and Johnson as well. Burns did not encourage the letters, which had started before he came on the case, but warned Vitale not to expose him further in them. (Id. p. 66) Vitale may have written directly to the state attorney since Burns could not control him. Vitale was impatient and wanted the case to move faster. Burns did not tell Vitale to write those letters and would never have. He was conducting the plea negotiations with the prosecutors himself. (Id. p. 67-68) Vitale came up with the idea of wearing a wire because he thought he could put the letters in context and get Johnson to implicate himself which would also help Vitale get less time. Burns wrote the letter dated January 14, 2003 to the prosecutors about the wire in order to calm Vitale and show that Burns was trying to get a deal. Vitale was very emotional and angry and Burns was concerned that he may have written something self-destructive. He was impatient and not always rational. Vitale came up with the idea because he thought he could put the letters in context and get Johnson to implicate himself which would also help Vitale get less time. Vitale came up with the idea because

he thought he could put the letters in context and get Johnson to implicate himself which would also help Vitale get less time. (Id. p. 69-72) The correspondence between Johnson and Vitale was completely organic. It was not initiated by Burns or the State. Vitale was not an agent of the state. Burns did not want Vitale to wear a wire because he was too emotional and unpredictable to do it successfully. (Id. p. 73) Vitale did meet with the prosecutors, both with and without Burns being present. (Id. p. 73-74)

Johnson's lead attorney, Robert Stone ("Stone"), testified that after he reviewed the evidence and spoke with Johnson, he decided the defense would be that Vitale killed T.H.; that decision was based on what Johnson told him and was certainly supported by Vitale's confessional letter. He informed the prosecution that Vitale had confessed to the killing. (Id. p. 75-77) He has practiced law for over forty-seven years, focusing criminal cases. He served as the State Attorney for the Nineteenth Judicial Circuit for almost sixteen years. He worked as a private defense attorney as well. He did numerous murder cases, including capital cases, as both a prosecutor and defense attorney. (Id. p. 87-88)

The State gave him the letters between Johnson and Vitale shortly before the trial, after Burns had let him know they existed. He did not know that Vitale had been in direct contact with the state himself; he could have argued that Vitale was

an agent of the state. Stone could use the letters from Vitale to impeach him. The prosecution did provide Stone with the letters from Vitale to the State before trial but he does not remember how he used them at trial. (Id. p. 78-80) Stone deposed Burns before the trial who said he had a bunch of letters that he gave the State shortly before the trial. Stone had no knowledge whether Vitale was a state agent. The State turned over the letters from Vitale to the prosecutors before the trial. (Id. p. 90-91) Stone would not have told Johnson to write Vitale if he knew he was so doing. Johnson had told him that Vitale wanted to confess but his attorney would not let him. Stone told Johnson that Vitale would have to tell the State himself or put it in writing since Stone could not approach Vitale. He assumed the two were passing notes since Johnson knew Vitale wanted to help him. Stone always told his clients not to speak to anyone about their case since whatever they said would come back to hurt them at trial. There was no secrecy in jail at all. He told Johnson that as well. (Id. p. 95-96)

Initially, Stone was going to handle Diggs. Both he and Garland went to talk to Diggs to go over his reports and findings. They also spoke to him before the deposition. Stone talked to Feagle in Tampa before they conducted Diggs's deposition. The two attorneys worked on the witnesses and investigation together. Stone consulted with both Feagle and Wright for whom he had tremendous respect.

He always called him whenever he handled a murder case, either as a prosecutor or a defense attorney. Stone discussed the forensic evidence with both experts. Neither could help him since they thought Diggs was correct and did a good job. He discussed the rupture of capillaries in strangulation cases and Feagle thought the perineal damage might have been caused by turtles, as did Diggs. (Id. p. 80-83, 90)

As noted above, Stone's theory of the defense was that Vitale had killed T.H. because he was in love with Johnson and jealous of her. (Id. p. 91) Johnson testified at trial that he did not kill T.H.. Stone did not believe that it was useful to challenge the cause of death being strangulation since the defense maintained that it was Vitale who strangled her. Stone argued that Vitale had used the necklace he picked up from the driveway. (Id. p. 91-94) Also, the forensic experts all agreed that the woman was strangled.

Vitale's comment about T.H. being asleep did not necessarily indicate that Johnson was going to have sex with her while she was asleep. Neither Johnson or Vitale thought that and Stone certainly did not draw that conclusion. (Id. p. 85-86) Stone tried to keep Vitale's comment about T.H. asking for her children out of the trial. He did not know what type of limiting instruction would have been helpful since they tend to draw even more attention to the testimony. He did not recall his

reasoning in this case but did remember that he wanted to have the jury pay as little attention to it as possible and a limiting instruction would not have accomplished that goal. (Id. p. 86, 89) Following the evidentiary hearing, the Circuit Court denied relief in a written order on April 11, 2012.

Based upon the evidence and appellate record, Johnson failed to meet his heavy burden under Strickland and Brady. The trial court properly denied relief on his post-conviction claims.

SUMMARY OF THE ARGUMENT

ARGUMENT I: Trial counsel was not ineffective during the guilt phase trial. The medical examiner's testimony that the wounds might have been made by cutting and his use of the term "heinous" in describing the death were not objectionable. Vitale never said Johnson wanted to have sex with the victim while she was sleeping so his testimony about that incident was not objectionable. Counsel strategically decided not to request a limiting instruction for part of Vitale's testimony because he did not want to draw more attention to it. Counsel was not ineffective in his cross examinations nor in his handling of the letters written between Vitale and Johnson.

ARGUMENT II: The State did not use Vitale as its agent. The evidentiary

hearing showed that Johnson initiated the letters, the vast majority of which were written before Vitale ever contacted the State. Trial counsel testified that the State gave him the letters before trial so there was no Brady violation either.

ARGUMENT III: Trial counsel prepared adequately for the penalty phase and presented the relevant mitigation evidence on Johnson's history and mental health issues. The evidence he presented at the hearing was cumulative to that presented at trial and he failed to demonstrate prejudice so the trial court correctly denied the claim.

ARGUMENT IV: The trial court properly summarily denied the claims regarding the kitchen knives since they were relevant. The medical examiner's testimony that the wounds could have been caused by knives was not objectionable and was supported by the evidence. Finally, Johnson cannot show prejudice for counsel's failure to object to the State's improper cross-examination of Johnson since this Court found the error to be harmless on direct appeal.

ARGUMENT

I

COUNSEL WAS NOT INEFFECTIVE IN THE GUILT PHASE AND THE COURT PROPERLY DENIED THESE CLAIMS AFTER AN EVIDENTIARY HEARING (restated)

The standard of review for ineffectiveness claims following an evidentiary hearing is *de novo*, with deference given the court's factual findings. "For ineffective assistance of counsel claims raised in postconviction proceedings, the appellate court affords deference to findings of fact based on competent, substantial evidence, and independently reviews deficiency and prejudice as mixed questions of law and fact." Freeman v. State, 858 So.2d 319, 323 (Fla. 2003).

> ... we review the deficiency and prejudice prongs as mixed questions of law and fact subject to a de novo review standard but ... the trial court's factual findings are to be given deference. So long as the [trial court's] decisions are supported by competent, substantial evidence, this Court will not substitute its judgment for that of the trial court on questions of fact and, likewise, on the credibility of the witnesses and the weight to be given to the evidence.

Arbelaez v. State, 898 So.2d 25, 32 (Fla. 2005). See Reed v. State, 875 So.2d 415 (Fla. 2004); State v. Riechmann, 777 So. 2d 342 (Fla. 2000).

For a defendant to prevail on an ineffectiveness claim, he must establish (1) counsel's representation fell below an objective standard of reasonableness, and (2) but for counsel's deficiency, there is a reasonable probability the result of the

proceeding would have been different. Strickland v. Washington, 466 U.S. 668, 688-89 (1984).

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

Valle v. State, 778 So.2d 960, 965 (Fla. 2001). At all times, the defendant bears the burden of proving not only counsel's representation fell below an objective standard of reasonableness, and was not the result of a strategic decision, but also actual and substantial prejudice resulted from the deficiency. See Strickland, 466 at 688-89; Gamble v. State, 877 So.2d 706, 711 (Fla. 2004).

In Davis v. State, 875 So.2d 359, 365 (Fla. 2003), this Court reiterated that the deficiency prong of Strickland requires the defendant establish counsel's conduct was "outside the broad range of competent performance under prevailing professional standards." (citing Kennedy v. State, 547 So.2d 912, 913 (Fla. 1989). With respect to performance, "judicial scrutiny must be highly deferential;" "every effort" must "be made to eliminate the distorting effects of hindsight," "reconstruct

the circumstances of counsel's challenged conduct," and "evaluate the conduct from counsel's perspective at the time." Strickland, 466 U.S. at 689; Davis, 875 So.2d at 365. In assessing the claim, the Court must start from a "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Strickland, 466 U.S. at 688-89 (citation omitted). The ability to create a more favorable strategy years later, does not prove deficiency. See Patton v. State, 784 So. 2d 380 (Fla. 2000); Cherry v. State, 659 So. 2d 1069 (Fla. 1995). Moreover, "[c]laims expressing mere disagreement with trial counsel's strategy are insufficient." Stewart v. State, 801 So.2d 59, 65 (Fla. 2001). "A court considering a claim of ineffectiveness of counsel need not make a specific ruling on the performance component of the test when it is clear that the prejudice component is not satisfied." Maxwell v. Wainwright, 490 So.2d 927, 932 (Fla. 1986). From Williams v. Taylor, 529 U.S. 362 (2000), it is clear the focus is on **what** efforts were undertaken and **why** a specific strategy was chosen over another. Investigation (even non-exhaustive, preliminary one) is not required for counsel reasonably to decline to investigate a line of defense thoroughly. See Strickland, 466 U.S. at 690-91 (stating "[s]trategic choices made after less than complete investigation are reasonable precisely to the extent the reasonable professional judgments support the limitations on investigation.").

Expounding upon Strickland, the Supreme Court cautioned in Wiggins v. Smith, 539 U.S. 510, 533 (2003):

> In finding that [the] investigation did not meet *Strickland*'s performance standards, we emphasize that *Strickland* does not require counsel to investigate every conceivable line of mitigating evidence no matter how unlikely the effort would be to assist the defendant at sentencing. Nor does *Strickland* require defense counsel to present mitigating evidence at sentencing in every case. Both conclusions would interfere with the "constitutionally protected independence of counsel" at the heart of *Strickland*.... We base our conclusion on the much more limited principle that "strategic choices made after less than complete investigation are reasonable" only to the extent that "reasonable professional judgments support the limitations on investigation." ... A decision not to investigate thus "must be directly assessed for reasonableness in all the circumstances."

Wiggins, 539 U.S. at 533. From Williams v. Taylor, 529 U.S. 362 (2000), it is clear the focus is on what efforts were undertaken and why a strategy was chosen. Investigation (even non-exhaustive, preliminary) is not required for counsel reasonably to decline to investigate a line of defense thoroughly. See Strickland, 466 U.S. at 690-91 ("[s]trategic choices made after less than complete investigation are reasonable precisely to the extent the reasonable professional judgments support the limitations on investigation.").

B. Counsel was not ineffective in his objection to the State's use of the word cuts to describe the wounds.

Johnson claims that it was improper for the prosecutor to refer to the wounds

as cuts in his questions and trial counsel should have objected. The State's theory was that the wounds to the perineal area were caused by Johnson carving it out to destroy any evidence linking him to the victim. The trial court found that Johnson failed to prove this claim at the evidentiary hearing.

> Johnson presented no additional forensic evidence at the evidentiary hearing. The court finds no deficient performance or prejudice where trial testimony established that the smooth-edged nature of the wound was consistent with being caused by a knife, and that the location and the nature of the wound were not consistent with damage by marine life; where the medical examiner testified he could not rule out other causes and admitted on cross-examination that the wound may have been caused by marine life; and where forensic experts consulted by defense counsel agreed with the medical examiner's conclusions. (T: 1378-81, 1384-86, 1405-07, 2219-24, 2232-36; PCT: 25-34, 48-52, 54-58, 80-83, 90)

(PCR p. 1678).

The evidence at the trial, and the evidentiary hearing, support the trial court's conclusion. The State presented several witnesses prior to Diggs to refute Johnson's contention, first presented to the police, that the wounds were caused by marine life. Puchala testified that the body was not swollen or very decomposed when he found it. (T: 1360-61). Tedder took courses in the types of wounds or destruction animals and marine life cause to dead bodies. He saw no evidence that marine life got to the body. The trauma in the vaginal area was not consistent with damage by marine life. (T: 1378-81). There was no damage to her fingers, toes, or

face. There were no teeth marks or missing flesh from her buttocks which would indicate that something was feeding on that area. Turtles were not responsible for the damage. (T: 1384-86). Morris, who has recovered dead bodies from Florida waters for twenty years, said that turtles make indentation marks on the face and the extremities, none of which was present here. He had never seen trauma like this caused by animals. (T: 1405-7).

Diggs also testified that marine life usually chew on the extremities like toes and eat in more than one spot. This body had no injuries to the extremities or in more than the one area. (T: 2222-24, 2232-6). Diggs did say that the wounds were consistent with being caused by a knife although he could not rule out other causes. (T: 2219-21). The jury was aware of both the defense theory that the injuries were the result of marine life and of Digg's opinion. The State's use of the word "cut" was not improperly suggestive or misleading given the evidence presented in support of it. Again, any objection would have been without merit and would have been overruled. Trial counsel was not ineffective for not pursuing it. King, 555 So.2d at 357-58; Teffeteller v. Dugger, 734 So. 2d 1009, 1020 (Fla. 1999).

Garland and Stone both consulted with forensic experts on whether the wounds were cuts or caused by marine life. Garland had Wright appointed to review the autopsy findings and to examine the wounds. He gave him all the

discovery material including the photographs. Wright was not helpful. [PCT p. 25-29, 48-52, 56-58] Wright told him that he could not say marine life caused the damage because the edges of the wounds were too smooth. He objected when the prosecutor called them cuts because he was leading the witness. Garland succeeded in getting Diggs to say that those wounds might have been caused by marine life. [Id. 30-34, 54-55] Garland did not think the wounds were ultimately the central issue in the case, the identity of the killer was. The defense theory was that Vitale was the murderer. [Id. p. 55] Stone consulted with both Wright and Feagle on the cause of death and the wounds. Both agreed with Diggs's conclusions. Feagle thought the wounds may have been caused by marine life, as did Diggs. [PCT p. 80-83, 90] The prosecutor was entitled to ask questions based upon his theory of what happened, just as the defense was. The evidence, however, was Diggs's answers. Johnson failed to demonstrate either deficient performance or prejudice and the court properly denied this claim.

C. Counsel was not ineffective for failing to object when Diggs used the word "heinous" to describe a death by strangulation.

Johnson claims Diggs's use of the word "heinous" in describing the death was inflammatory and improper and, thus, counsel was ineffective for not objecting. The trial court denied this claim, saying:

> The court finds that the medical examiner was not rendering an opinion concerning the HAC aggravating circumstance. The court agrees with trial counsel's evidentiary hearing testimony interpreting the medical examiner's "heinous" characterization merely as a description of the death, and not as a term of art. (PCT: 56) Consequently, the court finds no deficient performance or prejudice.

(PCR p. 1679). At the evidentiary hearing Garland testified that he did not think Diggs's use of the word heinous was objectionable since it has its own meaning, i.e. terrible. [PCT p. 56] Diggs was clearly describing the manner of dying by strangulation, not rendering an opinion on an aggravator before the jury in a separate trial for the penalty. The record supports the court's denial of relief.

On direct appeal, this Court found that the murder was heinous, atrocious, and cruel, saying in part:

> In concluding that the murder was HAC, the trial court relied on the medical examiner's testimony that the murder was committed by both manual and ligature strangulation, and that a strangulation victim starts to lose consciousness within fifteen to twenty seconds of the start of the attack.

Johnson, 969 So. 2d at 957. During his testimony, Diggs described how a person dies when strangled. Diggs used the word "heinous" as part of that description, much as he related how long a person remains conscious and how long it takes to die. All of those are also factors used in determining whether a murder was heinous. Diggs's use of the word was merely descriptive of a strangling death.

Also, Diggs used the word in the guilt phase, not the penalty phase, used it only once, and was not giving a legal opinion on an aggravator. Furthermore, given those facts, Johnson failed to show prejudice since the trial's outcome would not have changed with an objection. The jury also does not determine whether an particular aggravator is proven; the trial court does and would not be swayed because a witness had used the word "heinous" in the course of his testimony. The trial court properly denied relief.

D. Vitale did not testify that Johnson wanted to have sex with a sleeping woman nor was counsel ineffective for failing to object to the testimony that Vitale actually gave.

Johnson also contends that his trial counsel should have objected to Vitale commenting that Johnson wanted to have sex with the victim, which he incorrectly characterizes as Johnson wanting to have sex with a sleeping woman who could not consent. The trial court properly denied this claim since the record clearly showed that the woman was awake when she had sex with Johnson in the bushes, especially since she had to walk from the car to the bushes. There was also never any implication that this particular sex act was anything other than consensual. The testimony was not objectionable and Johnson failed to meet his burden to show either that counsel's performance was deficient or that he suffered prejudice as required by Strickland.

Vitale testified that Johnson asked him to take a walk which he did not question because of the way Johnson was acting and looking. "The way he looked or whatever, I figured what it was for." (T. 1690) Vitale's statement was based on Johnson's behavior and is similar to when one knows when someone sees a person is tired, ill, or drunk based upon his behavior. The statement was a valid interpretation of the non verbal communication Vitale witnessed and was not objectionable. Immediately following this testimony, Vitale continued by saying that Johnson and the victim walked together past him into the bushes. Both were undressed and she went willingly with Johnson. (T. 1691-92) She was an awake and willing partner. (T. 1778-86) Clearly, Johnson did not take advantage of a sleeping, incapacitated woman at this point in time. Additionally, Johnson did not demonstrated prejudice since the trial's outcome would not have differed if this statement had not come into evidence. He argues that it was prejudicial because Johnson faced sexual battery charges and, presumably, the jury may have believed this incident was the rape to which the charge applied. This interpretation simply does not match the trial evidence given that the victim willingly accompanied Johnson into the park to have sex. The jury could not have possibly used this act as the basis for a sexual battery conviction.

Garland testified that there was never an issue of non-consensual sex in the park. Vitale's comment about T.H. being asleep when they parked was different from his deposition but Garland did not think it significant. Vitale testified that Johnson was going to wake her up and take her to the bushes for sex. Garland thought Vitale looked like a liar at the trial and did not think the jury gave much credit to his testimony. (PCT p. 38-39, 61-62, 78) Stone also said the this comment did not necessarily indicate that Johnson was going to have sex with T.H. while she was asleep. Neither Johnson nor Vitale thought that and Stone certainly did not draw that conclusion. (PCT p. 85-86) The comment was simply not objectionable. Since Johnson failed to prove either that his counsel was deficient or that he was prejudiced by this testimony, this Court should affirm the denial of relief.

E. Counsel was not ineffective for not requesting a limiting instruction for Vitale's statement that the woman asked for her children while she died.

Johnson's next claim is that his trial counsel was ineffective for not asking for a limiting instruction when Vitale claimed that T.H. asked for her children while Johnson strangled her. Johnson argues that this Court said that this statement was prejudicial but any evidence of a defendant's guilt is prejudicial. Johnson did not, however, demonstrate that this statement met the prejudice standard set out in

Strickland nor did he show deficient performance other than simply dismissing trial counsel's strategy of minimizing this testimony.

The trial court, in denying relief, stated:

> Johnson claims that counsel failed to request a limiting jury instruction on Vitale's statement that Johnson told him the victim asked for her children as she was being strangled. At the evidentiary hearing, Stone and Garland testified that this statement was a surprise. Stone tried to keep the statement out of the trial. Both attorneys testified that once the trial court admitted the statement, a limiting jury instruction would have called even more attention to the statement. And although neither attorney could recall the reasoning for not requesting the limiting instruction, it is clear both attorneys recognized the potential impact of the admitted statement, and proceeded in a manner that would not call attention to Vitale's testimony. (PCT: 52-53, 314-15, 318-19) Consequently, the court cannot find this an unsound trial strategy. Further, given the Florida Supreme Court's note of the State's cautious use of Vitale's surprise statement, this court finds that Johnson cannot demonstrate sufficient prejudice. Johnson, 969 So. 2d at 952.

(PCR p. 1679-80). The record fully supports the court's opinion.

Garland thought Vitale was out to burn Johnson in any way he could. He did not ask for a limiting instruction on this comment by Vitale because doing so would only highlight the remark to the jury. He chose to let it alone rather than drawing more attention to it. (PCT p. 36, 47) Garland considered his options and chose a strategy which would not further highlight the comment to the jury. Stone tried to keep the remark out of the trial. He did not ask for a limiting instruction

because it would not have been helpful since they tend to draw even more attention to the testimony. He did not specifically recall his reasoning in this case but does remember that he wanted to have the jury pay as little attention to it as possible and a limiting instruction would not have accomplished that goal. (PCT p. 86, 89) That conduct was not deficient performance by his counsel but a reasonable professional judgement and trial strategy. Vallee, 778 So.2d at 965-66; Pietri, 885 So. 2d at 255-252; Asay, 769 So. 2d at 984 ("The defendant bears the burden of proving that counsel's representation was unreasonable under prevailing professional standards and was not a matter of sound trial strategy."); See Patton, 784 So. 2d 380; Cherry v. State, 781 So. 2d 1049, 1069 (Fla. 2001). Johnson has failed to demonstrate deficient performance on part of his attorneys. Furthermore, even if he had shown deficient performance, he failed the prejudice prong of the Strickland inquiry. This Court stated, "Further, we note that the State was cautious in its use of the statement. The prosecutor did not mention the statement again until the penalty phase, when he legitimately argued that it supported the HAC aggravator." Johnson, p. 952. The isolated comment did not infect the trial and lead to a conviction on its own; there was substantial evidence of Johnson's guilt. This Court should affirm the denial of this claim.

F. Counsel effectively and extensively cross examined Vitale.

Johnson's next issue is that his trial counsel fumbled in his cross examination of Vitale and failed to adequately impeach him in order to show the jury that everything he said was a lie. He further argues that counsel should have had the complete tape of Vitale's first statement played to the jury for them to properly assess his credibility. Initially, Johnson fails to adequately plead this issue since he asserts prejudice in a conclusory fashion. See Freeman, 761 So. 2d at 1061 (opining "defendant bears the burden of establishing a prima facie case based upon a legally valid claim. Mere conclusory allegations are not sufficient to meet this burden."). Moreover, the record clearly refutes his contentions and supports the trial court's denial of the claim.

The circuit court stated:

> The court has reviewed the extensive cross-examination of Vitale's trial testimony during which counsel explored inconsistencies in the various statements concerning Vitale's role, level of participation, and injuries; Johnson's role and direction of Vitale; the victim's behavior, statements, and injuries; and the jail letter exchange between Vitale and Johnson. (T: 1745-1827, 1947-80, 1997-2002) And although counsel may have struggled at times with his impeachment technique; the record reveals that counsel questioned Vitale on these three areas of inconsistency in Vitale's statements concerning the perineal wound, Johnson's admission to breaking the victim's neck, and Johnson's 'disclosure of the victim's request for her children. (T: 1774, 1802-03, 1997-2002, 2150-52) Further, the State investigator corroborated that Vitale had disclosed in his first

> statement Johnson's admission to breaking the victim's neck. (T: 2143-52) Therefore, absent an evidentiary showing of what specific information counsel failed to bring out concerning these three areas of inconsistency in Vitale's statements, the court finds no prejudice to the outcome of the trial.

(PCR p. 1680). As the court noted, Johnson did not present evidence at the hearing regarding areas of impeachment not covered by the examination and, thus, did not meet his burden. The trial record supports the court's conclusion.

Counsel did spend a considerable amount of time cross-examining Vitale about his previous statements to the police as well as the various letters he wrote while in custody. Initially, he outlined for the jury that Vitale gave numerous statements, including the trial testimony, and pointed out that he denied the crime, then admitted it, and finally blamed Johnson. (T:1746-48). He then proceeded to cross examine Vitale about the inconsistency between his initial statement to the police saying the victim wishes regarding going home and/or going to the bathroom with what he said in trial. (T: 1785-86). He marked the statement and had Vitale examine. (T: 1753-64). Vitale had repeatedly said that he participated in the crime because he did whatever Johnson asked him to do. Counsel then demonstrated how that was not always the case, by impeaching him with his statement to the police showing that Vitale refused to stop playing pool when Johnson told him to drive them somewhere. (T:1766-67). Counsel also questioned

him about the scratches on his arms and impeached him with his various police statements. (T:1767-68, 1770-71, 1787-88, 1956-57, 1959). Counsel pointed out Johnson's statement that he broke her neck was not in the initial police statement, but that Johnson said it was an accident. He impeached Vitale by page and line. (T: 1772-74, 1795-99, 1949). As discussed extensively in the side bar conversations, the tapes of Vitale's statement were incomplete with portions indiscernible and not recorded. Vitale maintained, and Hamrick backed him up, that he did say in his first statement Johnson admitted to breaking her neck, something no amount of impeachment could counter. (T: 1774, 2143-52). He pointed out inconsistencies at a number of points about what happened in the driveway and regarding the perineal injures. (T: 1784-85, 1802-03). He extensively cross-examined him about the letters he wrote while in custody, including the letter where Vitale wrote a detailed confession to the killing. (T: 1807-23, 1948-54, 1958-79). Counsel also brought out to the jury that Vitale first mentioned the victim's last words at the proffer for his plea deal and then, later, made no mention of it when the defense deposed him. (T: 1997-2002). Counsel brought out substantial impeachment during his questioning of Vitale and was not ineffective.

An attorney does not render ineffective assistance automatically by failing to impeach a witness with a report if cross-examination is used to bring out the

weaknesses in the witness's testimony. See State v. Riechmann, 777 So.2d 342, 356 (Fla. 2000); Card v. Dugger, 911 F. 2d 1494, 1507 (11th Cir. 1990); Adams v. Dugger, 816 F. 2d 1493 (11th Cir. 1987) (holding that defense counsel was not ineffective for failing to obtain expert pathologist where defense counsel cross-examined State expert and argued weaknesses in testimony to jury in closing argument). Likewise, failing to present cumulative impeachment evidence does not rise necessarily to the level of ineffective assistance. See Valle v. State, 705 So. 2d 1331, 1334-35 (Fla. 1997); Provenzano v. Dugger, 561 So. 2d 541, 545-46 (Fla. 1990); Van Poyck v. State, 694 So. 2d 686, 697 (Fla. 1997)(finding counsel was not ineffective in his cross-examination of a witness because a thorough examination was conducted even though the witness was not attacked directly). Here, counsel repeatedly questioned Vitale on the changes in, and the evolution of, his story and impeached him with specific references to his police statements and deposition. The lower court's denial of relief should be affirmed.

G. Trial counsel did not encourage letter writing between Johnson and Vitale.

Johnson argues that his trial counsel was ineffective because he either encouraged or failed to halt the letter writing between Johnson and Vitale, who he maintains was acting as an agent of the State. The record adduced at the

evidentiary hearing soundly refutes this claim and supports the circuit court's denial of relief.

> The court makes the following findings of fact and conclusions of law:
>
> The court notes the relevant timeline. in 2001, the offenses were committed and Johnson was indicted. Moore was appointed to represent Johnson. Stone was later retained to represent Johnson. Moore stayed on as second chair. Vitale sent a "confession" letter to Stone. On July 2, 2002, Stone sent Vitale's "confession" letter to the prosecutors. On November 20, 2002, Moore was discharged from representation. In January 2003, Garland was appointed to succeed Moore. On January 14, 2003, Burns sent a letter to the prosecutors referring to the Vitale plea negotiations. On October 22, 2003, Vitale sent a letter to the prosecutors referring to his contact with the State investigator, a letter to Vitale from Johnson, and a letter to Johnson from Vitale. In March 2004, Vitale sent a note to the prosecutors referring to a letter to Vitale from Johnson. In June 2004, the trial was conducted. In August 2004, the Defendant was sentenced.
>
> It is undisputed that Vitale communicated directly with Johnson, the prosecutors, the State investigator, Burns, and Stone. There is no evidence that the prosecutors initiated the contact or responded to Vitale. And there is no evidence that undermines Vitale's testimony that wearing a wire was his idea. Although there is reference to a jail visit by the State investigator, no testimony of the investigator or prosecutors was offered to explain the purpose of the visit. And the court declines to infer that the investigators visit was for the purpose of enticing or arranging for Vitale to elicit incriminating evidence from Johnson.
>
> Burns, Moore, Garland, and Stone are experienced trial attorneys and credible witnesses. There is no evidence that these attorneys had knowledge that the prosecutors initiated, encouraged, or responded to Vitale; or that the State was otherwise using Vitale to deliberately elicit incriminating statements from Johnson.
>
> Stone and Garland were unaware of Vitale's direct communication with the prosecutors until shortly before trial. They

were unaware of Burns' January 14, 2003, plea negotiation letter until shortly before the postconviction evidentiary hearing. However, no evidence was presented to demonstrate a willful discovery violation by the State with respect to the letter.

Moore, Stone, and Garland did not encourage Johnson to communicate with Vitale. Stone's explanation is credible as to his comment to Johnson that if Vitale's attorney would not let Vitale talk to the State, Vitale should put it in writing. The court does not interpret this as advice to Johnson to communicate with Vitale. And, as standard practice of seasoned criminal defense attorneys, the court finds all three attorneys would have warned Johnson of the risks of jailhouse communication.

Burns' explanation is credible as to his attempt to manage his uncontrollable client Vitale, and Vitale's expectations by addressing the recording in the January 14, 2003, letter. Burns corroborated Vitale's testimony that it was Vitale's idea to wear a wire.

In conclusion, Johnson has failed to meet his burden of proving that the State was using Vitale to deliberately elicit incriminating statements from Johnson or that Vitale was otherwise a State agent, and that counsel failed to protect Johnson from Vitale. Further, the Defendant fails to demonstrate prejudice of the letters to the outcome of the trial where the defense strategy was that Vitale, not Johnson, killed the victim. The letters were the only evidence other than Johnson's testimony that tied Vitale to the victim, thus supporting the viability of the defense. (T: 1816-28) And at trial, the State introduced no statements made by Johnson after the letters began as proof for the charged crimes that would otherwise demonstrate prejudice.

(PCR p. 1683-86).

Vitale wrote a number of letters admitting that he killed the victim after he got into an argument with her while Johnson was passed out. (T: 1806-10). This occurred over the course of six to seven months, not three years as mentioned by Johnson. (T: 2548-50). He testified that he did so at Johnson's behest once the

State chose to pursue the death penalty because he loved him and did not want him to die. Johnson was the initiator of this line of correspondence, not Vitale. (T: 1834-42, 1893-1900). It was Johnson who told Vitale what to do in the letters, not the other way around. Johnson himself admitted to coaching Vitale on what to put in the letters to avoid inconsistencies and make the confession sound. (T: 2463-70, 2521-30). Vitale did not coerce admissions from Johnson. These letters culminated in Vitale's letter confession addressed to the State Attorney and with Johnson's urging him to plead guilty. (T: 1907-26). Johnson's conclusory assertion that Vitale was a state agent is refuted by the record. These letters were already written, including two or three where Vitale confessed to the murder, and the State had not even been contacted by Vitale. Additionally of note is that it was Vitale who contacted the State to trade on this information. He testified, "I was calling my attorney trying for him to get in touch with you [the State Attorney] so we could discuss this with you." (T: 1946-47). Further, Johnson fails to clarify what incriminating evidence these letters provided other than showing that Johnson was manipulative with Vitale. It was the defense which first put on these letters; the State brought the additional letters in only to rebut the claim that Vitale confessed to the crime.

Much of the testimony at the evidentiary hearing revolved around these letters. Garland was appointed to Johnson's case on February 13, 2003 (ROA p. 403-5) Garland first learned of the letters from Moore when he came into the case. The letters were from both Vitale and Johnson. Garland never encouraged the letter writing and many of the letters predated his involvement in the case, including the one Stone sent to the prosecutors along with Vitale's "confession." (PCT p. 16-19) Moore was originally the second attorney on the case. He was aware of the letters from Vitale but he never encouraged Johnson to write. He never wants his clients communicating with anyone about their cases. (PCT p. 5-7)

Stone also testified on this issue. Stone would not have told Johnson to write Vitale if he knew he was so doing. Johnson had told him that Vitale wanted to confess but his attorney would not let him. Stone told Johnson that Vitale would have to tell the State himself or put it in writing since Stone could not approach Vitale. He assumed the two were passing notes since Johnson knew Vitale wanted to help him. Stone always told his clients not to speak to anyone about their case since whatever they said would come back to hurt them at trial. There was no secrecy in jail at all. He told Johnson that as well. (Id. p. 95-96) Each attorney testified that they did not tell Johnson to communicate with Vitale nor did they encourage him to do so once they learned of the correspondence.

Vitale testified that Burns was appointed after Vitale had some discussions with the State and that Burns knew the details of the discussions. (PCT: 124) Vitale stated that he exchanged numerous letters with Johnson while both were detained at the jail and that the letter writing was Johnson's idea. (PCT: 126) Vitale said he told Burns about the letter writing after it started, but could not recall how long thereafter that the letter writing continued. (PCT: 127) Vitale testified that he sent letters directly to the prosecutors when he could not get in touch with Burns, but Vitale did not get a response from the State. (PCT: 131, 133-134) Vitale testified he could not recall meeting with the prosecutors without Burns. (PCT: 133) Vitale said that he suggested to Burns that Vitale wear a wire at the jail to record Johnson's admissions, but Vitale did not discuss the wire with the prosecutors and does not believe Burns did so either. (PCT: 136-137) Vitale said the State investigator picked up some of Johnson's letters. (PCT: 132) Vitale's letter to the prosecutors established that the investigator picked up Johnson's letters on October 22, 2003. (PCT: Defense exhibit T) Vitale said he later gave some of Johnson's letters to Burns. (PCT: 133)

Johnson failed to show any deficient performance in his counsel's actions. Johnson's testimony at trial and his overall trial strategy depended on those letters since he claimed that Vitale was the one who actually killed the victim. If counsel

believed his client and knew that Vitale was willing to make a written confession, it was valid trial strategy to develop the defense. The fact that the defense ultimately did not succeed does not invalidate the approach or render it deficient. Moreover, Johnson initiated the letter writing without consulting his attorneys. Counsel was left to use this evidence as it best assisted Johnson. To support this story, counsel admitted the letters into evidence; without them, the only support for this theory would have been Johnson's own testimony. (T:1816-28). No other witness or piece of evidence in the trial tied Vitale with the victim outside Johnson's presence. Counsel had to question Vitale directly about whether he committed the murder and then impeach him if he denied it. The written letter in Vitale's own hand was the most direct way to accomplish this. Whether or not to have other inmates testify, who, by the way, knew of the letters, to impeach Vitale was well within the discretion a trial attorney has in presenting his case and is not deficient. Additionally, Johnson explained to the jury why his letters had suggestions and instructions in them by saying that both men were working on the plan together to avoid first degree murder charges on either. He testified that he threw away Vitale's letters with similar suggestions. (T: 2574-79). Pinning the murder on Vitale was his defense and his counsel's obvious trial strategy. Cherry v. State, 781 So. 2d 1049, 1050 (Fla. 2001) (rejecting claim of ineffective

assistance where defendant's actions constrained counsel's performance because "the reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions.") (quoting Strickland v. Washington, 466 U.S. 668, 691 (1984)); Sims v. State, 602 So. 2d 1253, 1257 (Fla. 1992) (finding when defendant directs counsel not to collect evidence, counsel is not ineffective in following client's wishes because counsel "has considerable discretion in preparing trial strategy and choosing the means of reaching the client's objectives.") That conduct was not deficient performance by his counsel but a reasonable professional judgement. Valle, 778 So.2d at 965-66; Pietri, 885 So. 2d at 255-252; Asay, 769 So. 2d at 984 ("The defendant bears the burden of proving that counsel's representation was unreasonable under prevailing professional standards and was not a matter of sound trial strategy."); See Patton, 784 So. 2d 380; Cherry, 659 So. 2d 1069.

Finally, Johnson has failed to demonstrate prejudice as required under Strickland. The outcome of the trial would not have differed but for the admission of these letters.[1] As noted above, the State did not seek to introduce these letters

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[1]Each individual claim must show prejudice in order to entitle a defendant to relief. Thompson v. State, 796 So.2d 511, 515 fn. 5 (Fla. 2001)(Denying individual claims "because at no point has Thompson alleged how he was prejudiced by counsel's failure to object or raise the asserted error").

until the defense had presented Vitale's "confession." The letters the State did seek to admit were to show that it was Johnson who was manipulating and threatening Vitale to pen the confession Johnson dictated. None of the letters incriminated Johnson and he made no confessions in them, contrary to his assertions. The other State witnesses put Johnson with the victim in his bedroom around the time of her death. Shipp testified that she heard screaming and saw Johnson grab and carry her into the house. (T: 1562-76). Beakley and Denigris heard the woman cry and scream to be let go when Johnson dragged her back into the bedroom. (T: 1597-1637). Vitale testified that Johnson was with the woman that night, had sex with her, took her into the house, and put her in the bedroom. He said that Johnson told him that he killed her and they both disposed of the body. (T: 1652-2002). Bien, Johnson's best friend, said that Johnson admitted that he killed the woman and asked for help in disposing of her body. (T: 2030-43). Johnson failed to meet either prong under Strickland but he failed to produce evidence that Vitale was acting as a State agent as he claimed. This Court should affirm.

H. Cumulative error.

Given that all of the preceding claims involved no error or ineffective

assistance of counsel, no cumulative error analysis is warranted. The denial of relief should be affirmed.

ARGUMENT II

THE STATE DID NOT WITHHOLD EXCULPATORY INFORMATION FROM JOHNSON NOR DID IT USE VITALE AS ITS AGENT. (Restated)

Johnson next claims that the State deliberately used Vitale as its agent to elicit incriminating statements from Johnson in violation of Massiah v. United States, 377 U.S. 201 (1964). He contends that the fact Vitale turned over letters to his attorney who then contacted the State is evidence that the State was actively soliciting Vitale to get incriminating evidence although he points to nothing besides the existence of the correspondence to support that contention. He further argues that the plea agreement and jail housing are suspicious and, therefore, indicative of the State's active role in getting statements by Johnson. Since Johnson could have raised this on his direct appeal, the claim is procedurally barred. This claim is without merit, the evidence at the hearing conclusively refuting it. The denial should be affirmed.

Johnson's Massiah claim is procedurally barred since it could have been raised on direct appeal. Muhammad, 603 So. 2d at 489 (holding "[i]ssues which

either were or could have been litigated at trial and upon direct appeal are not cognizable through collateral attack"); See Finney v. State, 831 So.2d 651 (Fla. 2002)(holding that issues that were or could have been raised on direct appeal are not cognizable in a Rule 3.850 motion); Moore v. State, 820 So.2d 199 (Fla. 2002) (holding that issues that were raised on direct appeal cannot be raised in post-conviction motion); Rivera v. State, 717 So.2d 477, 487 (Fla. 1998)(cannot raise claims that were or could/should have been raised on direct appeal); Harvey v. Dugger, 656 So.2d 1253 (Fla. 1995) (same).

In Massiah, 377 U.S. 201, the Supreme Court held that sixth amendment rights were violated when:

> [T]here was used against [the defendant] at his trial evidence of his own incriminating words, which federal agents had deliberately elicited from him after he had been indicted and in the absence of his counsel.

Id. at 206, 84 S.Ct. at 1203. In United States v. Henry, 447 U.S. 264 (1980), the Supreme Court held that an informant must be working in concert with the State and then actively instigate conversation designed to elicit incriminating information for a Massiah violation to occur. See Brown v. State, 725 So.2d 1164, 1165-66 (Fla. 2d DCA 1998). "[T]he primary concern of the Massiah line of decisions is secret interrogation by investigatory techniques that are the equivalent

of direct police interrogation." Kuhlmann v. Wilson, 477 U.S. 436, 459 (1986); see Cooper v. State, 856 So.2d 969, 973 (Fla.2003) ("[T]he police may not sidestep constitutional protections by employing jail residents as independent contractors to interrogate defendants without the presence of an attorney."). The Florida Supreme Court in Lightborne held that there must be "some overt scheme in which the state took part, or some other evidence of prearrangement aimed at discovering incriminating information" before an defendant's statements to an informant to be a violation of Massiah. Lightbourne v. State, 438 So.2d 380, 386 (Fla.1983). The passivity of law-enforcement authorities is the critical element in assessing the facts in any given case. See Rolling v. State, 695 So.2d 278, 291 (Fla.1997); Bottoson v. State, 443 So.2d 962, 964-65 (Fla.1983); Brown, 725 So.2d at 1166.

In Muehleman v. State, 503 So.2d 310 (Fla.1987), the Florida Supreme Court interpreted the "deliberately elicited" standard in terms of its plain meaning and found that the defendant's right to counsel had not been violated because his statements were not a product of a "stratagem deliberately designed to elicit an incriminating statement." Id. at 314 (quoting Miller v. State, 415 So.2d 1262, 1263 (Fla.1982)). See also Malone v. State, 390 So.2d 338, 339-40 (Fla.1980). As a federal court stated in United States v. Stevens, 83 F.3d 60, 64 (2d Cir. 1996):

The *Massiah* rule covers only those statements obtained as a result of

> an intentional effort on the part of the government , so information gotten before the inmates became agents/informants is not protected by the rule. If, however, an informant obtains some initial evidence, approaches the government to make a deal on the basis of that information, and then–with the backing of the government–deliberately elicits further evidence from an accused, the materials gotten after such government contact are properly excluded under the *Massiah* rule.

Furthermore, Henry does not apply to unsolicited statements made to a cellmate who is neither paid nor instructed by the government. Barfield v. State, 402 So.2d 377, 381 (Fla.1981); Bottoson v. State, 443 So.2d 962, 965 (Fla.1983).

In support of his claim, Johnson reincorporates his previous arguments for counsel being ineffective for not challenging the State using Vitale as an agent. The State respectfully does as well, again pointing out that beyond merely stating that the State used Vitale as an agent, Johnson provides no evidence that supports it. His conspiracy theories and speculations do not rise to the level of supporting such a claim. Further, as discussed in detail above, Johnson cannot show the necessary prejudice or harm from the admission of these letters. Vitale's direct testimony was complete by the time the first letter was mentioned. By that time, he and the other witnesses had testified about Johnson's actions, the victim's screaming and crying, and Johnson's admissions to Vitale and Bien, all evidence proving Johnson's guilt.

Vitale was not an agent of the State nor did he, in the letters in question, even try to get Johnson to confess in writing. The record refutes Johnson's assertions to the contrary. Most importantly, the State introduced **no statements** made by Johnson ***after*** the correspondence began as proof for the charged crimes. As pointed out before, Johnson made ***no*** incriminating statements to Vitale during or after the letters and certainly none after Vitale or Johnson contacted the State. The statements the State did introduce were those made to Vitale and Bien during the clean up of the murder and to Vitale when they were first incarcerated. (T. 1701-06, 1738-42, 1768-721793-96, 1982-87,1997-2002, 2030-36) Johnson points to no letter or piece of information from these jail house communications which was obtained after Vitale contacted the State. Clearly there was no violation of Massiah.

Furthermore, the State was utterly passive and was, in fact, ignorant of the correspondence until Vitale's and Johnson's attorneys contacted them. Johnson's bald assertion that Vitale was an agent is baseless and the record refutes it. Vitale and Johnson were well into this exchange of letters and conversations and Vitale's "confessions" were already written *before* he ever had contact with the State. He hoped that the letters would help reduce his exposure but he was acting on his own initiative in both continuing the letter writing and contacting the State. (T: 1946-

47). At the evidentiary hearing, Vitale specifically stated that the letters were Johnson's idea and Burns did not know about them when they began. (PCT p. 85-88) *He* was the one who wanted to wear a wire and *he* was the one who contacted the state; the state never responded to any of his letters. He wrote to the state when he could not get hold of Burns. (Id. p 85-92) Burns also stated that it was Vitale's idea to wear the wire. (PCT p. 69-70) Burns testified that he told the prosecutors about the letters between the two men. He did not encourage the letters and warned Vitale not to further expose himself to harm. (Id. p. 66) The letter by Burns in 2003 which Johnson quotes supports the fact that the State had made no agreement and had taken no action to further the Vitale/Johnson contact. That letter also clearly indicates that Vitale's confessions were complete and in the State's possession before the State took any action. Further, this one letter ***to*** the State was dated over a year after the letters Johnson noted in both his brief and at trial. Importantly, the State never responded to any of the letters Vitale sent, which, if anything, shows the lack of action by the State rather than it working "extensively" with Vitale. From the testimony detailed above, both Vitale and Johnson testified that the letters directing what was to go into the confession letter happened before it was written. Burns wrote that letter to the State to calm Vitale down and to get some control over him. (Id. p.70-72) That letter, referred to by Johnson as the "Burns

letter," demonstrates the lack of action by the State and its lack of interest in having Vitale get anything from Johnson. Burns said that the correspondence between Johnson and Vitale was completely organic and was initiated by either Burns or the state. Vitale was not an agent of the state. (Id. p. 73) Furthermore, the State did not introduce any of the letters into the trial until after Johnson's attorney confronted Vitale with his "confession" to put it into context. Finally, as noted by the circuit court, Johnson presented no witness and no evidence at the hearing to support his theory that Vitale was a state agent. The evidence and the witnesses at the hearing said exactly the opposite, that Vitale was not an agent of the state. There was no overt scheme or prearrangement by the State to obtain these letters or statements, hence there is no violation of Massiah. Lightbourne, 438 So.2d at 386; Rolling, 695 So.2d at 291; Bottoson, 443 So.2d at 964-65; Brown, 725 So.2d at 1166.

Vitale followed the course of conduct many inmates, and other police informants, have done in volunteering information on another defendant in the hope, but not the certainty, of obtaining more favorable treatment. That Vitale had a self-interest in obtaining better treatment from the State does not thereby automatically make him an agent of the government. The motivation to inform comes from the informer and not the government. Florida courts have refused to

find Massiah violations in similar situations. See Barfield, 402 So.2d at 381("The police did not even consider the cell mate as a potential informant until he had approached the authorities on his own initiative which occurred after the inculpatory statements had been made to him by appellant. The trial court directly met any potential Henry violation by suppressing all conversations between appellant and his cell mate after the cell mate's initial contact with the police."); Phillips v. State, 608 So.2d 778, 781 (Fla. 1992) ("Phillips has made no showing that the informants were state agents when they talked to him, that they in any way attempted to elicit information about the crimes, or that the State had anything to do with placing these persons in a cell with Phillips in order to obtain information"); Lightbourne, 438 So.2d 380 (fellow inmate was not a government agent because there was no preexisting agreement); Lightbourne v. Dugger, 829 F.2d 1012 (11 th Cir. 1987) (same); Rolling, 695 So.2d at 291 (prisoner kept trying to strike a deal with state and gathered information on his own before State ever became involved with him.); Dufour v. State, 495 So.2d 154 (Fla.1986) (Informant approached the authorities on his own initiative, indicating scheming on his part rather than the government's.); State v. Zecckine, 946 So.2d 72 (Fla. 1st DCA 2006)(informant deliberately obtained incriminating information entirely of his own volition to help himself and there was no agreement or plan between him and

the State.). "Henry and Malone do not impose on the police an affirmative duty to tell an informer to stop talking and not approach them again nor do they require that informers be segregated from the rest of a jail's population." Johnson v. State, 438 So.2d 774, 776 (Fla.1983). No Massiah violation exists and relief is not appropriate.

Finally, it is not at all clear that Vitale deliberately set out to get Johnson to incriminate himself in writing or on tape. As detailed previously and incorporated here, Vitale wrote these confessions and other letters in order to help Johnson avoid the death penalty and imprisonment. Additionally, he was not the instigator of these missives, Johnson was. The letters highlighted Johnson manipulating Vitale to write the confessions and apologies claiming the various actions and motivations of *Vitale* in committing this murder. Other than demonstrating Johnson's ability to control Vitale, these letters provided no directly incriminating evidence against Johnson. In so far as Vitale did not instigate the letters, although he did attempt to get incriminating evidence although none came forth, this situation differs markedly from those cases discussed above and is not really an informant situation in the classic sense at all. Vitale was a co-defendant who testified against his co-defendant; the jail house communications played little, if any, role in the State's case. The trial court's ruling should be affirmed.

Johnson charges that the State violated Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), and Giglio v. United States, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972), by not notifying the defense that Vitale was acting as its agent and that the State engaged in a pattern of conduct using inmates as agents in its prosecution of criminal cases. The standards applicable to this aspect of this claim are as follows. First, to establish a Brady claim, the defendant must show that he was prejudiced when the State willfully or inadvertently suppressed material, favorable evidence. Strickler v. Greene, 527 U.S. 263, 281-82, 119 S.Ct. 1936 (1999). To prove prejudice, the defendant must demonstrate "a reasonable probability that had the suppressed evidence been disclosed, the jury would have reached a different verdict. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Rhodes v. State, 986 So.2d 501, 508 (Fla.2008) (quoting Green v. State, 975 So.2d 1090, 1102 (Fla.2008)); see Strickler, 527 U.S. at 290, 119 S.Ct. 1936 ("[T]he question is whether 'the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.' " (quoting Kyles v. Whitley, 514 U.S. 419, 435, 115 S.Ct. 1555 (1995))). A Giglio violation is demonstrated when the prosecutor knowingly presented or failed to correct false testimony that was material to the case. Guzman v. State, 868 So.2d 498, 505

(Fla.2003). The evidence is material "if there is any reasonable likelihood" that it "could have affected" the jury's verdict. Id. at 506 (quoting United States v. Agurs, 427 U.S. 97, 103, 96 S.Ct. 2392 (1976)). Thus, the "State, as the beneficiary of the Giglio violation, bears the burden to prove that the presentation of false testimony at trial was harmless beyond a reasonable doubt." Id.

As argued extensively above, Johnson has failed to show that Vitale was acting as an agent or that the State failed to disclose anything, much less exculpatory evidence. Vitale was simply acting on his own. He was never a state agent so the State had nothing to hide from the defense. The State notified the defense of Vitale's plea agreement and the jury was well aware of it. Vitale testified that he received a reduced sentence because of his testimony and that he had to testify truthfully and give a truthful proffer and deposition. (T:1740-42). As discussed previously, defense counsel cross examined him extensively about the inconsistencies between his various statements. Counsel also questioned him about the plea deal and how that might affect his testimony. (T: 1797-80). The jury heard the problems and contradictions in Vitale's various versions of the events; they knew he was "singing for his supper" and was motivated to testify against Johnson. Those problems did not negate all the other evidence of Johnson's guilt. Furthermore, it is self-evident that a witness the State would call would likely

incriminate the defendant or why else would he be called by the prosecution. The jury being explicitly told that Vitale was expected to be consistent in saying Johnson was responsible for the victim's death would add nothing to their ability to judge the witnesses' credibility and assess the evidence against Johnson. Finally, Stone testified that the State turned over the letters between Vitale and Johnson *and* the letter from Vitale and Burns to the State before trial began. (PCT p. 78-80) Since the State provided the letters to the defense, there was no violation of Brady. Vitale's testimony at trial was consistent with his at the evidentiary hearing, that Johnson initiated the correspondence and the terms of his dealings with the State. Johnson has failed to prove his Giglio claim.

Further, he cannot demonstrate that the outcome of the trial would have differed. As noted above, the jury was aware of Vitale's actions and interactions with the State. Additionally, there was substantial evidence of Johnson's guilt and, assuming for the sake of discussing the second prong of Brady that something material and exculpatory had been undisclosed by the State, Johnson cannot show that the jury's verdict would have changed with this alleged evidence of the State using inmates as its agents. Numerous other witnesses put Johnson with the victim in his bedroom around the time of her death. Shipp testified that she heard screaming and saw Johnson grab and carry the victim into the house. (T: 1562-76).

Beakley and Denigris heard the woman cry and scream to be let go when Johnson dragged her back into the bedroom. (T: 1597-1637). Vitale testified that Johnson was with the woman that night, had sex with her, took her into the house, and put her in the bedroom. He said that Johnson told him that he killed her and they both disposed of the body. (T: 1652-2002). Bien, Johnson's best friend, said that Johnson admitted that he killed the woman and asked for help in disposing of her body. Hiding the body itself was evidence of guilt. Johnson himself told the police that he put his hand on her neck and she died. (T: 2285-95, 2311-2330, 2235). Furthermore, Johnson participated in destroying evidence by bleaching the car and hiding the body. He was the one person with a motive to destroy evidence of his semen and the injuries to the genital area would do that. Finally, Johnson never articulated or argued what false evidence the State knowingly presented in violation of Giglio. There was no Massiah, Brady, or Giglio errors nor can Johnson show the requisite prejudice required for relief.

ARGUMENT III

WHETHER JOHNSON RECEIVED CONSTITUTIONAL ASSISTANCE OF COUNSEL IN THE INVESTIGATION AND PRESENTATION OF MITIGATING EVIDENCE.

Johnson's next claim is that trial counsel was ineffective for failing to

present evidence in mitigation regarding Johnson's mental illness and his fetal alcohol syndrome which allegedly resulted in his difficulty controlling his emotions and behaviors. He argues that counsel failed to provide Dr. Williams, who testified at trial, with all the necessary witness statements and depositions which prevented him from cementing his diagnosis. Johnson has failed to establish this claim. The evidence presented at the evidentiary hearing clearly demonstrates that all the evidence Johnson claims was not discovered or presented was, in fact, gathered during his counsel's investigation and presented before the jury and the court. Consequently, the evidence is cumulative. Further, the evidence offered at the hearing does not establish prejudice. Had that testimony been presented at trial, which it substantively was, the result of the penalty phase would not be different since it was cumulative. Penalty phase counsel fulfilled his professional responsibility under Wiggins v. Smith, 539 U.S. 510, 123 S. Ct. 2527 (2003), Ake, and Strickland. Ineffective assistance was not proven and the trial court correctly denied relief.

The lower court stated:

> Johnson claims that counsel was ineffective for failing to investigate and present mental health mitigation evidence. Johnson contends that evidence of his major mental illness (specifically, severe' borderline personality disorder and post-traumatic stress disorder) never reached the jury. Johnson asserts that these diagnoses

coupled with his chaotic upbringing rendered Johnson unable to cope with environmental stressors.

At the evidentiary hearing, Johnson presented two witnesses to prove that the investigation and presentation of mental health mitigation evidence were deficient. The lay witness was Johnson's sister Danielle Blount Fernandez. During cross examination it was determined that the postconviction testimony did not include any fact not brought out in this witness's trial testimony other than how the overall dysfunction of the family affected Johnson. (EH: 169-79) Consequently, the court finds no prejudice to the o utcome of the penalty phase for failure to present mitigation evidence largely cumulative to the evidence presented at trial. *Gilliam v. State*, 817 So. 2d 768, 781 (Fla. 2002).

In addition, Johnson presented expert testimony of clinical and forensic psychologist Jethro W. Toomer. Dr. Toomer testified that he conducted a psychological evaluation of Johnson and reviewed documents as part of the evaluation (appellate opinion; reports, deposition, and trial testimony of Dr. Theodore Williams; Johnson's school and medical records; the result of Dr. Robert Brugnoli's neuropsych evaluation; penalty phase testimony of Johnson's family members; and the sentencing order). (EH: 218)

Dr. Toomer diagnosed Johnson as suffering from depression, psychoactive substance abuse, and a variety of personality disorder syndromes. (EH: 229). Dr. Toomer stated that the data suggests the existence of an overall borderline personality disorder, an underlying learning disability, PTSD traits, and "soft signs" of organic brain damage. (EH: 224, 232-34, 238) Dr. Toomer opined that these diagnoses were exacerbated by the longstanding instability and dysfunction of Johnson's family background, resulting in Johnson's inability to respond appropriately to environmental stressors like rejection by the victim. Dr. Toomer concluded that this supported the finding of two statutory mitigating circumstances - Johnson was under the influence of extreme mental or emotional disturbance; and Johnson's capacity to appreciate the criminality of his conduct, or to

conform his conduct to the requirements of the law was substantially impaired. (EH: 248-252)

> The court finds that cross-examination undermined the credibility and novelty of Dr. Toomer's testimony. Dr. Toomer did not prepare a written report and his diagnoses are unsupported by the DSM-IV criteria. (EH: 252-53, 262-68) Dr. Toomer did not ask Johnson about the details of the crime, did not link the diagnoses to the timeframe of the crime, and thus lacked the basis to support the mitigating circumstances. (EH: 257- 59) Dr. Toomer did not test for organic brain damage and failed to acknowledge Dr. Brugnoli's test finding of no evidence of organic brain damage when Dr. Toomer testified on direct to "soft signs" of brain damage. (EH: 268-69) Dr. Toomer did not rebut the findings of Dr. Williams or Dr. Brugnoli, and added only the new diagnosis of PTSD. (EH: 270-271) And lkkkastly, Dr. Toomer did not testify to any new facts that were unknown to Dr. Williams or Dr. Brugnoli at the time of their evaluations. Therefore, the court determines that Dr. Toomer's testimony is largely cumulative, does not support the finding of the two statutory mitigating circumstances, and fails to demonstrate deficiency in the mental mitigation evidence. Thus, the Defendant fails to demonstrate prejudice to the outcome of the penalty phase.

(PCR p. 1687-88). The record supports the court's findings and denial of relief.

Garland was responsible for the penalty phase trial. By the time he got on the case, Dr. Williams had already been appointed. Garland discussed his findings with him and then had Dr. Brugnoli appointed to do neuropsychological testing on Johnson. Brugnoli found nothing they could use in the penalty phase and he would not change his opinion without clear evidence of intoxication, which they did not have. Garland made a strategic decision not to call him because he found no

organic brain damage. (PCT p.39, 41, 72-73) Garland also assisted Williams in getting in contact with Johnson's family. He did not think a mitigation expert was necessary. He interviewed the family and they did not provide a lot of information. Garland found out about the issues with the parents abusing alcohol, the physical and sexual abuse of Johnson, and his learning disabilities. (Id. p. 39-40, 63, 65-66, 71) Garland chose Williams to testify because he thought it would be more instructive to the jury. He testified about Johnson's background, mental health issues, substance abuse and about the dysthymic disorder with antisocial personality disorder. Williams testified that Johnson met the criteria for two statutory mental health mitigators. Williams and Johnson's sister testified about the physical and sexual abuse Johnson experienced. She as a very good witness. (Id. p. 74-77)

Toomer testified at the hearing that Johnson suffers from depression, personality disorder, and substance abuse. (PCT p. 32-33) He diagnosed him with a borderline personality disorder, learning disorders, post-traumatic stress disorder ("PTSD") and substance abuse disorder. He acknowledged that his diagnosis of borderline personality disorder did not comply with the diagnostic criteria listed in the DSM IV, a work which allows mental health professionals to standardize their diagnostic criteria and be able to communicate with each other competently. (Id. p.

35-36) He believed that Johnson qualified for two statutory mitigators: severe emotional and mental disturbance and an inability to conform his behavior to the law. (Id. p. 42) Non-statutory mitigation is present in Johnson's lack of a stable home life as a child, the ferocity of the physical and sexual abuse he suffered, and his upbringing. (Id. p. 44-45, 52-55) Toomer believes that Johnson shows "soft signs" of brain damage. He did acknowledge that Dr. Brugnoli did do the testing and found no brain damage. Toomer did not question those findings. (Id. p. 55) Toomer also acknowledged that Dr. Williams had diagnosed Johnson with a personality disorder, substance abuse disorder, depression, and with PTSD as a factor. (Id. p. 56, 62-63) Williams testified to the same statutory and non-statutory mitigators that Toomer did and Toomer added nothing new. (Id. p. 57) Williams also told the jury about Johnson's intoxicated state the night of the crime. (Id. p. 58)

At the penalty phase trial Dr. Williams testified Johnson grew up in an abusive home and showed signs of post-traumatic stress disorder and depression in his early life. "And certainly how it affected Richard early on is he began to manifest some symptoms , what's referred to in our profession as posttraumatic stress disorder...." (T. 2926) Williams explained that Johnson suffered PTSD and had symptoms of the disorder even when he was a young child.

> And in Richard's case, he was put in a situation where there was a lot of domestic violence, not talking, just yelling, screaming, somebody throwing cups, we're talking about pretty significant abuse by dad against all members of the family. As a consequence, people not only with Vietnam Vets but in Richard's case as well had began to develop a variety of other symptoms.

(T. 2927-28)

The mitigating evidence did come in through Williams at the penalty phase trial. Johnson did well in his special education classes until he entered adolescence, and acted "bad" so he would not be teased about the classes. As Johnson grew older, he self-medicated with drugs/alcohol and got into trouble. He is not a major depressive type, but has many unresolved issues; he has "just this mild, moderate dysthmic depression." His setting of fires and getting into trouble meet the diagnostic criteria of antisocial personality disorder. Johnson's testing showed learning disabilities. (T.35 2925-37, 2939-43, 2944-47, 2950-54, 2972-76, 2979-80). Dr. Williams opined that Johnson was intoxicated at the time of the crime and met the minimum requirements for a mixed personality disorder and antisocial personality disorder (T.35 2959-60). He offered two statutory and ten non-statutory mitigators. The record clearly shows that Toomer and Williams almost totally mirrored each other and Johnson presented nothing new at the evidentiary hearing.

Johnson also called his sister at the evidentiary hearing. She said that Stone called her and told her she was going to testify at the penalty phase. She had a twenty minute conversation with him in his office. She spoke with him a couple of times on the telephone and saw him twice more in his office but never discussed what she was going to testify about. She never got a letter from either counsel. Neither counsel prepared her for her interview with Williams which lasted an hour and a half. Nor did the attorneys prepare her for the deposition taken by the State although Garland accompanied her at that. (PCT p. 5-7) As a child, she lived with Johnson and her two other brothers, Christopher and David, in Stuart with their parents. Her mother worked long hours at Publix and her father worked construction during the day and tended bar at night. The kids took care of themselves when the parents were gone. Their father was physically and verbally abusive to their mother, getting into weekly fights with her in front of the children. Their father was an alcoholic. When their mother had to work at night, their father would take them to the bar with him while he worked. 8-9) They had relatives living near by but they did not go over there much after their cousin Dean sexually abused Johnson and Fernandez at one time over the course of a month. Their home environment was volatile, hostile, and unpredictable. Their father physically abused Johnson weekly. Their parents separated a month after they moved the

family to Ft. Pierce. Their mother started seeing Pat Kent who also physically abused the children. He was with them for two years. Their mother worked three jobs and started drinking heavily. She fought with Pat. Johnson avoided Pat all the time, either hiding in his room or staying away from the house. (Id. p. 10-12) Johnson suffered from night terrors since he was small. He would fall asleep at school at times and would awaken screaming. Fernandez would be called to calm him down. He had a speech impediment and went to speech classes. Their mother never stressed education and never helped them with their homework. She ended her relationship with Pat over the way he treated Johnson. She then married Frank who dislike Johnson, calling him stupid. Their mother continued drinking when she was not working and argued with Frank. (Id. p. 13-14) Johnson did poorly at school and dropped out after the 9th grade. He left home and used drugs. He supported himself by doing odd jobs. Fernandez conceded that she testified at trial about the home situation, the sexual and physical abuse, their mother's drinking, the night terrors, the poor school performance, the speech class, the drug abuse, and Johnson's difficulty maintaining a job at trial. She admitted that she testified to essentially the same things now as she did then. (Id. p. 19-23)

At the original trial, Danielle told how her father was drunk every night and would argue and physically abuse her mother. (T. 2862) He also physically abused

Johnson and her as well by throwing them across the room. He suffered from nightmares due to his service in Viet Nam. He would awaken at night and carry a gun around the house, terrorizing his family. (T. 2863) She told how he would beat Johnson with sticks after having made Johnson go a chose which stick with which he would be beaten. Their mother drank excessively after her divorce. (T. 2864) She and Johnson had to fend for themselves when their mother was out drinking. Their mother drank each night until she passed out and the children would go to their grandmother's house because their mother was so out of it. (T. 2865, 2870) Johnson's Uncle Mike sexually abused him and Danielle. Johnson was also sexually assaulted by his cousin Dean. (T. 2866-67) Their mother's boyfriend Pat verbally and physically abused Johnson. (T. 2870) Their mother worked so much that she spent very little time with her children. (T. 2873-74) Johnson suffered from night terrors and would fall asleep at school only to awaken screaming. Johnson hated school, in part because he did so poorly. He was in a speech class in elementary school. Education was not pushed in their home. (T. 2870-72) Frank Spears, their mother's second husband, abused Johnson and called him a devil child. (T. 2874) Johnson began using drugs and fell in with a bad crowd. (T. 2872) Johnson never had steady work and had a volatile relationship with his child's mother. (T. 2875-77) She also recounted that he started a fire when young. (T.

2880) Again, the no new evidence was presented at the evidentiary hearing which was not presented at the original trial.

Penalty phase counsel cannot be deemed ineffective for failing to present cumulative mitigation during sentencing. Gilliam v. State, 817 So.2d 768, 781 (Fla. 2002)(finding that the record refutes any claim of prejudice, as the substance of the testimony that Gilliam argues should have been presented would have been largely cumulative to the evidence presented at trial); Downs v. State, 740 So.2d 506, 516 (Fla.1999) (affirming trial court's denial of defendant's claims that counsel was ineffective for failing to investigate and present additional mitigating evidence where the additional evidence was cumulative to that presented during sentencing); Rutherford v. State, 727 So. 2d 216, 225 (Fla. 1998) (finding additional evidence offered at postconviction evidentiary hearing was cumulative to that presented during penalty phase, thus, claim was denied properly); Woods v. State, 531 So. 2d 79, 82 (Fla. 1988) (reasoning "[t]he jury, however, heard about Woods' [psychological] problems, and the testimony now advanced, while possibly more detailed than that presented at sentencing, is, essentially, just cumulative to the prior testimony. More is not necessarily better."). Further, Johnson has failed to establish prejudice, that is, he cannot show that there is a reasonable probability

that the result of the proceeding would have been different because the testimony is cumulative to what was presented at trial. Strickland, 466 U.S. at 694; Patton, 784 So. 2d at 392(finding that counsel cannot be ineffective for failing to present cumulative mitigation during sentencing). The jury's recommendation would not have been different had it heard this cumulative non-statutory mitigation.

A review of the above testimony establishes that Garland's preparation for the penalty phase was constitutionally proper. In order to prove ineffectiveness in this area, there needs to be an almost total abdication of counsel's duty to investigate mitigation. See Wiggins, 123 S.Ct. at 2542 (finding counsel ineffective where there was a complete abandonment of representation - cou nsel did not investigate or present mitigation, but merely accepted a presentence report). Moreover, counsel is not ineffective merely because, years later, one can point to something different or more that could have been done. See Chandler v. United States, 218 F.3d 1305, 1312-14 (11th Cir.2000). Finally, Johnson did not establish prejudice because it is clear that, based upon the significant and weighty aggravators found in this case, the purportedly additional mitigation, most of which was cumulative, would not have resulted in a life recommendation.

ARGUMENT IV

THE TRIAL COURT'S SUMMARY DENIAL OF SEVERAL OF JOHNSON'S CLAIMS WAS PROPER. (Restated)

In order to demonstrate that counsel was ineffective, Parker must establish a prima facie case that defense counsel's performance was deficient and that the deficient performance affected the outcome of the trial. A court's summary denial of a postconviction motion will be affirmed where the law and competent, substantial evidence support its findings. Diaz v. Dugger, 719 So.2d 865, 868 (Fla. 1998). In Lucas v. State, 841 So.2d 380, 388 (Fla. 2003), this Court stated that: "To uphold the trial court's summary denial of claims raised in a 3.850 motion, the claims must be either facially invalid or conclusively refuted by the record. Further, where no evidentiary hearing is held below, we must accept the defendant's factual allegations to the extent they are not refuted by the record." See State v. Coney, 845 So.2d 120, 134-35 (Fla. 2003); Peede v. State, 748 So.2d 253, 257 (Fla. 1999). Also, "[t]o support summary denial without a hearing, a trial court must either state its rationale in its decision or attach those specific parts of

the record that refute each claim presented in the motion." McLin v. State, 827 So.2d 948, 954 (Fla. 2002) (quoting Anderson v. State, 627 So.2d 1170, 1171 (Fla. 1993)).

For a defendant to prevail on an ineffectiveness claim, he must establish (1) counsel's representation fell below an objective standard of reasonableness, and (2) but for counsel's deficiency, there is a reasonable probability the result of the proceeding would have been different. Strickland, 466 U.S. 688-89.

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

Valle v. State, 778 So.2d 960, 965 (Fla. 2001). At all times, the defendant bears the burden of proving not only counsel's representation fell below an objective standard of reasonableness, and was not the result of a strategic decision, but also actual and substantial prejudice resulted from the deficiency. See Strickland, 466 at 688-89; Gamble v. State, 877 So.2d 706, 711 (Fla. 2004).

In Davis v. State, 875 So.2d 359, 365 (Fla. 2003), this Court reiterated that

the deficiency prong of Strickland requires the defendant establish counsel's conduct was "outside the broad range of competent performance under prevailing professional standards." (citing Kennedy v. State, 547 So.2d 912, 913 (Fla. 1989). With respect to performance, "judicial scrutiny must be highly deferential;" "every effort" must "be made to eliminate the distorting effects of hindsight," "reconstruct the circumstances of counsel's challenged conduct," and "evaluate the conduct from counsel's perspective at the time." Strickland, 466 U.S. at 689; Davis, 875 So.2d at 365. In assessing the claim, the Court must start from a "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Strickland, 466 U.S. at 688-89 (citation omitted). The ability to create a more favorable strategy years later, does not prove deficiency. See Patton v. State, 784 So. 2d 380 (Fla. 2000); Cherry v. State, 659 So. 2d 1069 (Fla. 1995). Moreover, "[c]laims expressing mere disagreement with trial counsel's strategy are insufficient." Stewart v. State, 801 So.2d 59, 65 (Fla. 2001). "A court considering a claim of ineffectiveness of counsel need not make a specific ruling on the performance component of the test when it is clear that the prejudice component is not satisfied." Maxwell v. Wainwright, 490 So.2d 927, 932 (Fla. 1986). From Williams v. Taylor, 529 U.S. 362 (2000), it is clear the focus is on **what** efforts were undertaken and **why** a specific strategy was chosen over another.

Investigation (even non-exhaustive, preliminary one) is not required for counsel reasonably to decline to investigate a line of defense thoroughly. See Strickland, 466 U.S. at 690-91 (stating "[s]trategic choices made after less than complete investigation are reasonable precisely to the extent the reasonable professional judgments support the limitations on investigation.").

A. The knives were relevant to the case so Johnson's claim that trial counsel should have objected was properly denied.

Johnson contended in his motion for postconviction relief that his trial counsel should have objected to the admission of the knives into evidence because the State failed to show that they belonged to Johnson and that they were irrelevant to the case. The trial court properly denied this claim based on the trial testimony that the knives belonged to Johnson and Vitale and the medical examiner said that they could have been used to inflict the wounds to the victim.

The trial court found:

> Johnson claims that counsel failed to object to admission of the kitchen knives into evidence where the State never established that the knives belonged to Johnson and where the knives were irrelevant. The court finds that the knives were properly admitted where Johnson told police he owned the knives and testified at trial that his roommate Vitale owned the knives (T: 2322-30, 2397); and where there was testimony that the knives could have been used for cuts on the victim's face and perineum (T: 2023-24; 2201-04). Thus, the claim is summarily denied because Johnson fails to allege a legally sufficient claim of deficient performance and prejudice.

(PCR. 1676).

Despite Johnson's repeated assertion that the knives were "completely irrelevant," they were relevant as possible weapons responsible for the cuts on the victim's face and her genital area, as even trial counsel acknowledged. (T: 2023-24). The State legitimately tried to demonstrate that Johnson had access to such weapons since its theory was that Johnson used them to make those wounds. Morris testified that Johnson and Vitale moved in with the two knives which she washed. She also said that there was no blood on either of them, a fact which was certainly helpful to the defense. (T:2022-29). Johnson testified that the knives belonged to Vitale although he told the police that he owned kitchen knives. (T: 2322-30, 2397). Diggs testified that in addition to the perineum lacerations the victim had a cut from something like a knife on her forehead which occurred before her death. (T: 2201-4). He also testified that the wounds in the perineal area could have been caused by such a knife. (T: 2202-3). A knife or knives were used against the victim before her death, a fact which is undisputed. Johnson and Vitale shared a room and the knives were part of their property which they transferred when they moved. Johnson had access to those knives and was the person present with the victim in the room that morning according to all the witnesses. The victim

suffered both pre-mortem and post-mortem cuts to her body. The knives were relevant and properly admitted. Counsel is not ineffective for failing to raise a nonmeritorious issue. King v. Dugger, 555 So.2d 355, 357-58 (Fla. 1990); Teffeteller v. Dugger, 734 So.2d 1009, 1020 (Fla. 1999). Since Johnson has failed to establish the insufficiency prong, this court need not reach the second prong. Strickland, 466 U.S. at 697, 104 S.Ct. 2052; See also Chandler v. United States, 218 F.3d 1305, n. 44 (11th Cir.2000); Waterhouse v. State, 792 So.2d 1176, 1182 (Fla.2001). This claim is without merit and was properly denied.

B. The trial court properly denied the claim that Johnson was ineffective for not objecting to the medical examiner's testimony that the knives could have caused the wounds.

Johnson contended in his motion for postconviction relief that his trial counsel should have objected to the medical examiner's testimony because it was misleading and prejudicial. The trial court properly denied this claim, stating:

> Johnson claims that counsel failed to object to the medical examiner's testimony concerning the knives and the possibility that the knives could produce the victim's wounds. The court finds no prejudice where the medical examiner testified that the wounds were consistent with being caused by a knife although he could not rule out other causes (T: 2219-21); and where other testimony indicated that the wounds were inconsistent with trauma caused by animals and marine life. (T: 1378-81; 1385-86; 1405-07, 2222-24, 2232-36). Therefore, the claim is summarily denied.

(PCR. 1677).

Johnson's claim regarding the improper testimony about the nature of tissue damage caused by marine life was properly denied. The evidence at trial clearly supported the court's ruling since the medical examiner said he could not definitively determine what had caused the wounds, only that they were consistent with having been caused by a knife although he could not rule out other means of producing them. Furthermore, as outlined earlier, there was testimony from other witnesses that refuted the hypothesis that they were caused by animals. Johnson merely refers to the testimony of Tedder, Hamrick, and Griffith without describing how counsel was ineffective or what the prejudice was. The State was entitled to try to convince the jury of its theory for the cause of the wounds as Johnson was as well when counsel continually sought to establish that the wounds were caused by animals. The jury had both positions before it when they deliberated so Johnson failed to establish any prejudice from this testimony. The record supports the trial court's denial of the claim.

The State maintains that the claim is conclusory and must be summarily denied. Conclusory allegations are legally insufficient on their face and may be denied summarily. See Atwater v. State, 788 So. 2d 223, 229 (Fla. 2001) (stating "defendant bears the burden of establishing a prima facie case based upon a legally valid claim. Mere conclusory allegations are not sufficient to meet this burden.");

Freeman, 761 So. 2d at 1061 (opining "defendant bears the burden of establishing a prima facie case based upon a legally valid claim. Mere conclusory allegations are not sufficient to meet this burden."); Ragsdale v. State, 720 So. 2d 203, 207 (Fla. 1998) (stating that although courts are encouraged to conduct evidentiary hearings, a summary/conclusory claim "is insufficient to allow the trial court to examine the specific allegations against the record").

C. Johnson failed to establish the prejudice prong of Strickland since the issue regarding the State's cross-examination of Johnson was raised on appeal and found to be harmless.

Johnson argued that he was prejudiced by his trial counsel's failure to object to the State's improper cross-examination of Johnson. Given that this Court found no prejudice when it reviewed this issue on direct appeal, the trial court's summary denial of the claim was proper. The trial court stated:

> Johnson claims that counsel failed to object to the prosecutor twice asking Johnson whether witness Thomas Beakley was truthful when he testified that the victim was crying. This issue was raised on appeal where the Florida Supreme Court found harmless error. Johnson, 969 So. 2d at 955. Consequently, the defendant cannot demonstrate prejudice, and the claim is summarily denied.

(PCR. p. 1677).

The court properly denied the claim regarding the failure to object to the cross-examination of Johnson since it is procedurally barred and meritless. He

cannot establish prejudice under the Strickland requirements since this issue was raised on direct appeal and this Court found the questioning improper but any error was harmless, stating:

> Despite the improper questioning, any error in overruling an objection on the grounds now argued would have been harmless. Johnson responded to the questioning without stating that he thought Beakley was untruthful. In each instance, the question concerned only whether Hagin was crying or whining. Johnson parried the prosecutor's suggestion that either he or Beakley had to be lying by asserting that what Beakley heard as a cry, Johnson heard as a whine. There is no reasonable possibility that this exchange so affected the jury's view of Johnson's credibility that it contributed to the verdict. *See State v. DiGuilio*, 491 So. 2d 1129, 1139 (Fla. 1986) (defining test of harmless error as whether appellate court can conclude beyond a reasonable doubt that the error did not affect the verdict). For the same reason, the questions do not cross the higher threshold of fundamental error, which can be raised even if unpreserved because it "goes to the foundation of the case or the merits of the cause of action and is equivalent to a denial of due process." *J.B. v. State*, 705 So. 2d 1376, 1378 (Fla. 1998).

Johnson, 969 So.2d at 955.

Based on this, Johnson may not claim ineffectiveness of counsel to gain a second review. Riechmann 777 So.2d at 353 n.14; Teffeteller, 734 So. 2d at 1019; White v. State, 559 So. 2d 1097, 1099-1100 (Fla. 1990); Medina v. State, 573 So. 2d 293, 295 (Fla. 1990) (holding "[a]llegations of ineffective assistance cannot be used to circumvent the rule that postconviction proceedings cannot serve as a second appeal"). Moreover, given the finding of harmless error, Johnson is unable

to prove prejudice under Strickland. Relief should be denied.

CONCLUSION

Based upon the foregoing, the State requests respectfully this Court affirm the denial of postconviction relief.

CERTIFICATE OF SERVICE

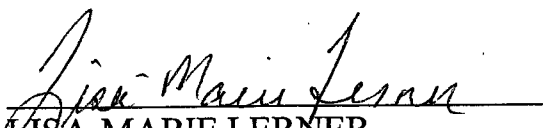
I HEREBY CERTIFY that a true and correct copy of the foregoing Answer Brief has been furnished by U.S. mail to Scott Gavin, Assistant CCRC-South, One East Broward Boulevard, Suite 444, Fort Lauderdale, Florida 33301 this 30th day of January, 2013.

CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this brief is 14-point Times New Roman, in compliance with Fla. R. App. P. 9.210(a)(2).

Respectfully submitted,

PAMELA JO BONDI
ATTORNEY GENERAL



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