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IN THE SUPREME COURT OF FLORIDA

CASE NO.: SC12-1386

STEVEN DOUGLAS HAYWARD

APPELLANT

VS.

STATE OF FLORIDA

APPELLEE

.....
ON APPEAL FROM THE CIRCUIT COURT OF THE NINETEENTH JUDICIAL
CIRCUIT, IN AND FOR SAINT LUCIE COUNTY, FLORIDA,
(CRIMINAL DIVISION)
.....

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TABLE OF CONTENTS

TABLE OF CONTENTS.....i

TABLE OF AUTHORITIES.....iii

PRELIMINARY STATEMENT.....1

STATEMENT OF THE CASE AND FACTS.....1

 Trial and Direct Appeal.....1

 United States Supreme Court Certiorari.....10

 State Postconviction.....10

SUMMARY OF THE ARGUMENT.....25

ARGUMENT.....27

ISSUE I

 THE TRIAL COURT PROPERLY DENIED HAYWARD’S CLAIM OF
 INEFFECTIVE ASSISTANCE OF PENALTY PHASE COUNSEL FOLLOWING
 AN EVIDENTIARY HEARING27

 Overview.....27

 Standard of Review.....27

 Penalty Phase Counsel Investigated Mitigation Properly....13

ISSUE II

 FOLLOWING AN EVIDENTIARY HEARING, THE TRIAL COURT PROPERLY
 DENIED HAYWARD’S CLAIM THAT COUNSEL WAS INEFFECTIVE DURING
 THE MOTION TO SUPPRESS FOR FAILING TO CHALLENGE OFFICE MACE
 REGARDING THE POLICE DEPARTMENT’S HADCUFFING POLICY.....61

 Standard for *Strickland*62

 Standard for *Brady*.....62

 Standard for *Giglio*.....64

ISSUE III

 THE TRIAL COURT’S SUMMARY DENIAL OF CLAIMS OF INEFFECTIVE
 ASSISTANCE OF COUNSEL DURING THE MOTION TO SUPPRESS, TRIAL,
 AND PENALTY PHASES WAS PROPER (restated).....69

Standard of Review for Summarily Denied Claims.....	70
Penalty Phase Counsel's Failure to Object to the Prosecutor's Closing Argument Did Not Amount to <i>Strickland</i> Prejudice.....	71
Counsel's Representation at the Suppression Hearing was not Ineffective.....	73
Trial Counsel Rendered Effective Assistance with Respect to Roosevelt McDowell and Dorothy Smith.....	81
Roosevelt McDowell.....	81
Dorothy Smith.....	83
ISSUE IV	
HAYWARD WAS AFFORDED A FULL AND FAIR HEARING ON HIS POSTCONVICTION MOTION (restated).....	84
Samuel Peaks.....	89
The trial Court Considered All Relevant Evidence.....	92
Standard of Review.....	93
The Trial Court Properly Sustained the State's Objection to Hayward Inquiring into the Letter the Prosecutor Sent to Robert Udell as it Was Work Product.....	95
Standard of Review.....	96
Argument.....	93
CONCLUSION.....	99
CERTIFICATE OF SERVICE.....	99
CERTIFICATE OF COMPLIANCE.....	99

TABLE OF AUTHORITIES

Cases

Ake v. Oklahoma, 470 U.S. 68 (1985)..... 31

Anderson v. State, 627 So.2d 1170 (Fla. 1993)..... 71

Arbelaez v. State, 775 So.2d 909 (Fla. 2000)..... 88

Arbelaez v. State, 889 So.2d 25 (Fla. 2005)..... 28

Asay v. State, 769 So.2d 974 (Fla. 2000)..... 38

Bogle v. State, 655 So.2d 1103 (Fla. 1995)..... 87

Boyd v. State, 910 So.2d 167 (Fla. 2005)..... 63

Brady, 373 U.S. at 87..... 63

Brendlin v. California, 551 U.S. 249 (2007)..... 10

Chandler v. Dugger, 634 So.2d 1066 (Fla. 1994)..... 85

Chandler v. State, 848 So.2d 1031 (Fla. 2003)..... 73

Chandler v. United States, 218 F.3d 1305 (11th Cir. 2000)..... 79

Cherry v. State, 659 So. 2d 1069 (Fla. 1995)..... 28, 73

Cherry v. State, 781 So. 2d 1049 (Fla. 2001)..... 56

Cole v. State, 701 So.2d 845 (Fla. 1997)..... 93, 96

Conahan v. State, 118 So.3d 718 (Fla. 2013)..... 63, 64

Cooper v. Sec’y, Dept. of Corr., 646 F.3d 1328 (11th Cir. 2011)
..... 55

Correll v. State, 558 So. 2d 442 (Fla. 1990)..... 38

Darling v. State, 966 So.2d 366 (Fla. 2007)..... 50

Davis v. State, 875 So.2d 359 (Fla. 2003)..... 28

Davis v. State, 928 So.2d 1089 (Fla. 2005)..... 48, 49

<i>Downs v. Moore</i> , 801 So.2d 906 (Fla. 2001).....	87
<i>Downs v. State</i> , 740 So.2d 506 (Fla. 1999).....	85
<i>Eddings v. Oklahoma</i> , 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982)	94
<i>Evans v. State</i> , 995 So.2d 933 (Fla. 2008).....	97
<i>Farina v. State</i> , 679 So.2d 1151(Fla. 1996), receded from.....	87
<i>Fernandez v. State</i> , 730 So.2d 277 (Fla. 1999).....	46
<i>Ford v. State</i> , 802 So.2d 1121 (Fla. 2001).....	54
<i>Freeman v. State</i> , 858 So.2d 319 (Fla. 2003).....	28
<i>Freeman</i> , 761 So.2d at 1061.....	84, 85
<i>Gamble v. State</i> , 877 So.2d 706 (Fla. 2004).....	28
<i>Giglio</i> , 405 U.S. at 154 , 92 S.Ct. 763.....	64
<i>Glock v. Moore</i> , 776 So.2d 243 (Fla. 2001).....	96
<i>Guzman</i> , 868 So.2d at 506.....	64
<i>Hardwick v. Dugger</i> , 648 So.2d 100 (Fla. 1994).....	78
<i>Harrell v. State</i> , 709 So.2d 1364 (Fla. 1998).....	89
<i>Harrington v. Richter</i> , 131 S.Ct. 770 (2011).....	30
<i>Harvey v. Dugger</i> , 656 So.2d 1253 (Fla. 1995).....	77
<i>Hawk v. State</i> , 718 So.2d 159 (Fla. 1998).....	82
<i>Hayward v. Florida</i> , 130 S.Ct. 2385 (2010).....	10
<i>Hayward v. State</i> , 24 So.3d 17 (Fla. 2009).....	passim
<i>Hegwood v. State</i> , 575 So.2d 170 (Fla. 1991).....	64
<i>Herring v. State</i> , 446 So.2d 1049(Fla. 1984), receded from.....	93
<i>Hess v. State</i> , 794 So.2d 1249 (Fla. 2001).....	93

<i>High v. Head</i> , 209 F.3d 1257 (11th Cir. 2000).....	64
<i>Hill v. State</i> , 515 So.2d 176 (Fla. 1987).....	93, 94, 95
<i>Hitchcock v. Dugger</i> , 481 U.S. 393, 107 S.Ct. 1821, 95 L.Ed.2d 347 (1987)	94
<i>Jent v. State</i> , 408 So.2d 1024 (Fla. 1981).....	93, 96
<i>Johnson v. Sec’y, Dept. of Corr.</i> , 643 F.3d 907 (11th Cir. 2011)	55
<i>Johnson v. State</i> , 921 So.2d 490 (Fla. 2005).....	63
<i>Johnston v. State</i> , 497 So.2d 863 (Fla. 1986).....	54
<i>Jones v. State</i> , 709 So.2d 512 (Fla. 1998).....	64
<i>Jones v. State</i> , 732 So. 2d 313 (Fla. 1999).....	33, 38
<i>Kearse v. State</i> , 770 So. 2d 1119 (Fla. 2000).....	87
<i>Kearse v. State</i> , 969 So.2d 976 (Fla.).....	95, 97
<i>Kight v. State</i> , 512 So.2d 922 (Fla. 1987).....	54
<i>Lightbourne v. State</i> , 841 So.2d 431.....	63
<i>Lockett v. Ohio</i> , 438 U.S. 586 (1978).....	93, 94
<i>Long v. State</i> , 118 So.3d 798 (Fla. 2013).....	41
<i>Lowe v. State</i> , 2 So.3d 21 (Fla. 2008).....	73, 78
<i>Lucas v. State</i> , 841 So. 2d 380 (Fla. 2003).....	70
<i>Maxwell v. Wainwright</i> , 490 So. 2d 927 (Fla. 1986).....	28, 78
<i>McLin v. State</i> , 827 So.2d 948 (Fla. 2002).....	71
<i>Medina v. State</i> , 573 So. 2d 293 (Fla. 1990).....	74, 77
<i>Meggs v. McClure</i> , 538 So.2d 518 (Fla. 1st DCA 1989).....	87, 88
<i>Melendez v. State</i> , 718 So.2d 746 (Fla. 1998).....	41, 85
<i>Mills v. State</i> , 786 So.2d 547 (Fla. 2001).....	96

<i>Miranda v. Arizona</i> , 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966)	6
<i>Moore v. State</i> , 820 So.2d 199 (Fla. 2002).....	78
<i>Mordenti v. State</i> , 894 So.2d 161 (Fla. 2004).....	64
<i>Occhicone v. State</i> , 768 So.2d 1037 (Fla. 2000).....	50
<i>Pagan v. State</i> , 29 So.3d 938 (Fla. 2009).....	28, 62, 63
<i>Pantoja v. State</i> , 59 So.3d 1092 (Fla. 2011).....	46
<i>Patton v. State</i> , 784 So.2d 380 (Fla. 2000).....	28
<i>Peede v. State</i> , 748 So. 2d 253 (Fla. 1999).....	70
<i>Pietri v. State</i> , 885 So.2d 245 (Fla. 2004).....	96
<i>Pooler v. State</i> , 980 So.2d 460 (Fla. 2008).....	55
<i>Ray v. State</i> , 755 So.2d 604 (Fla. 2000).....	93, 96
<i>Reaves v. State</i> , 639 So.2d 1 (Fla. 1994).....	96
<i>Reed v. State</i> , 640 So.2d 1094 (Fla. 1994).....	88
<i>Rimmer v. State</i> , 59 So.2d 763 (Fla. 2010).....	27
<i>Ring v. Arizona</i> , 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002)	3
<i>Rivera v. State</i> , 717 So.2d 477 (Fla. 1998).....	85
<i>Rogers v. State</i> , 511 So.2d 534 (Fla. 1987).....	54
<i>Rogers v. State</i> , 783 So.2d 980 (Fla. 2001).....	86, 87, 89
<i>Rogers v. State</i> , 788 So.2d 331 (Fla. 1st DCA 2001).....	91
<i>Rose v. State</i> , 617 So.2d 291 (Fla. 1993).....	38
<i>Rose v. State</i> , 774 So.2d 629 (Fla. 2000).....	85
<i>Rutherford v. State</i> , 727 So. 2d 216 (Fla. 1998).....	56

<i>Simmons v. State</i> , 105 So.3d 475 (Fla. 2012).....	50
<i>Sochor v. State</i> , 883 So.2d 766 (Fla. 2004).....	28, 63
<i>Spencer v. State</i> , 615 So.2d 688 (Fla. 1993).....	2
<i>Squires v. State</i> , 558 So. 2d 401 (Fla. 1990).....	56
<i>State v. Coney</i> , 845 So. 2d 120 (Fla. 2003).....	70, 96
<i>State v. Green</i> , 733 So.2d 583 (Fla. 1st DCA 1999).....	81
<i>State v. Hayes</i> , 997 So.2d 446 (Fla. 4th DCA 2009).....	87
<i>State v. Kokal</i> , 562 So.2d 324 (Fla. 1990).....	97
<i>State v. Rabin</i> , 495 So.2d 257 (3d DCA 1986).....	96
<i>State v. Riechmann</i> , 777 So.2d 342 (Fla. 2000).....	77
<i>State v. Sireci</i> , 502 So. 2d 1221 (Fla. 1987).....	31
<i>Stewart v. State</i> , 37 So.3d 243 (Fla. 2010).....	50
<i>Stewart v. State</i> , 801 So.2d 59 (Fla. 2001).....	39, 40
<i>Strickland v. Washington</i> , 466 U.S. 668 (1994).....	passim
<i>Strickler v. Greene</i> , 527 U.S. 263 (1999).....	64
<i>Suggs v. State</i> , 923 So.2d 419 (Fla. 2005).....	64
<i>Taylor v. State</i> , 855 So.2d 1 (Fla. 2003).....	66
<i>Teffeteller v. Dugger</i> , 676 So.2d 369 (Fla.1996).....	91
<i>Teffeteller v. Dugger</i> , 734 So.2d 1009 (Fla. 1988).....	73, 78
<i>United States v. Bolden</i> , 353 F.3d 870 (10th Cir. 2003).....	87
<i>United States v. Starrett</i> , 55 F.3d 1525 (11th Cir. 1995).....	64
<i>Valle v. State</i> , 778 So.2d 960 (Fla. 2001).....	28
<i>Way v. State</i> , 760 So.2d 903 (Fla. 2000).....	64
<i>White v. State</i> , 559 So. 2d 1097 (Fla. 1990).....	71, 72, 73

<i>Wiggins v. Smith</i> , 539 U.S. 510 (2003).....	29
<i>Wike v. State</i> , 813 So. 2d 12 (Fla. 2002).....	85
<i>Williams v. Taylor</i> , 529 U.S. 362 (2000).....	29
<i>Windom v. State</i> , 886 So.2d 915 (Fla. 2004).....	31, 39
<i>Wong Sun v U.S.</i> , 371 U.S. 471 (1963).....	10
<i>Wong v. Belmontes</i> , 130 S.Ct. 383 (2009).....	30
<i>Wyatt v. State</i> , 71 So.3d 86 (Fla. 2011).....	31, 39
<i>Wyatt v. State</i> , 78 So.3d 512 (Fla. 2011).....	39
<i>Yarborough v. Gentry</i> , 540 U.S. 1 (2003).....	29
<i>Zack v. State</i> , 753 So.2d 9 (Fla. 2000).....	93, 96

Statutes

Section 90.604, Fla. Stat.....	82
Section 90.610.....	46
Section 90.701, Fla. Stat.....	82
Section 921.141, Florida Statute.....	59

Rules

Fla. R. App. P. 9.210(a)(2).....	99
Fla. R. Crim.P 3.220(g)(1).....	97
Fla. R. Crim. P. 3.190.....	89, 90
Fla. R. Crim. P 3.851.....	10

PRELIMINARY STATEMENT

Appellant, Steven Douglas Hayward, Defendant below, will be referred to as "Hayward" and Appellee, State of Florida, will be referred to as "State". Reference to the appellate record will be by "R", to the postconviction record will be "PCR", and supplemental materials will be designated by the symbol "S" preceding the type of record referenced, Hayward's initial brief will be notated as "IB" followed by the appropriate volume and/or page number(s).

STATEMENT OF THE CASE AND FACTS

Trial and Direct Appeal - On March 22, 2005, Hayward was indicted for the February 1, 2005 first-degree murder of Daniel Destefano ("Destefano"), robbery with a deadly weapon, burglary of a conveyance while armed, and possession of a firearm or ammunition by a convicted felon. Hayward's motion to suppress his statements and to dismiss the case were denied on February 9, 2007 (R.11 6-7, 91-96) and on March 5, 2007, jury selection began. (R.13 176). On March 8, 2007 the jury was sworn and testimony commenced the next day. (R.23 1409-16; R.24 1458). By general verdict for the first-degree murder charge and with special interrogatories for the other charges, on March 14, 2007, the jury convicted Hayward on all counts. (R.7 1146-47). The penalty phase began on March 19, 2007 and the jury rendered

an eight to four recommendation for death the next day. (R.8 1189; R.31 2357) Following the April 27, 2007 *Spencer v. State*, 615 So.2d 688 (Fla. 1993) hearing, on June 1, 2007, Hayward was sentenced to death upon the finding of three aggravators, two of which were merged, no statutory mitigation, and eight nonstatutory mitigating factors. Also, Hayward was designated a Prison Releasee Reoffender who qualified for minimum mandatory terms under the 10-20-Life statute. For the robbery and burglary convictions, Hayward received life sentences and for the count of possession of a firearm by a convicted felon, he was given 15 years with the minimum mandatory term of three years under 10-20-Life. (R.8 1261-93).

On direct appeal, this Court noted that Hayward raised 10 issues on appeal¹ and found the following:

¹ This Court identified Hayward's direct appeal issues as:

(1) the statements of the murder victim to police describing his attacker were improperly admitted under the excited utterance and dying declaration exceptions to the hearsay rule, and in violation of the Confrontation Clause; (2) introduction of Hayward's statements to police at the rooming house and their observations while there violated his Fourth Amendment rights; (3) introduction of the recorded jail conversations between Hayward and Smith were more prejudicial than probative due to the vulgarity of the language used, affecting both the guilt and penalty phases; (4) comments made by the prosecutor in closing argument during the penalty phase comparing the life choices made by the victim and Hayward constituted prosecutorial misconduct requiring resentencing; (5) there was insufficient evidence concerning the

The Circumstances of the Murder and the Investigation

Sometime before 4 a.m. on the morning of February 1, 2005, Destefano arrived at a convenience store and began filling the vending machine with newspapers. Destefano had secured a concealed weapons permit for a .357 caliber silver revolver which he was wearing in a holster on his belt. Roosevelt McDowell (McDowell), a resident of a nearby rooming house, heard "hollering" and heard Destefano shout, "I don't have no more, I don't have no more." McDowell then heard two gunshots followed by another, louder gunshot. He opened the door to his room and saw a person he described as Mexican^{FN2} on one knee who was continuing to say, "I don't have no more." McDowell saw a black man searching through a nearby car. McDowell testified that the man then went to the street light on the corner where McDowell could see the man examining his bleeding left hand. According to McDowell, the man was wearing some sort of head covering. McDowell then saw Destefano limp away in an easterly direction and saw the black man take a short-cut around McDowell's rooming house, leaving the area in a westerly direction.

FN2. Destefano was of Italian descent with dark olive skin.

Sometime shortly after 4 a.m., Destefano was found about a block away by an early morning fisherman, who called 911. Officer James Grecco of the Fort Pierce Police Department received the 911 dispatch and quickly responded, arriving about two or three minutes

identity of the shooter; (6) there was insufficient evidence as to whether a robbery was actually accomplished; (7) there was insufficient evidence establishing premeditation; (8) the standard jury instruction on premeditation is insufficient; (9) Florida's sentencing scheme is unconstitutional under the United States Supreme Court's decision in *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002); and (10) imposition of a death sentence based on an eight-to-four jury recommendation is unconstitutional.

Hayward v. State, 24 So.3d 17, 28 (Fla. 2009) (footnote omitted).

before the paramedics arrived. As the paramedics prepped Destefano for transport, Officer Grecco asked Destefano, "What happened?" Destefano stated that a black male with a black stocking cap over his face ran up to him and shot him. He also told the officer that he fired back with his handgun, but that he "didn't know what happened to it." Soon thereafter, Destefano lost consciousness and died.

Dorothy Smith, Hayward's girlfriend, lived in a rooming house a few blocks away from the convenience store where Destefano was shot. According to Smith, on the morning of the shooting, Hayward arrived at her room just before dawn with an injury to his hand. He claimed the injury was inflicted by two black men who robbed him and shot him in the hand. Smith immediately urged him to go to the hospital and asked if he wanted her to call an ambulance or the police. Hayward vehemently refused Smith's offer and even unplugged the telephone to prevent her from calling anyone. Hayward then went around the rooming house asking various residents to sew up his hand, but no one would do so.

A few hours later, when Smith learned from a television newscast that someone had been shot at the convenience store, she asked Hayward about the shooting. He denied any involvement and told her that he had been shot at a different location. Just before Smith left for the store that morning to buy something for breakfast, she retrieved a bloody ten-dollar bill Hayward had placed in a drawer that morning. When she returned, she found Hayward packing his bags to leave, but she convinced him to stay. Shortly thereafter, Hayward sold a silver handgun for \$100.FN3

FN3. Destefano's fiancée testified that Destefano's gun was silver.

Two days after the shooting, the police responded to Smith's rooming house after receiving a report that someone there had a possible gunshot wound to the hand and had been asking the residents to sew it up. When the officers arrived, they found the front door open but asked and received permission from other residents to enter the common area. The residents then directed the officers to Smith's open door where they knocked

on the door frame and Smith answered. As Smith was talking to the officers, Hayward came out of the communal bathroom located directly across from Smith's room and walked into the hallway where the officers were standing. The officers immediately noticed his bandaged hand and asked if they could see the wound. Hayward removed the bandage and, when the officers asked him what happened, he and Smith both indicated that Smith had "cut" him with a knife. At this point, Detective Dan Flaherty asked Officer Darren Mace and Hayward to go outside so he could talk with Smith alone. Hayward complied and stepped outside with the officer, where Officer Mace asked him to come to the police station to talk about the "cut" on his hand. Hayward agreed and was handcuffed before being placed in the back seat of the police car. Officer Mace told Hayward that he was not under arrest, and that it was police policy to handcuff anyone being transported in a police car.

After being handcuffed, but just before entering the car, Hayward suddenly stated to Officer Mace that he "wasn't going to lie," that he had been robbed the other day and thought he had been shot. Officer Mace left Hayward in the squad car and went to inform Detective Flaherty of Hayward's statement. Smith, who was within hearing distance of the officers' conversation, then revised her story as well. She said that she had gotten in an argument with Hayward the afternoon before the murder and had stabbed him in the hand. She added that when he returned the next morning, he told her that he had been shot in the very same hand by two black men who robbed him.

Once at the police station, Officer Mace took off Hayward's handcuffs but secured him by an ankle bracelet to a table in an interview room. Hayward was then advised of his *Miranda* rights.FN4 After waiving his *Miranda* rights and agreeing to discuss the incident, Hayward provided the officers with several different versions of how his hand was injured. He told the officers that he lied when he first claimed he had been stabbed. He explained that he had actually been robbed by two men, one black and one Mexican, while trying to sell marijuana at the convenience store. Hayward told the officers that he was shot in the hand as he tried to take the gun away from the

black robber.

FN4. In *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), the United States Supreme Court held that any statements made in response to interrogation by a defendant in police custody would be admissible at trial only if the defendant was informed of the right to consult with an attorney before and during questioning and of the right against self-incrimination prior to questioning by police, and the defendant understood these rights and voluntarily waived them. Hayward does not claim that the interview statements admitted into evidence were obtained in violation of the requirements of *Miranda*.

Hayward subsequently changed his story again, this time stating that he was not robbed at all, but instead had witnessed Destefano being robbed and shot by a lone black man. Hayward said that he attempted to pick up a gun left at the scene but dropped it and it went off, shooting him in the hand. He told the officers that even though his hand was bleeding, he went through Destefano's car looking for anything of value. After concluding his statement, Hayward was arrested for Destefano's murder.

A few months later, when the common laundry room in Smith's rooming house was renovated, a black .22 caliber revolver identified as the murder weapon was found behind a board covering a vent in the wall. Hayward's blood was discovered inside the gun's firing chambers.

Medical Examiner Dr. Charles Diggs testified that Destefano suffered a nonfatal injury to his left thigh from a .22 caliber bullet that entered the thigh horizontally, which was consistent with Destefano standing up when the shot was fired. Destefano died as a result of internal bleeding caused by a second .22 caliber bullet that entered Destefano's upper left chest area and traveled downward at a forty-five-degree angle, coming to rest in his lower intestine. This was consistent with Destefano having been shot from above, while kneeling.

Because he bled internally, Destefano's blood was not found at the crime scene. On the other hand, a great deal of Hayward's blood was found at the crime scene, on several of Destefano's personal items found strewn around his car, on the door frame of Destefano's car, on several locations on the outside walls of McDowell's rooming house, and on a fence post adjacent to the rooming house. The hooded jacket that Hayward was wearing the morning of the murder evidenced a number of heavy blood transfer stains FN5 originating from Hayward. There was a large tear on the inside pocket of the jacket, which also bore evidence of Hayward's blood. Criminalist Earl Ritzline testified that the tear was big enough to have been used as a hiding place for two guns. Significantly, even though in his statement to the police Hayward denied touching Destefano, the front and back of Destefano's pants were stained with large amounts of Hayward's blood, including heavy transfer blood stains on Destefano's back pockets. Ritzline opined that the perpetrator had pushed his bloody hand inside the pockets while searching them.

FN5. Blood transfers or wipes on fabric are usually highly concentrated. This can occur, for example, when a person presses a bloody object, such as a hand, against the fabric, in essence crushing large quantities of blood into the fabric.

The jury also heard portions of two taped telephone calls Hayward made to Smith from jail shortly after his arrest, which the State offered as proof of Hayward's consciousness of guilt and to show Hayward was attempting to coach Smith in her testimony. At the close of the evidence, the defense argued in a motion for judgment of acquittal that the State had not refuted Hayward's hypothesis that he was only an observer and not the actual shooter. The motion was denied and the case was submitted to the jury. The jury found Hayward guilty of first-degree murder, robbery, burglary of a conveyance, and possession of a firearm by a convicted felon.

Penalty Phase and Sentencing

During the penalty phase, the State presented evidence

of Hayward's 1988 convictions for second-degree murder and two counts of armed robbery. A witness to the 1988 crimes testified that he was standing outside a bar talking to the victim when Hayward and his codefendant began shooting Uzis in the parking lot. Hayward approached the victim from behind and said, "Let me have it." When the victim looked over his shoulder and laughed, Hayward shot the victim from behind. The witness stated that after the first shot, Hayward repeatedly pulled the trigger on the Uzi, but it had apparently jammed and only made a clicking sound. The lead detective in that case testified that the victim was shot in the groin area and bled to death. The detective testified that when questioned, Hayward admitted he was present when the murder occurred, but claimed that he was only an observer. Hayward also told the police that two black youths from Fort Lauderdale committed the murder, and he offered a location where the perpetrators might be found. Hayward eventually pled nolo contendere to the crimes.

Victim impact testimony was offered by Destefano's mother, sister and fiancée. They spoke about Destefano's character, his hard work, and how much he would be missed by them.

In mitigation, Hayward presented the testimony of psychologist Dr. Michael Reardon, as well as the testimony of four family members: Hayward's brother, his two sisters, and his mother. Dr. Reardon testified that Hayward had the potential to be rehabilitated because he had shown an ability to focus on learning despite his low average IQ (91), as exemplified by his attainment of a GED while in prison for the first murder. The psychologist also indicated that Hayward had made license plates and worked in other areas while in prison. Hayward's mother testified that due to the family's financial difficulties, she had to work two jobs and was absent from the home quite often. In her absence, Hayward's older half-siblings took care of and disciplined him. Hayward's mother testified that his siblings often picked on Hayward and even beat him up. She testified that Hayward's stepfather was present in the home during Hayward's early years, but later, Hayward's biological father, an alcoholic, came to live with the family. Hayward grew up without a consistent father-figure in his

life. The jury recommended a death sentence by a vote of eight to four.

In sentencing Hayward to death, the court found three aggravators: (1) that Hayward had prior violent felony convictions based on his convictions for second-degree murder and two counts of armed robbery, to which the court assigned "extremely great weight"; (2) that the murder was committed during the course of a robbery; and (3) that the murder was committed for pecuniary gain. The court found that the second and third aggravators merged and gave the single aggravating circumstance "great weight." There were no statutory mitigators offered or found, but the court found the following nonstatutory mitigators applicable: (1) Hayward could have received a life sentence; (2) he grew up without a father; (3) he was loved by his family; (4) he had academic problems; (5) he obtained a GED in prison; (6) he would make a good adjustment to prison; (7) he had financial stress at the time of the crime; and (8) he had some capacity for rehabilitation. Each was given "little weight" except for the factor that Hayward could have gotten a life sentence, which was given "very little weight," and the factor that he grew up without a father, which was given "some weight." The trial court, in the sentencing order, summarized its reasoning in sentencing Hayward to death as follows:

Not only does this Court find that the totality of the aggravating circumstances in this case far outweigh the mitigating circumstances, but the Court expressly finds that each statutory aggravator, when considered alone outweighs the totality of the mitigating circumstances.

The facts supporting the Defendant's previous conviction for Second Degree Murder and Armed Robberies, which formed the basis of the first statutory aggravating circumstance are compelling. When compared to the facts and circumstances of the murder and robbery in this case, they are alarming. The Defendant had been released from the Department of Corrections eighty-seven (87) days prior to committing another murder and robbery in which the life of another innocent human being was senselessly ended. It is difficult to imagine how the Defendant could have

robbed and killed a person in 1988, served 16 years in prison for those crimes with more than enough time to contemplate the horrific, irreversible and unforgivable consequences of his actions, yet within ninety days of release from prison, commit the same crimes resulting in the same horrific, irreversible and unforgivable consequences.

Hayward v. State, 24 So.3d 17, 24-28 (Fla. 2009).

United States Supreme Court Certiorari - Following the affirmance of the conviction and sentence by the Florida Supreme Court, Hayward sought certiorari review raised four questions.² On April 26, 2010, the United States Supreme Court denied certiorari. *Hayward v. Florida*, 130 S.Ct. 2385 (2010).

State Postconviction - Following public records litigation, on or about April 21, 2011, Hayward filed his postconviction relief motion pursuant to Rule 3.851 Fla.R.Crim.P. (PCR.4 557 - R.5 678), and subsequently was given leave to file an amended motion based on changes in the State's lethal injection

² (1) Did the police restrain Hayward's liberty, and did he acquiesce to the apparent authority of the police under *Brendlin v. California*, 551 U.S. 249 (2007) when at least 20 officers came to his rooming house and he was confronted by several officers who questioned him and asked him to show his hand in the hallway as he came out of the bathroom? (2) Did the state supreme court err in using a Fifth Amendment analysis to create a spontaneous statement exception to the exclusionary rule of *Wong Sun v U.S.*, 371 U.S. 471 (1963)? (3) Did the state supreme court err in holding that Hayward's station house statement was admissible under the Fourth and Fourteenth Amendments because it was made after he had been advised of, and waived, his Fifth Amendment right to remain silent and to counsel? (4) Did the state supreme court err in finding that the police had probable cause to detain Hayward in that the court relied on evidence obtained after Hayward was detained?

protocols. It was agreed that that the State would respond only to the amended motion. On August 16, 2011, Hayward filed his amended motion (PCR.6 842 - PCR.7 963) and on October 19, 2011, the State responded. (PCR.8 1132 - PCR.9 1419).

The Case Management Conference was held on December 19, 2011 (PCR.20 236-358) after which, on January 3, 2012, the trial court ordered an evidentiary hearing on: Claim IV(B), ineffective assistance of guilt phase counsel "for the limited purpose" related to "the law enforcement presence at the rooming house, and the written transport handcuff policy including related *Brady* or *Giglio* claims"; Claim IC(C)(ii) "as to witness Craig Reynolds and suspect George Brooks only;" Claim IV(C)(iii); and Ground V(A) and (B) - ineffective assistance of penalty phase counsel. (PCR.10 1444-46).

The evidentiary hearing was held February 27 through March 1, 2012 and on March 28, 2012. During the hearing, Hayward presented: trial counsel Jerome Stone ("Stone") and Robert Udell ("Udell"); family members Barbara Johnson; Debra Fleury; Pamela Clark; Derrick Green; Terrance Hayward; Dr. Michael Riordan (trial mental health expert); Venus Oleyourrk (Udell's private investigator); social worker Cecelia Alfonso; and Behavioral Neurologist Dr. Thomas Hyde. The State called: Fort Pierce Police Captain Greg Kirk; State Attorney's Investigator Ed Arens, Jr.; and Dr. Michael Riordan. The parties submitted

written closing arguments (PCR.14 2069-2107; PCR.15 2108-2222).

The record reflects that the instant murder occurred in 2005 and went to trial in 2007 with Robert Udell ("Udell") and Jerome Stone ("Stone") defending Hayward. At the evidentiary hearing, Stone testified he had been a practicing criminal defense counsel since 1995 having prosecuted all manner of criminal cases, with the exception of capital murder cases, during his more than four years for the State Attorney's Office in the 19th Circuit. After leaving the State Attorney's Office, Stone attended the "Life Over Death" and "Death Is Different" seminars. On July 19, 2005, almost two years before trial commenced, Stone was appointed to Hayward's case. Although it was his first death penalty case, Stone asked to be appointed as Hayward's second chair counsel along with Robert Udell who had been practicing criminal defense since his 1981 admission to the Illinois bar. (PCR.21 391-94, 429, 435; PCR.22 496-97). Udell had defended approximately 10 capital cases, seven of which went to a penalty phase, and like Stone, had taken the Life Over Death seminar. (PCR.22 499-500). According to Stone, Hayward's case was not a complicated one. There were approximately 300 pages in discovery (PCR.21 429, 435). Udell and Stone split the work on the case; primarily, Udell handled the pre-trial motions and penalty phase and Stone did the guilt phase. However, investigations to find guilt phase witnesses were conducted and

Udell and Stone were involved in all aspects of the case. Stone examined Officer Flaherty at the suppression hearing and Roosevelt McDowell, Dorothy Smith, and Edith Hepburn at trial. (PCR.21 397, 436; PCR.22 503, 505,06).

With respect to the motion to suppress, the defense received the facts from the discovery materials and talking to witnesses. Also, a private investigator, Venus Oleyourrk, was utilized for Hayward's case. Udell testified that he had visited the rooming house looking for witnesses, but did not find anyone helpful for suppression motion; no one saw Hayward's arrest. (PCR.22 534-35, 537). Udell and Stone conversed about the discovery (PCR.21 398-99, 404-05). The defense's goal for the motion to suppress was to exclude as many of Hayward's statements as possible and toward this, the defense concentrated on Hayward's handcuffing and the police show of force. The defense challenged Hayward's statements given to the police at the rooming house (PCR.21 407-09, 440-41). It was Stone's testimony that the defense wanted to suppress as much as it could of Hayward's statements because the more Hayward spoke the more he compounded the problem he faced - the more he implicated himself. (PCR.21 441-42).

Stone recalled that there were a "handful" of officers present at Hayward's rooming house. The officers and discovery materials revealed there were five officers inside and outside

the rooming house. Stone had no reason to disbelieve the officers' testimony regarding who was at the rooming house. Udell agreed that there was nothing in the record indicating 20 officers were present at the rooming house. In fact, based on Stone's years of knowledge regarding the Fort Pierce police, it would have taken the entire force to be on duty that day for the police to have 20 officers present at the rooming house. The officers were dressed in "typical" police garb, with a holstered sidearm; one officer had a shotgun. (ROA.1 46, 52-53; PCR.21 408-09, 444-46; PCR.22 533). The theory the defense pursued in seeking suppression of Hayward's rooming house statements was that the police used a show of force and that there was non-consensual contact with the police. (PCR.21 441-42) The focus was on the officers' actions and the display of a shotgun, not the number of officers present at the residence. (PCR.21 444-47)

From Stone's experience in dealing with the police during his days as a prosecutor and defense counsel, he recalled that the Fort Pierce police officers, for officer safety, cuff anyone who that transport and that handcuffed person would ride in the back seat and that the policy "makes sense." (PCR.21 409-10). No efforts were undertaken by either Stone or Udell to obtain the Fort Pierce Police Department written policy on handcuffing, nor had Stone read that policy. However, according to Stone, whether or not the Fort Pierce Police have a written policy on

cuffing persons they transport would have made no difference in a Fourth Amendment context as the focus there is on the totality of the circumstances. Further, Stone noted that Hayward had made multiple statements. (PCR.21 446-48, 465-66; PCR.22 528).

Hayward's multiple statements limited the defense that could be pursued. According to Stone, if the defense did not go with the most plausible statement Hayward made to the police, there would be no defense. Stone needed some explanation for what Hayward had said to the police and would account for the evidence, especially given that Hayward's blood was at the scene. The defense strategy was to concede to as much of the State's points to maintain credibility and reduce the number of conflicts between Hayward's account and the evidence. Hayward's statements limited the defense which could be used. The theory Hayward shot himself and left his blood at the scene was not an unreasonable explanation as to how his DNA was found at the crime scene. (PCR.21 458-62). Stone explained: "so conceding some things with what we thought was a reasonable explanation would help us, at least give us a chance." This strategy was also followed with respect to some of the victim's statements which the defense did not contest in the suppression hearing. (PCR.21 462-63). As a result, the defense chose not to object to the victim's statement that he had shot at his assailant, but was unsure if he hit him. This was also based on the defense

assessment that the victim's statement did not hurt the defense.
(PCR.21 463)

Stone explained that the defense strategy was circumscribed by Hayward's multiple statements including that Hayward had shot himself when picking up a gun at the scene. (PCR.21 414) While Stone does not recall trying to contact Craig Reynolds ("Reynolds"), he had discovery on Reynolds and knew he had been sitting outside at the time of the shooting and had reported hearing one gunshot from a larger caliber weapon followed by shots from a smaller caliber gun. (PCR.21 413-16, 447-48). Also important to Stone was the fact that Hayward testified at trial and agreed with McDowell's report that the smaller caliber shots were fired before the larger caliber shot was fired. (PCR.21 447-48). Stone recognized that Hayward's testimony contradicted Reynolds' statement, and in his professional opinion, he would not want to put on a witness, i.e., Reynolds, to contradict Hayward's testimony. Such a conflict would undercut Hayward's credibility with the jury. (PCR.21 448-49)

With respect to George Brooks ("Brooks"), Stone recalled that Brooks was an initial suspect based on an anonymous 911 call. Stone did not personally meet with Brooks and did not know if Udell made contact with Brooks or Brooks' girlfriend at the time. (PCR.21 416-18, 449-51) At trial, through Detective Coleman, the prosecutor, Tom Bakkadah, presented the fact that

Brooks was an initial person of interest, but that he had been eliminated as a suspect. (PCR.21 449-51). This was confirmed by Udell. (PCR.22 538-40). Under the rules of evidence, neither Stone nor Udell saw a way to have the anonymous tip 911 tape entered into evidence. Stone thought he could do no more than what the prosecutor had done already for the defense. (PCR.21 451; PCR.22 540-41).

Fort Pierce Police Department Captain Greg Kirk ("Kirk"), with over 30 years with the Department, testified that the Department has an unwritten policy/practice for transporting non-prisoners in police cars. Kirk is an adjunct instructor at Indian River State College and for the past 20 years has trained Fort Pierce police officers on transportation issues. In fact, Kirk trained Officer Mace, the officer who transported Hayward to the police station. (PCR.26 1090-92). Kirk explained that he trains his officers that they have discretion in deciding when to handcuff a non-prisoner, but for officer safety reasons, suspects are usually handcuffed. (PCR.26 1092-93). As part of the training program, Kirk teaches his officers to inform those they are transporting why they are being handcuffed for transportation. (PCR.26 1094).

Hayward presented the testimony of his mother Barbara Johnson, his sister Debra Fleury, brothers Derrick Green and Terrance Hayward, and the mother of his child, Pamela Clark in

support of his claim penalty phase counsel rendered ineffective assistance. He also presented the testimony of a social worker and mitigation specialist from New York, Cecelia Alfonso, and a behavioral neurologist, Dr. Thomas Hyde.

Witnesses Barbara Johnson, Debra Fleury, and Terrance Hayward testified in the penalty phase. Their testimony at the evidentiary hearing, along with the testimony of Cecelia Alfonso, repeated information provided at Hayward's trial and the second *Spencer* hearing. The lay witnesses reported that Hayward was one of six children and he was the product of an affair his mother, Barbara Johnson, had with Tony Johnson while married to her first husband. (PCR.23 624, 672) Tony Johnson was an alcoholic who drank every day. (PCR.23 674) Hayward's step-father worked out of town returning home on the weekends. Because his step-father worked away from home and his mother worked two jobs, the older children had to care for the Hayward. (PCR.23 663-64). Hayward's sister, Theresa Williams, would discipline him when he misbehaved. (PCR.24 768-70) Hayward's siblings had legal and substance abuse problems and his brother, Tony Johnson, had anger issues. (PCR.24 777, 802-03) Hayward's siblings beat him up. (PCR.24 768-70, 781-82, 884-86; PCR.26 1071). Hayward did not do well in school, and would get into trouble. His mother tried to get help for Hayward but was unsuccessful. (PCR.23 678-80)

Barbara Johnson, Debra Fleury, Derrick Green, and Terrance Hayward all testified that when the stepfather, Harold Hayward, would come home on the weekends, Barbara Johnson would inform him of the misdeeds committed by the children during the week and he would whip them. (PCR.23 665; PCR.24 756, 866-67; PCR.26 1055) Debra Fleury and Derrick Green claimed that Barbara Johnson was abusive towards her son. (PCR.24 EH. 4 401, 4 524) Barbara Johnson and Hayward's siblings also testified that their mother was a heavy drinker. (PCR.23 675; PCR.24 765, 871; PCR.26 1059) The witnesses described how Barbara Johnson and Tony Johnson would fight with each other. Hayward's older brothers would mimic wrestling moves they saw on television on Hayward when he was young. (PCR.23 676; PCR.24 777, 781-82, 884; PCR.26 881, 1067, 1071)

Following the testimony of Hayward's mother and siblings, the defense presented the testimony of Dr. Thomas Hyde in support of the claim penalty phase counsel was ineffective for failing to discover mental health mitigation. Dr. Hyde is a behavioral neurologist specializing in the study of schizophrenia. (PCR.28 1325, 1350-52) The doctor opined that Hayward suffered from "depression not otherwise specified" (PCR.28 1347) While Dr. Hyde believed that Hayward suffered from attention deficit hyperactivity disorder as a child, he could not make that diagnosis once Hayward reached adulthood. (PCR.28

1348) Dr. Hyde also opined that Hayward had a right temporal lobe dysfunction of unknown etiology. However, Dr. Hyde opined that he found no history of any head injuries. (PCR.28 1345-46) Testifying in general terms, Dr. Hyde explained that persons with right frontal lobe dysfunction exhibit impulsive behavior, do not think about the long-term consequences of their actions, have impaired reasoning, have difficulty maintaining long-term relationships and employment, and may be susceptible to mood disorders. (PCR.28 1346-47)

Hayward's trial attorneys, Jerome Stone and Robert Udell, both testified at the evidentiary hearing. Stone testified that the penalty phase was primarily Udell's part of the case. (PCR.21 419) Udell testified that at the time he represented Hayward he was an experienced death penalty litigator who had been practicing law for 25 years, was licensed in three states, and had tried approximately 10 death penalty cases in Florida. (PCR.22 496-500) The defense theory of mitigation was to emphasize that Hayward had siblings who were successful and productive members of the community and that Hayward's history showed that he was a model prisoner and would do well in confinement. The defense wanted to avoid testimony by members of Hayward's family who were convicted felons. (PCR.21 419-20) Counsel made a strategic decision to present only the members of the Hayward's family who held productive, respectable jobs and

did not have criminal histories. Stone explained that by showing the jury that Hayward had family members "cut from the same cloth" who were successful, he and Udell hoped to convince the jury that Hayward did not need to be sentenced to death but could be sentenced to life and would survive in prison without creating any problems. (PCR.21 452) Because Hayward had been convicted previously of murder, Stone and Udell decided that putting before the jury anyone with a criminal background would prejudice their client and harm their efforts to win a life sentence. (PCR.21 453) They chose to use as witnesses Terrance Hayward because of his military background and Debra Fleury because of her employment as a deputy sheriff. (PCR.21 452-53).

In leading up to the penalty phase, Stone was the attorney who consulted with Hayward himself. He recalled speaking to the his client about his background; Stone would meet Hayward in the jail, sit with him and ask Hayward to give his life history "from start to finish." (PCR.21 454-55) Stone testified that he reviewed the facts of Hayward's prior murder conviction, DOC records, school records, and psychological test records, and spoke to Hayward about these materials. (PCR.21 455-56) He also specifically asked Hayward about whether he had suffered any physical, emotional, or sexual abuse. Hayward never told him that he had suffered any abuse. (PCR.21 456-57).

Robert Udell testified that he took the lead role during

the penalty phase of the trial. (PCR.22 503) To prepare for it he would have reviewed all discovery materials, medical records, if any, school records, criminal history records, social history records, and psychological history records. (PCR.2 505, 508) He had an independent recollection of meeting with Hayward's family members on one occasion and recalled numerous phone calls with female members of Hayward's family. (PCR.22 509-10) He recalled ten to fifteen phone conferences with Hayward's mother and sister, but after refreshing his memory with his billing records, recalled approximately forty-one phone calls with them. (PCR.22 543, 573-82). From his talks with Hayward's family members, Udell was aware that the Hayward family was dysfunctional, but not the worst he had heard about. (PCR.22 511) He knew that the family was poor; Tony Johnson was an alcoholic; Hayward was disciplined, but not beaten; Hayward ran the streets as a young man, was a good brother, and was loved by his family. (PCR.22 509-10)

After speaking with Hayward's family, Udell made a strategic decision not to present testimony from members of the family who were convicted felons because he wanted to present witnesses who he felt would make a good impression on the jury. (PCR.22 583-84) He also made a strategic decision not to present any mental health mitigation because there was none to present; there was no evidence of a psychological disorder in Hayward's

record. (PCR.22 547) Udell did not want Dr. Riordan to perform personality testing because there were signs that Hayward could be diagnosed with anti-social personality disorder and he did not believe such a diagnosis was mitigating. (PCR.22 546-47)

Regarding the testimony presented at the second Spencer hearing, Udell testified that the family approached him after trial and told him that they had not been forthcoming with their testimony before the jury and that Harold Hayward had inflicted egregious beatings on Hayward when he was young. (EH.2 185) They told him that they had not revealed this information before trial because they were embarrassed by it. (PC.22 544) Udell was shocked by this information because he had discussed this issue with them before trial and they had described it as discipline but not as something severe or significant. (PCR.22 544-45).

Dr. Riordan's testimony showed the weaknesses in Dr. Hyde's opinions. He testified that there is a twenty-one test battery called the Halsted-Reitan specifically designed for detecting neuropsychological impairment. (PCR 1413-14) That test was never given to Hayward. Dr. Riordan disagreed with Dr. Hyde's selective incorporation of portions of tests to bolster his opinion of frontal lobe dysfunction because the tests were used out of context. (PCR.28 1417-18, 1430) Riordan explained that in the field of neuropsychological testing, any abnormalities discovered during neurological testing should have been followed

up by neuropsychological testing with psychometric norming. (PCR.28 1436) Dr. Riordan explained that psychometric norming is a process whereby a person's performance on a test is compared to others of like age, sex, education, and race. (PCR.28 1436) Dr. Riordan also testified that in addition to reviewing the test and examination given to Hayward by Dr. Hyde, he also reviewed the results of the RBANS test given to Hayward by one of his experts who did not testify, Dr. Harvey. (PCR.28 1407-10) The RBANS is a neuropsychological test. (PCR.28 1433) Dr. Hyde was never provided the results of Hayward's RBANS to review. (PCR.28 1389) After reviewing all of the materials relied upon by Dr. Hyde and the RBANS test administered by Dr. Harvey, Dr. Riordan concluded that there were no indications of any frontal lobe dysfunction. (PCR.28 1438)

On June 14, 2012, the trial court denied postconviction relief, and this appeal followed.³ (PCR.15 2223-46).

³ Hayward also has filed a Petition for Writ of Habeas Corpus under case number SC13-1787. The State's response is due on November 26, 2013 also with its Answer Brief in the instant appeal.

SUMMARY OF THE ARGUMENT

Issue I - Penalty phase counsel conducted a profession mitigation investigation and made reasonable decision as a result of his findings. Counsel shall not be deemed deficient for the actions he took where lay witnesses were not forthcoming and changed their testimony during the collateral litigation. Nonetheless, Hayward has failed to show that any new mental health information or history of abuse/neglect would undermine confident in the sentencing. Hence, Hayward has failed to prove both deficiency and prejudice under Strickland and relief was denied properly.

Issue II - Hayward has failed to carry his burden under *Strickland* with respect to counsel's failure to challenge Officer Mace on whether the Fort Pierce Police had a written policy on handcuffing passengers of police cruisers for officer safety. Hayward has not shown that had counsel impeached Ofc. Mace with the fact that the policy was not written, but part of officer trialing, that the result of the suppression hearing would have been different. Likewise, neither Hayward's *Brady* nor *Giglio* claim requires relief as prejudice was not proven.

Issue III - The record supports the summary denial of the claims of ineffective assistance of counsel related at suppression hearing and trial as the claims were either legally insufficient as pled, procedurally barred, or both deficiency

and prejudice could not be shown given the result of the direct appeal. Relief was denied properly and should be affirmed.

Issue IV - Hayward received a full and fair postconviction hearing; the trial court's evidentiary and legal rulings were proper.

ARGUMENT

ISSUE I

THE TRIAL COURT PROPERLY DENIED HAYWARD'S CLAIM OF INEFFECTIVE ASSISTANCE OF PENALTY PHASE COUNSEL FOLLOWING AN EVIDENTIARY HEARING (restated)

Overview - Hayward asserts that the trial court erred in denying his claim of ineffective assistance of penalty phase counsel following an evidentiary hearing. He claims counsel was deficient by failing: (1) to timely obtain a qualified mental health expert; to provide the mental health expert with necessary information and access to Hayward; and (3) to investigate the lay witnesses adequately. Hayward maintains that these alleged failings resulted in prejudice under *Strickland v. Washington*, 466 U.S. 668 (1994) entitling him to a new penalty phase. The trial court's rejection of this claim was proper under *Strickland* and the trial court's factual findings are supported by competent substantial evidence. Hayward did not carry his burden under *Strickland*; his claim of ineffective assistance of counsel was not proven. This Court should affirm.

Standard of Review - This Court provided in *Rimmer v. State*, 59 So.2d 763, 775 (Fla. 2010), that:

Because an analysis of a claim of ineffective assistance of counsel presents mixed questions of law and fact, this Court employs a mixed standard of review, deferring to the circuit court's factual findings that are supported by competent, substantial

evidence, but reviewing the court's legal conclusions de novo. See *Sochor v. State*, 883 So.2d 766, 771-72 (Fla. 2004).

See *Pagan v. State*, 29 So.3d 938, 949 (Fla. 2009); *Arbelaez v. State*, 889 So.2d 25, 32 (Fla. 2005); *Davis v. State*, 875 So.2d 359 (Fla. 2003); *Freeman v. State*, 858 So.2d 319 (Fla. 2003).

To prevail on an ineffectiveness claim,⁴ the defendant must show (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. See *Valle v. State*, 778 So.2d 960, 965 (Fla. 2001). At all times, the defendant bears the burden of proving both prongs of *Strickland*. *Gamble v. State*, 877 So.2d 706, 711 (Fla. 2004).

⁴ 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." 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. 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). "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).

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

... 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.... 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 preliminary-non-exhaustive) 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."). "When counsel focuses on some issues to the exclusion of others, there is a strong presumption that he did so for tactical reasons rather than through sheer neglect. See *Strickland*, 466 U.S., at 690, 104 S.Ct. 2052 (counsel is "strongly presumed" to make decisions in the exercise of professional judgment)." *Yarborough v. Gentry*, 540 U.S. 1, 8 (2003).

"In light of 'the variety of circumstances faced by defense counsel [and] the range of legitimate decisions regarding how best to represent a criminal defendant,' the performance inquiry necessarily turns on 'whether counsel's assistance was reasonable considering all the circumstances.' *Id.*, at 688-689, 104 S.Ct. 2052. At all points, '[j]udicial scrutiny of counsel's performance must be highly deferential.' *Id.*, at 689, 104 S.Ct. 2052. *Wong v. Belmontes*, 130 S.Ct. 383, 384-85 (2009). As noted in *Harrington v. Richter*, 131 S.Ct. 770, 787-88 (2011):

With respect to prejudice, a challenger must demonstrate "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." ... It is not enough "to show that the errors had some conceivable effect on the outcome of the proceeding." ... Counsel's errors must be "so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." ...

... Even under *de novo* review, the standard for judging counsel's representation is a most deferential one. Unlike a later reviewing court, the attorney observed the relevant proceedings, knew of materials outside the record, and interacted with the client, with opposing counsel, and with the judge. It is "all too tempting" to "second-guess counsel's assistance after conviction or adverse sentence." ... The question is whether an attorney's representation amounted to incompetence under "prevailing professional norms," not whether it deviated from best practices or most common custom.

Richter, 131 S.Ct. at 787-88 (citation omitted).

Ineffectiveness of penalty phase counsel claims alleging counsel failed to conduct a proper mitigation investigation and

failed to secure a proper mental health evaluation by failing to provide pertinent materials to the mental health expert are governed by *Strickland* and its progeny as well as the principals announced in *Ake v. Oklahoma*, 470 U.S. 68 (1985). To prove a claim under *Ake*, the defendant must establish that the psychological examination was "grossly insufficient" and that the expert "ignore[d] clear indications of either mental retardation or organic brain damage" before a new sentencing hearing is required. *State v. Sireci*, 502 So. 2d 1221, 1224 (Fla. 1987). In *Windom v. State*, 886 So.2d 915, 928 (Fla. 2004), this Court denied an *Ake* claim because the defendant "failed to demonstrate that his defense was 'devastated by the absence of a psychiatric examination and testimony [and that] with such assistance, the defendant might have [had] a reasonable chance of success.'" See *Wyatt v. State*, 71 So.3d 86 (Fla. 2011)

Penalty Phase Counsel Investigated Mitigation Case Properly

- Hayward asserts that counsel failed: (1) to obtain the assistance of a qualified mental health expert in a timely fashion; (2) to provide the expert with necessary information and access to Hayward; and to investigate the lay witnesses adequately. (IB 41). Following an evidentiary hearing, the trial court determined that Hayward had not carried his burden under *Strickland* as he failed to show that Dr. Riordan,

Hayward's expert, was not provided records or time to conduct his evaluation. Also, no prejudice was shown as Hayward's postconviction mental health expert, Dr. Hyde, reviewed the same materials as Dr. Riordan and failed to quantify or link the mental health findings to Hayward's behavior. With respect to the investigation of lay witnesses, the trial court again rejected that claim of ineffective assistance. This rejection was based in part on the finding a defense witness was not credible, much of the evidence was presented at trial, and the newly evolved evidence was not prejudicial given the information revealed, withheld, or downplayed by Hayward and his family during counsel's investigation. These findings are supported by competent, substantial evidence and the legal conclusions comport with *Strickland* and its progeny. Relief was denied properly and that ruling should be affirmed.

In resolving the ineffectiveness claims challenging the penalty phase preparation the trial court found:

V.A.i. Counsel was ineffective for failing to investigate and prepare a mental health mitigation defense.

Hayward claims that counsel was ineffective for failing to investigate and prepare a mental health mitigation defense. At the evidentiary hearing, Hayward did not produce any records that counsel failed to provide to forensic psychologist Dr. Michael Riordan at trial, and failed to show that Dr. Riordan had insufficient time to review the records or perform a thorough mental health evaluation. (EH 622-23.) At trial, Dr. Riordan found no basis to conduct

neuropsychological testing; but recognized traits of anti-social personality disorder that could be confirmed or denied by further personality testing that was not conducted. (EH 639-646.) Confirmation of this diagnosis would not be mitigating. (EH 642-646, 664.)

In postconviction, Hayward did not offer any evidence undermining the adequacy of Dr. Riordan's examination. Hayward presented the testimony of behavioral neurologist Dr. Thomas Hyde. Dr. Hyde did not administer any psychological tests. (EH 989, 1030.) Dr. Hyde relied upon the same records as Dr. Riordan and came to a different conclusion regarding neuropsychological deficits. (EH 973.) Dr. Hyde found no history of head injuries. (EH 986-987.) After performing a mini mental state exam, Dr. Hyde opined that Hayward had soft signs of frontal lobe dysfunction, depression not otherwise specified, and childhood ADHD. (EH 980-981, 988-989.) However, no evidence was presented describing the degree of neurological impairment or specifically linking the diagnoses to Hayward's adult functioning and behavior. And in rebuttal, Dr. Riordan reviewed the results of Dr. Hyde's examination and concluded that Hayward did not exhibit any signs of frontal lobe dysfunction. (EH 1056, 1079.)

Consequently, the court finds that Hayward was merely able to procure a new mental health expert with a different opinion but did not prove that the initial mental health examination was inadequate. See *Jones v. State*, 732 So. 2d 313, 320 (Fla. 1999). Thus, Hayward is not entitled to relief.

V.A.ii. Counsel was ineffective for failing to investigate mitigating evidence of childhood abuse and neglect; and for failing prepare lay witnesses.

Hayward claims that counsel was ineffective for failing to investigate mitigating evidence of his childhood related to the nature, extent, and duration of family member abuse of Hayward; family household violence; and parental neglect. Hayward contends that family members did not disclose this evidence at the time of trial because counsel did not ask family members about the things that happened to Hayward during his childhood; or as pled in the postconviction motion, family members lied at trial because they were

embarrassed to disclose the abuse and neglect. (See amended motion page 56.) (EH 351-353, 432-435, 910.)

The crux of Hayward's claim is counsel was deficient in conducting a single group family interview of less than two hours duration three to four weeks before trial that did not include all family members. (EH 349, 429, 529, 715-716.) And counsel did not explain why he wanted family members to testify and did not ask about things that happened to Hayward during his childhood. (EH 351-353, 432-435, 446-447.)

In support of this claim, at the evidentiary hearing Hayward presented the testimony of: his mother - Barbara Johnson; his siblings - Debra Fleury, Derrick Green, and Terrance Hayward; and forensic social worker and mitigation specialist Cecilia Alfonso. In analysis of this claim, the court finds Alfonso's testimony not credible because at the evidentiary hearing she first testified to details of family abuse that she had failed to reveal during her deposition despite specific inquiry, she offered no explanation for her failure to disclose information at deposition, she refused to admit her advocacy for the defense but later recanted, and she inserted her irrelevant opinions and had to be cautioned by the court. (EH 860-861, 912-913, 923-929.) Consequently, for this claim the court does not rely upon Alfonso's testimony.

At the evidentiary hearing, it was established that Hayward's stepfather, mother, or biological father utilized weekly or frequent corporal punishment to discipline Hayward and his siblings. (EH 307-308, 315-317, 397, 506-507.) Hayward was punished from the time he was two to four years old. (EH 308, 398, 524.) Punishment consisted of whipping or beating with a hand, switch, belt, extension cord, water hose, or piece of tire that sometimes caused welts, open sores, torn skin, bleeding, or bruising. (EH 307-308, 374, 397-398, 507, 698.) Hayward's mother testified that the purpose of the whipping was not to be mean or abusive but was for discipline. (EH 374-377.) Hayward's sister stated that she and her siblings thought that this was the way it was supposed to be, but now viewed from an adult perspective the punishment was abuse. (EH 449.)

In addition, evidentiary hearing testimony showed that Hayward did not have adult supervision while his

parents were at work. In his parents' absence Hayward was cared for by his older siblings who would punch, hit, slap, throw, body slam, and wrestle Hayward to boss him around or toughen him up. (EH 409-411, 506, 528, 712-714.) At one time Hayward's mother became aware that his older brothers were beating him; but it is unclear when she became aware and whether she took any action to prevent the beatings. (EH 321.) However, Hayward's brothers didn't see it as abuse; they saw it as just wrestling with Hayward or toughening him up. (EH 534, 712-714.)

Other mitigating circumstances presented at the evidentiary hearing included: Hayward didn't know Tony Johnson was his biological father, Hayward started going to the citrus grove as a toddler and during his childhood was expected to pick fruit, Hayward's parents drank heavily and his biological father was an alcoholic, Hayward's parents argued frequently and Hayward observed their physical violence, Hayward's mother stabbed his father, Hayward didn't do well in school and his mother was unable to help him, and sometimes there was not enough food to eat so the family ate expired food. (EH 307, 310-311, 318, 320, 373, 416, 419, 717.)

The court finds that much of this childhood mitigating evidence was presented at trial however the details presented at the evidentiary hearing amplify the nature, extent, and duration of the corporal punishment and parental neglect. Yet, the weight of this evidence is undercut by: the evolution of detail through the penalty phase, two Spencer hearings, and the postconviction evidentiary hearing; the sworn postconviction motion asserting that family members lied at trial because they were embarrassed; the inconsistent testimony that family members were not asked about the abuse and neglect; the earlier perception of family members that the corporal punishment was normal discipline; the failure of Hayward to report physical abuse to counsel; and the testimony of Hayward's trial and postconviction mental health experts that Hayward did not disclose any physical abuse during mental health interviews. (EH 659-660, 1040-1041, 1046-1047.)

Nonetheless, the court is reasonably convinced that there are mitigating circumstances of childhood abuse and parental neglect that were not presented at trial. But, the court cannot find counsel deficient

given Hayward's failure to report any abuse, and given the earlier family member perceptions that they were merely disciplining Hayward or toughening him up. And even if counsel was deficient, there is no evidence to explain how the unperceived and unreported childhood abuse and parental neglect negatively impacted Hayward's adult life. Accordingly, the court assigns little weight to the totality of the mitigating evidence of childhood abuse and parental neglect presented at the evidentiary hearing. Consequently, there is no prejudice to the outcome of the penalty phase because as in the sentencing order, the court expressly finds that these mitigating circumstances added to the totality of the mitigating circumstances found at trial are outweighed by each statutory aggravator.

(PCR. 15 2242-46).

As the trial court concluded, Hayward failed to establish that his trial attorneys were ineffective during the penalty phase of his trial. His claims regarding mental health mitigation fail because he did not prove that he received an inadequate mental health examination by Dr. Michael Riordan. His claims regarding non-mental health mitigation fail because his attorneys cannot be faulted for failing to discover information which was intentionally withheld from them by Hayward and his family.

Turning first to Hayward's claims that his trial attorneys were deficient in securing him an adequate mental health evaluation, he has failed to prove that his attorney's actions were deficient. As the trial court found, Hayward failed to produce any evidence that his counsel failed to provide records

to Dr. Riordan or that Dr. Riordan did not have time to review them or perform a thorough evaluation. The evidence established that Udell provided hundreds of pages of records to Dr. Riordan for his review. (Defense Exhibits 1, 2) Hayward did not offer any records which penalty phase counsel had not provided Dr. Riordan. Furthermore, Dr. Riordan testified that although he had to work on a weekend, he had an adequate amount of time to conduct his review and do what he needed to do. (PCR.25 991-92) Significantly, Dr. Riordan found no basis to conduct neuropsychological testing of Hayward. Although he thought further personality testing was advisable, he did not conduct any. (PCR.25 998-1001) The doctor recognized that Hayward had traits of anti-social personality disorder, which would not be mitigating, but thought that further personality testing would confirm or deny that. (PCR.25 1001-05, 1023) These record facts support the findings of the trial court.

Hayward's presentation of a new mental health expert, neurologist, Thomas Hyde, did nothing to support the claim that Hayward's penalty phase counsel were deficient in retaining Dr. Riordan. Notably, Hayward offered no testimony regarding the adequacy of Dr. Riordan's examination. In fact, Dr. Hyde clearly stated that he was not a psychologist, did not administer psychological tests, and would not make a diagnosis within the purview of psychologists. (EH.8 989, 1030). Such supports the

trial court's conclusion in that respect. (PCR.15 2242-43). Also, Dr. Hyde relied upon the same records as did Dr. Riordan, but came to a different conclusion regarding neuropsychological deficits. (PCR.28 1332) As recognized by the trial court, this Court has long held that neither counsel's representation nor the trial expert's opinion or examination is rendered deficient merely because the defendant is able to find a new doctor years later willing to give a more favorable opinion. See *Asay v. State*, 769 So.2d 974 (Fla. 2000) (reasoning first expert's evaluation is not less competent merely upon the production of conflicting evaluation by another expert); *Jones v. State*, 732 So. 2d 313, 320 (Fla. 1999) (reasoning mental health expert's evaluation is not rendered inadequate or incompetent merely because the defendant had found an expert who would provide testimony conflicting with the original expert); *Rose v. State*, 617 So.2d 291, 293-94 (Fla. 1993) (finding counsel was not ineffective in the penalty phase where counsel decided to forego additional mental health evidence when expert found defendant suffered from antisocial personality disorder and ruled out the possibility of an organic brain disorder); *Correll v. State*, 558 So. 2d 442, 426 (Fla. 1990) (reasoning mental health examination is not inadequate simply because defendant is able to find experts later to testify favorably based on similar evidence).

Such is the case with the testimony of Dr. Hyde. Dr. Hyde's

opinion of frontal lobe dysfunction, depression not otherwise specified, and childhood ADHD are simply the opinions of a more favorable expert. Hayward offered absolutely no testimony to establish that the actions of counsel or Dr. Riordan led to a missed diagnosis of one of these conditions. Dr. Riordan reviewed the same historical materials and new examination and the "mini-mental state examination" relied upon by Dr. Hyde and concluded that Hayward did not exhibit any signs of frontal lobe dysfunction. (PCR.25 1415, 1438) This evidentiary hearing testimony established that Hayward merely was able to procure a new expert with a different opinion and nothing more. This is woefully insufficient to carry Hayward's burden under *Strickland*; neither counsel nor Dr. Riordan was so deficient that counsel was not functioning as the counsel guaranteed defendants by the Sixth Amendment. See Wyatt, 71 So.3d at 1110; Wyatt v. State, 78 So.3d 512, 528-33 (Fla. 2011); *Windom*, 886 So.2d at 928.

In the case of *Stewart v. State*, 801 So.2d 59 (Fla. 2001), the death row inmate filed a postconviction motion alleging that his penalty phase counsel was ineffective for failing to investigate and present evidence of alleged childhood abuse at the hands of his stepfather. *Id.* at 67. Stewart's counsel testified at the evidentiary hearing that he personally interviewed family members and spoke to Stewart about his

upbringing, yet neither the family nor Stewart ever mentioned any abuse by his stepfather. *Id.* Stewart had also been examined by a psychiatrist and had never revealed to his own expert any abuse by his stepfather. This Court affirmed the finding that the attorney's actions were reasonable. *Id.* Furthermore, this Court found that Stewart's failure to communicate to counsel or his own expert the existence of any abuse precluded him from claiming that his attorney's failure to pursue such mitigation was unreasonable. *Id.*

Here, the un-rebutted testimony of Jerome Stone ("Stone") established that he met several times with Hayward and asked him specifically if he had ever been abused physically, emotionally, or sexually. Hayward gave his counsel no indication of such abuse. Hayward also failed to reveal any indications of abuse to his own expert, Dr. Riordan. In fact, Dr. Riordan found Hayward to be a good historian because his statements were corroborated by the many records provided to him by trial counsel. (ROA. 2441-2442) At the evidentiary hearing, Dr. Riordan testified that he inquired of Hayward about physical, emotional, or sexual abuse and Hayward replied that he did not suffer any such abuse. (PCR.25 1018-19) Hayward's denial of any physical, emotional, or sexual abuse did not end with his discussions with trial counsel or expert. As late as April, 2011, Hayward denied to his post-conviction expert, Dr. Hyde, that he had suffered any physical

abuse by anyone. (PCR.28 1401-02) The only evidence Hayward offered in support of suffering abuse as a child came during the cross-examination of his post-conviction mitigation expert, Cecelia Alfonso, who the trial court determined was biased and not credible and whose testimony it rejected.⁵ (PCR.15 2243-44) As explained in *Long v. State*, 118 So.3d 798, 804 (Fla. 2013), this Court will not substitute its judgment for that of the trial court's on issues of credibility as the trial court is in a superior position having observed the witness. See *Melendez v. State*, 718 So.2d 746, 747-748 (Fla. 1998) (reiterating appellate court will not substitute its judgment for that of the trial court on questions of fact, witness credibility and weight to be given to the evidence).

⁵ Notably, Alfonso never testified that Hayward claimed any abuse from Harold Hayward, Tony Johnson, or his other siblings. During the evidentiary hearing, however, she revealed that Hayward had told her that his mother abused him as a child. Alfonso had to admit, however, that she failed to reveal this information during her deposition despite being asked to do so. (PCR.27 1282-88) She had no explanation for her failure other than to say, "I'm sorry." (PCR.27 1288) Notwithstanding her apology, her claim that Hayward revealed to her abuse at the hands of his mother is not worthy of belief given her inexplicable omission of this fact from her deposition and the testimony of Hayward's trial attorneys, trial expert, and post-conviction expert. Alfonso's credibility was further impaired by her refusal to acknowledge that a mitigation specialist is an advocate for the defense (EH. 7 912) and her recantation of that assertion a few minutes later. (PCR.27 1271-72) Furthermore, as the trial court found significant, Alfonso had to be cautioned about inserting her irrelevant opinions into the testimony (PCR.27 1219-20) and at one point argued with the trial court's ruling on a relevance objection. (PCR.27 1222)

In addition to the Hayward's repeated failure to inform anyone who asked about whether he had ever been the victim of abuse, the evidence established that the members of his family who so willingly regaled the court with tales of excessive discipline and familial strife at the evidentiary hearing willfully concealed this information, assuming *arguendo* that it was true, from Hayward's penalty phase counsel. Barbara Johnson, Debra Fleury, and Terrance Hayward all testified at the evidentiary hearing that they never testified at trial about any of the abuse or family dysfunction that they detailed during their evidentiary hearing testimony because Udell never asked them about. (PCR.23 710-12; PCR.24 790; PCR.26 1076-77) Their testimony, however, suffered from internal inconsistencies and was flatly contradicted by Udell's testimony and by the trial testimony of Hayward's sister, Theresa Williams.

Hayward's own motion for postconviction relief, which he swore under oath was "true and correct" states that his family members "lied during their penalty phase testimony because they were embarrassed about the things that happened to Mr. Hayward during his childhood." (PCR.6 897) Fleury's testimony at the *Spencer* hearing bore this out. She testified that the family members didn't tell the jury a number of things about Hayward's background because they were embarrassed. (ROA.36 2763) At the evidentiary hearing, however, Fleury's testimony had changed and

her expressed reason for not revealing this information to the jury was because no one ever asked the question. (PCR.24 793 Barbara Johnson and Terrance Hayward echoed this claim. (PCR.23 711; PCR.26 1076-77) Only during Fleury's cross-examination did she concede that her testimony at the evidentiary hearing was inconsistent with her testimony at the trial. After being confronted with the inconsistencies in her testimony, her answers evolved again and she claimed that she had withheld the information from the jury and the court because of a combination of embarrassment and Udell's failure to ask about it. (PCR.24 805-06)

Fleury's testimony was suspect in many other aspects as well. She claimed that she initiated her testimony at the second *Spencer* hearing so that she could tell the judge the real story of Hayward's background. (PCR.24 801-02) She conceded, however, that despite her professed reasons for testifying she still withheld information from the court. (PCR.24 825-26) She acknowledged that she failed to tell the court that Hayward was abused as a child. (PCR.24 808-09) She also admitted that her testimony at the evidentiary hearing about the frequency and severity of her sister Theresa's disciplining of Hayward changed. (PCR.24 821) Perhaps the most telling example of the metamorphosis her testimony underwent between the time of the trial and the evidentiary hearing was her description of Tony

Johnson. At the evidentiary hearing she testified that Johnson was an emotionally abusive monster who threatened to burn down the family home and murder all of the children. (PCR.24 777) She had told the trial judge, however, that Johnson never gave the children any problems. (ROA.36 2765) When confronted, she claimed that threatening to burn down the house and kill her and her siblings was not "giving them problems." (PCR.24 824)

While the trial court found the existence of new childhood mitigation, the weight was discounted due to the above "evolution" of information, the admission by the family that they "lied" previously, Hayward's denial of physical abuse, and the fact Hayward did not disclose the abuse to his experts.⁶

⁶ The testimony of Hayward's other evidentiary hearing witnesses suffered from the infirmities commonly associated with fabricated testimony. Derrick Green, a multiple convicted felon, testified that his mother abused Hayward and that he and his brothers also abused him while mimicking wrestling moves. (PCR.24 884-85, 890) Three weeks before the hearing, however, Green told State Attorney Investigator Ed Arens that Barbara Johnson had not abused Hayward and that Harold Hayward and Tony Johnson were the only persons in the family who had been abusive to the petitioner. (PCR.26 1103-04) When confronted at the evidentiary hearing, Green denied telling Arens that his mother had not abused Hayward and incredibly said that listening to his own voice on the recorded interview would not refresh his memory. (PCR.24 891) He then admitted that he had knowingly lied to Arens because he did not want to be forthcoming with the information. (PCR.24 572) Further evidence of Green's lack of credibility was revealed by Green's assertion to Inv. Arens that the wrestling moves he and his brothers performed on Hayward were not "abuse," abuse, but three short weeks later he had changed his assessment and concluded that the wrestling moves were, in fact, abuse. (PCR.24 893-94).

(PCR.15 2245). Nonetheless, the trial court determined counsel was not deficient again based in part on Hayward's and family members' prior disclosures to counsel. (PCR.15 2245)

This is supported by Udell's testimony that he did inquire of the family about whether Hayward suffered any abuse was corroborated by Fleury's *Spencer* hearing testimony and the trial testimony of Hayward's sister, Theresa Williams. Williams told the jury that neither Barbara Johnson nor Tony Johnson had ever physically, sexually, or emotionally abused Hayward. (ROA.32 2472-2473) Her testimony was in response to a question from Udell, which indicates that he knew the answer before he asked the question. The fact that she denied any abuse also fit within trial counsel's stated theory of mitigation - to present Hayward as an aberration from an otherwise successful family.

Other witnesses also waffled on whether Hayward had suffered any abuse as a child. At the evidentiary hearing, Terrance Hayward, Derrick Green, and Debra Fleury testified that Barbara Johnson had abused the petitioner. Barbara Johnson, however, denied that allegation and testified that she did not beat her children and only whipped them when necessary for being disobedient. (PCR.23 734-35) At trial, both Theresa Williams and Debra Fleury told the jury that Barbara Johnson provided a good home for them and did the best she could. (ROA.32 2472, 2478) This testimony conflicted with the evidentiary hearing testimony. Also, the testimony at the evidentiary hearing regarding Tony Johnson's abusive behavior was contradicted by Derrick Green's testimony. Green testified that Tony Johnson treated the children well. (EH.4 530-531). Such evidence supports the reduced weight assigned to the mitigation claimed and clearly supports the conclusion that counsel was not deficient in failing to uncover that which the family hid of possibly enhanced after Hayward was sentenced to death.

Hayward takes issue with the trial court's crediting of Udell's account. (IB at 46, FN 5). However, the trial court's credibility findings are supported by the evidence, as outlined above. Furthermore, the basis for Udell's disbarment is not relevant, as the trial court concluded. See *Pantoja v. State*, 59 So.3d 1092, 1096 -1097 (Fla. 2011).⁷ Relevancy and admissibility were not established by Hayward as there was neither an allegation Udell engaged in similar practices in this case as had led to his disbarment in another case nor that he had been convicted of a felony. Clearly Hayward's attempt to present bad character evidence was halted properly.

Based upon *Stewart*, Hayward's own denial of abuse to his attorney, his trial expert Dr. Riordan, and his post-conviction

⁷ In *Pantoja v. State*, 59 So.3d 1092, 1096-97 (Fla. 2011) this Court reasoned:

We have held that "evidence of particular acts of ethical misconduct cannot be introduced to impeach the credibility of a witness. The only proper inquiry into a witness's *1097 character for impeachment purposes goes to the witness's reputation for truth and veracity." *Fernandez v. State*, 730 So.2d 277, 282 (Fla. 1999). In so holding, we have explained, "Allowing this testimony would violate sections 90.608, 90.609, and 90.610, Florida Statutes (1993), which prohibit impeachment by reference to specific bad acts other than convictions for felonies or misdemeanors involving dishonesty." *Fernandez*, 730 So.2d at 282-83. In accordance with this, we have repeatedly interpreted section 90.610 to permit impeachment of a witness's credibility only by felony conviction or by a conviction involving a crime of dishonesty or false statement. See *id.* . . .

expert Dr. Hyde precludes him from succeeding on a claim that his attorneys were deficient for failing to uncover his alleged childhood abuse. The intentional withholding of this information from trial counsel by his family members likewise precludes him from relief. Udell's testimony conflicts with the testimony of Hayward's siblings on this issue, however, in finding Udell was not deficient the trial court must make a credibility determination that Udell's account was more credible than the postconviction family witnesses. Moreover, Udell's testimony is corroborated by other evidence in the case, and he had no motive to mislead the court. He no longer practices law and lives in another state. His testimony was simply more credible than the testimony of Barbara Johnson, Terrance Hayward, and Debra Fleury. This is especially so when considering the copious inconsistencies in their testimony with their own prior testimony and the testimony of each other.

As the trial court concluded, Hayward failed to establish that his counsel's strategy during the penalty phase was unreasonable. *Strickland* requires that trial counsel conduct a reasonable investigation into mitigation. *Strickland*, 466 U.S. at 691. Hayward faulted Udell and Stone for not spending enough time preparing for the penalty phase. This Court, however, has held that a finding that defense counsel was prepared for penalty phase does not revolve around the amount of time an

attorney spent on the case or the number of days he spent preparing for it. *Davis v. State*, 928 So.2d 1089, 1105 (Fla. 2005) In *Davis*, the defendant established during on postconviction that his attorney did not begin preparing for the penalty phase until after a guilty verdict was returned. *Id.* at 1105. Counsel only spent eleven hours preparing for the penalty phase, and that preparation consisted of an interview with the defendant and his mother. *Id.* The Court found that counsel's performance was not deficient given the mitigation that was presented and counsel's reasons for not presenting additional mitigation. *Id.* at 1106-1110.

In the instant case, the evidentiary hearing testimony established that counsel did prepare for the penalty phase. This was not a case where counsel undertook no efforts to investigate and uncover mitigation. Stone met multiple times with Hayward. Hayward was examined by an expert who testified about 19 areas of mitigation. (PCR.25 1017) Udell met with Hayward's mother, two sisters, brother, some nieces and nephews, and a family friend.⁸ (PCR.23 710) He presented four of these witnesses at the trial, and they discussed many areas of Hayward's background.

⁸ Hayward also takes issue with the fact, Udell held a group interview with Hayward's family members. (IB 46) However, Hayward presented no evidence showing that this was deficient performance or that the family members would have disclosed the background information when interviewed by Udell as they apparently did when presented at the postconviction evidentiary hearing years later.

Hayward faulted Udell for not consulting with Derrick Green and Pamela Clark, but offered no evidence that the witnesses with whom he did speak would not have possessed the same knowledge. In *Davis*, the defendant faulted counsel for only interviewing his mother and presented a host of other witnesses whom he argued should have been interviewed. *Id.* at 1106. Specifically, he argued that by interviewing additional family members his attorney would have learned about different details of his life that would have provided additional mitigation. *Id.* This Court rejected the claim because the defendant's mother would have known about the information the other witnesses could have provided and because counsel made a strategic decision not to present testimony that might present the defendant in a negative light. *Id.* at 1108-1109.

Taken at face value, Derrick Green and Pamela Clark did not offer any testimony that would not have been known by the members of the petitioner's family who did testify. Their testimony also carried with it the negative connotations that Udell and Stone sought to avoid during the penalty phase, namely, that both witnesses were convicted felons.⁹ The strategy to not present relatives and associates of the petitioner who were convicted felons can hardly be called unreasonable. Even

⁹ Green was actually incarcerated at the time of the petitioner's trial, and Clark was on federal parole for a drug conspiracy conviction. (PCR.23 736; PCR.24 846)

Barbara Johnson and Terrance Hayward admitted at the evidentiary hearing that the siblings who did testify at the trial were the ones who had been the most successful and would have made the best impression. (PCR.23 746-47; PCR.26 1081) See *Darling v. State*, 966 So.2d 366, 377 (Fla. 2007) (finding "even if alternate witnesses could provide more detailed testimony, trial counsel is not ineffective for failing to present cumulative evidence.") See also, *Stewart v. State*, 37 So.3d 243, 258 (Fla. 2010). Choosing witnesses supporting penalty phase mitigation theme and avoiding witnesses who may present a negative picture is not deficient or prejudicial performance. See *Simmons v. State*, 105 So.3d 475, 487 (Fla. 2012) (reiterating "[s]trategic decisions do not constitute ineffective assistance of counsel if alternative courses have been considered and rejected and counsel's decision was reasonable under the norms of professional conduct.") (quoting *Occhicone v. State*, 768 So.2d 1037, 1048 (Fla. 2000)).

The trial court's determination that even if counsel should have found and presented the enhanced evidence of childhood abuse/neglect mitigation, no prejudice resulted (PCR.15 2245) is proper under the *Strickland* standard and this Court's case law. *Strickland* does not require courts to decide questions of deficient performance and prejudice if a defendant makes an insufficient showing in one of the areas. *Strickland*, 466 U.S.

at 697. This means that where a claimant fails to establish prejudice from an alleged deficiency of his attorney, the court need not address whether counsel's performance was ineffective. However, as the trial court did, even assuming that counsel's performance was deficient, Hayward has failed to show there is a reasonable probability that the balance of the aggravating and mitigating circumstances in his case would have been different.

With respect to the alleged abuse suffered by him as a child, the evidence at best established the existence of non-statutory mitigation that was substantially undercut by the inconsistencies among witnesses. The new mitigation could be categorized as follows:

1. Harold Hayward was an alcoholic and was abusive to the children.
2. Hayward's mother fought with Harold Hayward and Tony Johnson.
3. Tony Johnson was abusive to the children.
4. Barbara Johnson was abusive to the children.
5. The children had to work in citrus groves.
6. Hayward's siblings were abusive to him.¹⁰
7. The petitioner was a good father to his son.
8. The petitioner has depression not otherwise specified, had ADHD as a child, and has frontal lobe dysfunction.

The import of this new mitigation, however, when viewed in light of the testimony offered at trial from Hayward's mother

¹⁰ Barbara Johnson did testify that Hayward's siblings beat him (ROA.36 2759) and that fact was noted by the Florida Supreme Court's opinion in this case. *Hayward v. State*, 24 So.3d 17, 27 (Fla. 2009).

and siblings in addition to Dr. Riordan's 19 areas of mitigation, would not have altered the balance of the aggravating and mitigating circumstances. The testimony established that Harold Hayward moved out of the family home when Hayward was five years old and had no contact with the family afterwards. (PCR.24 771-73)¹¹ Given that Hayward himself denied to his attorneys, Dr. Riordan, and Dr. Hyde that he had ever been abused, it is unlikely that whippings by Harold Hayward could be viewed as particularly mitigating. As far as Harold Hayward's alcoholism is concerned, the minimal import of this mitigation was summarized by Barbara Johnson when she offered at trial and collateral review that she knew of no effect alcoholism had on her son. (ROA.32 2487-2488, PCR.23 731)

Although Hayward claimed that he and his siblings were forced to work in the citrus groves, his brother Terrance testified that the kids were only required to work in the groves when they were suspended from school. (PCR.26 1070) The alleged sibling abuse had never been described as abuse by any of siblings before the evidentiary hearing. (ROA.32 2474, 2479; PCR.24 821, 893-94)

Furthermore, there was no testimony about how the fights between Barbara Johnson and her husbands may have affected

¹¹ Fleury testified that she was nine years old when Harold Hayward moved out, and that she was four years older than the petitioner. (PCR.24 749).

Hayward. Debra Fleury and Terrance Hayward testified that they never saw their parents arguing, but only heard it. (PCR.24 766; PCR.26 1060) Likewise, there was no testimony about the effect, if any, that the alleged abuse by Tony Johnson, Barbara Johnson, and the other siblings had on Hayward. There was also conflicting testimony about the alleged abuse. Derrick Green testified that Tony Johnson did not abuse the children. (PCR.24 1059-60) Debra Fleury testified at the *Spencer* hearing that Tony Johnson never gave the children any problems. (ROA.36 2765) Barbara Johnson explained that she did not abuse her children. (PCR.23 734-35) Her daughters, Theresa Williams and Debra Fleury, told the jury that she was a good mother and provided a good home. (ROA.32 2472, 2478)

The testimony regarding Hayward being a good father was greatly diminished by the fact that Pamela Clark admitted that Hayward had been in prison for 20 to 22 years of her son's 24 years of life. (PCR.24 844) She also admitted that she only had a relationship with Hayward for six or seven months and that she only took her son to visit with him in prison for three years. (PCR.24 834, 837)

Although an abusive childhood may be mitigating as to a particular defendant, the trial court properly concluded Strickland prejudice was established in this case. This Court has held that the trial court is not required to find the

presence of mitigation if there is no showing that the childhood traumas produced any effect upon the defendant relevant to his character, record or circumstances of the offense. *Rogers v. State*, 511 So.2d 534 (Fla. 1987); *Johnston v. State*, 497 So.2d 863 (Fla. 1986); *Kight v. State*, 512 So.2d 922 (Fla. 1987); *Lara v. State*, 511 So.2d 534 (Fla. 1987); *Ford v. State*, 802 So.2d 1121 (Fla. 2001). Hayward failed to present any evidence of the effect these alleged childhood traumas had on Hayward. While this failure may be attributable to Hayward's denial of any childhood abuse, the reasons for the deficiencies in his offer of proof are irrelevant. Hayward's failure to meet his burden shows that there is no prejudice from the failure of trial counsel to offer such "mitigation" because it does not meet the definition of mitigation in the first place. The lack of any mitigating value to these claims is supported by the testimony of Barbara Johnson, Terrance Hayward, and Debra Fleury.

When asked why Hayward turned out the way he did, they never claimed that his upbringing had any effect on him at all. To the contrary, Barbara Johnson said she didn't know what happened to him, but that he had frequently been in trouble and no one could get through to him. (ROA.32 2487, 2489) Terrance Hayward said that he had been successful and that his brother had had the same opportunities as he had had. (ROA.32 2464) Debra Fleury told the jury she believed Hayward's problems might

be attributable to his dislike of school. (ROA.32 2481) When the evidentiary hearing testimony is considered in light of the trial testimony on this issue, the relative weakness of these alleged mitigating factors are evident.¹² Although Hayward grew up in the same allegedly abusive home as his siblings, he was the only one who grew up to kill others. (PCR.27 1279-81)

Hayward points to *Cooper v. Sec'y, Dept. of Corr.*, 646 F.3d 1328, 1354 (11th Cir. 2011) and *Johnson v. Sec'y, Dept. of Corr.*, 643 F.3d 907, 936 (11th Cir. 2011) to suggest that his claim that failure to discover his suffered abuse/neglect in childhood which should have been presented as mitigation and failure to do so necessitates a new penalty phase. (IB 68-69) However, as found by the trial court and as outlined above, the mitigation evidence offered on collateral review was of limited weight given how the witnesses hid the every evolving abuse/neglect until the postconviction litigation. This is not a case where counsel did nothing to develop mitigation, but one where Hayward and his family apparently hid information from counsel. See *Pooler v. State*, 980 So.2d 460, 467 (Fla. 2008) (finding counsel conducted a reasonable investigation and was not ineffective in the mitigation case presented given the actions of the defendant

¹² Even Hayward's biased mitigation specialist/social worker, Cecelia Alfonso, had to admit that there were many children who grew up in homes with domestic violence but very, very few of them grew up to kill others. (PCR.27 1291)

and his family of hiding the negative aspects of the defendant's life in favor of presenting him in a more positive light); *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."); *Rutherford v. State*, 727 So. 2d 216, 224-25 (Fla. 1998) (finding counsel was not ineffective where he failed to investigate, develop, and present mitigating evidence regarding defendant's harsh childhood and war experiences where defendant did not cooperate in presenting certain mitigation evidence); *Squires v. State*, 558 So. 2d 401, 402-03 (Fla. 1990) (noting counsel's decisions circumscribed by defendant's admissions to counsel and evidence)

Like the childhood abuse/neglect evidence, the mental health mitigation offered by Hayward was extremely weak and prejudice was not shown. Dr. Hyde opined that Hayward suffered from frontal lobe dysfunction, but Hayward's trial expert disagreed with that opinion. It is hardly prejudicial to refrain from placing before the jury conflicting opinions from one's own experts. Dr. Hyde's credentials, moreover, are in anatomy and behavioral neurology, not neuropsychology. (PCR.28 1325 966) He specializes in the study of schizophrenia and the biological basis for mental illness, none of which Hayward had. (PCR.28

1350-52) Although Dr. Hyde has authored some 138 publications, none were in the forensic domain. (EH.8 998)

Dr. Hyde based his opinion on a five minute test for cognitive impairment designed as a screening test for dementia in elderly patients and his own neurological examination. (PCR.28 1332-24) He admitted there were many medical tests available for assessing frontal lobe deficits - PET scan, SPECT, MRI, CT, and MRI Scan. (PCR.28 1390-91) Yet, Dr. Hyde did not administer any of these tests, nor did he ask for or review any neuropsychological tests designed to detect frontal lobe impairment. (PCR.28 1387-90) Dr. Hyde could not form an opinion on the cause of Hayward's dysfunction and conceded that it would have been good to have more information available to him in this case. (PCR.28 1349, 1390) Also, Dr. Hyde admitted that Hayward scored "normal" on the "mini-mental state examination." (PCR.28 1363) Despite this normal test result, claimed to have found "indications" of impairment, but admitted they were not definitive. (PCR.28 1373-74) He also admitted that the test was never designed to detect frontal lobe impairment in criminals. (PCR.28 1363-64) Dr. Hyde based his opinion of frontal lobe dysfunction largely on his assessment of Hayward's physical performance on his home-brewed neurological examination, despite Hayward's normal performance on large portions of the examination. (PCR.28 1375-76, 1378-80) Inexplicably, Dr. Hyde

placed heavy reliance on Hayward's apparent inability to successfully complete a motor sequencing test involving hand movements, yet he could not recall how many of the 20 attempts at the test Hayward completed. (PCR.28 375-78) He acknowledged that unlike normed psychological tests which score a subject's performance and compare it to other persons, the assessment of his examination was purely his opinion. (PCR.28 1401-02) As he admitted readily, His opinion must be tempered by the fact it comes with a vigorous opposition to capital punishment and disbelief that any person's guilt could be established to his satisfaction to justify a death sentence. (PCR.28 1358-61)

Dr. Hyde also found that Hayward suffered from "depression not otherwise specified," but that the depression was only moderate. (PCR.28 1347, 1354) The impact of this diagnosis is blunted by Dr. Riordan's trial testimony that Hayward was depressed and had suicidal thoughts, but overcame them. (ROA.32 2452) Dr. Hyde's diagnosis of childhood ADHD was hardly mitigating, since Dr. Hyde found that Hayward must have overcome it because he obtained his GED in prison. Furthermore, Dr. Hyde was unable to opine that Hayward had any residual attention disorders as an adult. (PCR. 1356)

Dr. Riordan's testimony showed the weaknesses in Dr. Hyde's opinions. He testified that there is a 21 test battery, Halsted-Reitan, specifically designed for detecting neuropsychological

impairment. (PCR.28 1413-14) That test was never given to Hayward. Dr. Riordan disagreed with Dr. Hyde's selective incorporation of portions of tests to bolster his opinion of frontal lobe dysfunction because the tests were used out of context.¹³ (PCR.28 1417-18, 1430) He also testified that in addition to reviewing the test and examination given Hayward by Dr. Hyde, he reviewed Hayward's results on the RBANS test administered by Dr. Harvey, who was not called by the defense to testify at the evidentiary hearing. (PCR.25 1407-10) The RBANS, a neuropsychological test, was not provided to Dr. Hyde to review. (PCR.28 1389, 1433) Conversely, after reviewing all of the materials relied upon by Dr. Hyde and the RBANS test administered by Dr. Harvey, Dr. Riordan concluded that there were no indications of frontal lobe dysfunction. (PCR.28 1438)

Conspicuously absent from Dr. Hyde's testimony was any finding that Hayward suffered from any of the statutory mental health mitigators listed in Florida Statute 921.141. Viewing the testimony of Dr. Hyde in the context of Dr. Riordan's testimony, Hayward failed to show any prejudice. The testimony offered by Dr. Hyde was contradicted by Hayward's other expert. Dr. Hyde's

¹³ Dr. Riordan explained that in the field of neuropsychological testing, any abnormalities discovered during neurological testing should have been followed up by neuropsychological testing with psychometric norming. He explained that psychometric norming is a process whereby a person's test performance is compared to others of like age, sex, education, and race. (PCR.28 1436).

opinion was based upon scant evidence and had no basis in neuropsychological testing. He also did not relate his opinions to Hayward's specific case. At best, Dr. Hyde spoke only in general terms about the effects of frontal lobe dysfunction, but never testified that Hayward exhibited any of those effects or that Hayward's actions at the time of the murder were related to those effects. (PCR.28 1356-57)

Moreover, the sentencing court found the existence of three aggravating circumstances in Hayward's case: (1) that Hayward had prior violent felony convictions based on his convictions for second-degree murder and two counts of armed robbery, to which the court assigned "extremely great weight"; (2) that the murder was committed during the course of a robbery; and (3) that the murder was committed for pecuniary gain. *Hayward v. State*, 24 So.3d 17, 27 (Fla. 2009). The sentencing court merged the second and third aggravating factors. *Id.* and found that each aggravating circumstance alone outweighed the penalty phase mitigation and the fact Hayward had a prior second-degree murder conviction from which he had been free from prison for just 87 days before killing Destefano was "compelling" to the trial court. *Hayward*, 24 So.3d at 27-28. This Court detailed the compelling nature of the testimony regarding Hayward's previous murder conviction which very much like the instant murder. *Id.* at 26-27. As the trial court noted in its sentencing order, the

facts of the prior murder had eerie similarities to the murder of Daniel Destefano. The postconviction court concluded, the new mental health mitigation was merely a different opinion by a new expert and the new childhood abuse/neglect mitigation was a little weight when assessed in light of the aggravating factors each of which were found by the sentencing court to outweigh the mitigation. (PCR.15 2243, 2245). The record supports this conclusion. In light of the great strength of the aggravating circumstances in this case, the inclusion of the benign and weak mitigation offered at the evidentiary hearing does not alter the balance of the aggravating and mitigating circumstances. Therefore, this Court should agree with the conclusion reached by the trial court in denying postconviction relief, namely, that Hayward has failed to establish any *Strickland* prejudice. The denial of relief should be affirmed.

ISSUE II

FOLLOWING AN EVIDENTIARY HEARING, THE TRIAL COURT PROPERLY DENIED HAYWARD CLAIM THAT COUNSEL WAS INEFFECTIVE DURING THE MOTION TO SUPPRESS FOR FAILING TO CHALLENGING OFFICER MACE REGARDING THE POLICE DEPARTMENT'S HANDCUFFING POLICY (restated)

Pointing to Officer Mace's ("Ofc. Mace") testimony at the suppression hearing, along with counsel's evidentiary hearing testimony and the Fort Pierce Police Department ("FPPD") written policy on handcuffing persons who are transported in a FPPD cruiser, Hayward asserts it was ineffective assistance of

counsel not to have impeached Ofc. Mace's statement that there is a written policy requiring handcuffing passengers. Hayward also asserts that there were *Brady*¹⁴ and *Giglio*¹⁵ violations arising from the State's failure to disclose the written policy and for permitting Ofc. Mace to testify that there was such a policy. The trial court's determination that Hayward failed to carry his burden under *Strickland*, *Brady*, and *Giglio* are supported by the record facts and Florida law. The denial of postconviction relief should be affirmed.

Standard for Strickland - A mixed standard of review is applied to review of Strickland claims following an evidentiary hearing. The reviewing court defers "to the circuit court's factual findings that are supported by competent, substantial evidence, but review[s] the court's legal conclusions *de novo*." *Pagan*, 29 So.3d at 949. In order to prevail on an ineffectiveness claim, the defendant must show (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.

Standard for Brady - A reviewing court will "utilizes a mixed standard of review, "defer[ring] to the factual findings

¹⁴ *Brady v. Maryland*, 373 U.S. 83 (1963)

¹⁵ *Giglio v. United States*, 405 U.S. 150 (1972)

made by the trial court to the extent they are supported by competent, substantial evidence, but review [ing] de novo the application of those facts to the law.'" *Sochor*, 883 So.2d at 785 (quoting *Lightbourne v. State*, 841 So.2d 431, 437-38 (Fla. 2003)); *Conahan v. State*, 118 So.3d 718, 730 (Fla. 2013).

"The *Brady* rule requires that the prosecution not suppress evidence favorable to an accused where that 'evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.' *Brady*, 373 U.S. at 87...." *Boyd v. State*, 910 So.2d 167, 179 (Fla. 2005).

To establish a *Brady* violation, the defendant has the burden to show (1) that favorable evidence—either exculpatory or impeaching, (2) was willfully or inadvertently suppressed by the State, and (3) because the evidence was material, the defendant was prejudiced. [c.o] To meet the materiality prong, 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. ... The remedy of retrial for the State's suppression of evidence favorable to the defense is available when "the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." ... Giving deference to the trial court on questions of fact, this Court reviews *de novo* the application of the law and independently reviews the cumulative effect of the suppressed evidence.

Pagan v. State, 29 So.3d 938, 946-47 (Fla. 2009) (citation omitted) See, *Boyd v. State*, 910 So.2d 167, 179 (Fla. 2005); *Johnson v. State*, 921 So.2d 490, 507 (Fla. 2005); *Lightbourne v.*

State, 841 So.2d 431, 437-38 (Fla. 2003); *Way v. State*, 760 So.2d 903 (Fla. 2000); *Jones v. State*, 709 So.2d 512, 519 (Fla. 1998); *Hegwood v. State*, 575 So.2d 170, 172 (Fla. 1991); *Strickler v. Greene*, 527 U.S. 263, 280-82 (1999); *High v. Head*, 209 F.3d 1257, 1265 (11th Cir. 2000); *United States v. Starrett*, 55 F.3d 1525, 1555 (11th Cir. 1995).

Standard for Giglio - In evaluating *Giglio* claims, this Court applies a mixed standard of review, deferring to the trial court's factual findings that are supported by competent, substantial evidence and reviewing the application of the law to those facts *de novo*. *Suggs v. State*, 923 So.2d 419, 426 (Fla. 2005)" *Conahan v. State*, 118 So.3d 718, 728 -729 (Fla. 2013). This Court has discussed Giglio stating:

A *Giglio* claim is based on the prosecutor's knowing presentation at trial of false testimony against the defendant. See *Giglio*, 405 U.S. at 154-55, 92 S.Ct. 763; *Guzman*, 868 So.2d at 506. To establish a *Giglio* violation, it must be shown that (1) the testimony given was false; (2) the prosecutor knew the testimony was false; and (3) the statement was material.

...

... Under *Giglio*, where the prosecutor knowingly uses perjured testimony, or fails to correct what the prosecutor later learns is false testimony, the false evidence is material "if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury.".... 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....

Mordenti v. State, 894 So.2d 161, 175 (Fla. 2004).

In rejecting Hayward's claim, the trial court determined:

At the evidentiary hearing, Captain Greg Kirk testified that although there is no written handcuff policy, the Fort Pierce Police Department handcuff practice has been memorialized in officer training. Officers are trained to handcuff individuals being transported in the back of a police car for the safety of the officer, even if the individual is not under arrest. And Officer Mace received the training from Captain Kirk. (EH 731-738.) Hayward presented no evidence rebutting the FPPD handcuff practice or the related officer training, or proving that the State knew that the handcuff practice was unwritten. And it is undisputed that Officer Mace told Hayward he was being cuffed for officer safety and that he was not under arrest.

Thus, the court finds no exculpatory or impeaching evidence in the fact that Officer Mace erroneously believed that there was a written handcuff policy where there was a memorialized training practice; and finds Officer Mace's misstatement that there was a written policy harmless beyond a reasonable doubt where the substance of the memorialized training practice was conveyed to Hayward, so Hayward could not have reasonably believed that he was being detained. Therefore, the Defendant has failed to carry his burden under *Strickland*, *Brady*, and *Giglio*; and is not entitled to relief.

(PCR.15 2240-41)

The record support the trial court's findings and legal conclusion. From Stone's experience in dealing with the police during his days as a prosecutor and defense counsel, he recalled that the Fort Pierce police officers, for officer safety, cuff anyone who thy transport and that handcuffed person would ride in the back seat. That policy made sense to Stone (PCR.21 409-10). No efforts were undertaken by either Stone or Udell to

obtain the FPPD written policy on handcuffing, nor had Stone read that policy. However, according to Stone, whether or not the FPPD had a written policy on cuffing persons they transport would make no difference in a Fourth Amendment context as the focus is on the totality of the circumstances. Furthermore, Hayward had made multiple statements to the police. (PCR.21 446-48, 465-66; PCR.22 528).

Also, FPPD Captain Kirk testified that the Department has an unwritten policy/practice for transporting non-prisoners in police cars. Kirk trained Ofc. Mace with respect to that policy. (PCR.26 1090-92). Kirk trains his officers that they have discretion in deciding when to handcuff a non-prisoner, but for officer safety reasons, suspects are usually handcuffed. (EH.6 733-34). As part of the training program, Kirk teaches his officers to inform those they are transporting why they are being handcuffed for transportation. (PCR.26 1092-94).

While handcuffs may, by definition, be restraining devices, this Court has previously allowed such restraint when the intention behind it is not arrest, but rather officer safety, as was the case here. See *Taylor v. State*, 855 So.2d 1, 27 (Fla. 2003) (finding that defendant who was handcuffed for safety reasons, but was informed he was not under arrest "not amount to an illegal detention or de facto arrest"). In the case at bar, Hayward was handcuffed while being transported to the station,

but was advised he was not under arrest. Ofc. Mace was very deliberate when handcuffing Hayward, assuring him that not only was he not under arrest, but was only being handcuffed for officer safety reasons as required by department protocol. (R.11 33-36). Ofc. Mace's actions conformed to the training he received from Captain Kirk. (PCR.26 1091-94). Moreover, the suppression issue is viewed from the standpoint of a reasonable man. *Hayward*, 24 So.3d at 34-36. Hayward was told he was not under arrest and that he was cuffed for officer safety. As such, neither prong of *Strickland* was established. Stone was aware of the FPPD policy of handcuffing those transported, and Hayward has not shown that the trial court would have suppressed the statements had it been informed that there was no written policy on cuffing suspects, only a verbal training protocol. See *Hayward*, 24 So.3d at 36 (finding Hayward's spontaneous statements of Officer Mace were admitted properly even though he was cuffed at time statements were made). Hence, *Strickland* prejudice was not established.

Turning to the *Brady/Giglio* claim arising from Ofc. Mace's testimony, relief was denied properly. The fact that Ofc. Mace erroneously believed there was a written policy for cuffing persons during transportation does not become exculpatory evidence, especially where Fort Pierce officers are trained that for their safety they should cuff persons being transported in

their cruisers. (PCR.26 1091-94). As with the prejudice prong of *Strickland*, Hayward must show that the result of the proceeding would have been different had Ofc. Mace been impeached with the fact that there was no written policy, only a training policy to handcuff those placed in the back of a police car. Again, Hayward was told that he was being cuffed for officer safety and that he was not under arrest. The fact that there is no written policy does not call into question Hayward's spontaneously offered statement that he was shot in the hand, and not stabbed by his girlfriend. Hayward has not carried his burden under *Brady* and relief must be denied.

While the record reflects that there is no written policy for cuffing passengers, Hayward did not call Ofc. Mace to establish that he was not being truthful when he reported there was a written policy especially in light of the training provided by Captain Kirk. The record is also clear that Fort Piece officers are trained to cuff those they transport in the back of the police cruisers and that this is for officer safety. As with the *Brady* analysis, the State has shown that the result of the suppression hearing would not have been different. The unwritten policy was in place and the information given to Hayward regarding why he was being cuffed did not change; although he was not under arrest, he was being handcuffed for

officer safety.¹⁶ The State has carried its burden under *Giglio* to show the mis-statement was harmless beyond a reasonable doubt. Regardless of whether the State had Hayward's spontaneous statement that he was shot instead of stabbed, there remained Hayward's post-*Miranda* statements to that effect and the plethora of evidence placing Hayward at the scene and committing the murder, robbery, and burglary of Daniel Destefano. See *Hayward*, 24 So.3d at 24-26, 33-37 (setting out factual findings and harmless error analysis related to suppression issue conducted on direct appeal)

ISSUE III

THE TRIAL COURT'S SUMMARY DENIAL OF CLAIMS OF INEFFECTIVE ASSISTANCE OF COUNSEL DURING THE MOTION TO SUPPRESS, TRIAL, AND PENALTY PHASES WAS PROPER. (restated)

Here, Hayward asserts the summary denial of three claims was error. He maintains that he should have received an evidentiary hearing on his claims: (a) that penalty phase counsel was ineffective in failing to object to the prosecutor's penalty phase closing argument (IB 74-76) and (b) that counsel was ineffective at: (1) the suppression hearing for failing to investigate and argue Hayward's statements at the police station

¹⁶ A reasonable man would not have acted differently had he known that the FPPD cuffing policy was merely an unwritten policy which was part of officer training and not a written policy. Such does not enter into the calculus when an officer informs a reasonable man he is not under arrest, but being cuffed for officer safety reasons only.

were coerced and was not knowingly, intelligently, and voluntarily made¹⁷ (IB 76-81), and (2) the guilt phase for failing to effectively challenge: (i) Roosevelt McDowell on competency to testify grounds or on cross-examination; (ii) Dorothy Smith on competency to testify based on her alleged mental illness. (IB at 81-84). Hayward also raises a cumulative error argument. (IB at 84-85). The trial court denied these claims summarily as they either were procedurally barred having been raised and rejected on direct appeal, thus no prejudice could be shown, or were legally insufficient as pled. Such rulings are supported by the record and should be affirmed.

Standard of Review for Summarily Denied Claims - In *Lucas*

v. State, 841 So. 2d 380, 388 (Fla. 2003), this Court stated:

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 also, *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 court must either state its rationale in its decision or attach those specific parts of the record that refute each claim presented in the

¹⁷ This was raised as Claim IV(B)(iii) and (vi) in the amended motion for postconviction relief. (PCR.6 869-75, 877-78)

motion." *McLin v. State*, 827 So.2d 948, 954 (Fla. 2002) (quoting *Anderson v. State*, 627 So.2d 1170, 1171 (Fla. 1993)). Additionally, a defendant is not entitled to relief on a claim of ineffective assistance of counsel where there has been an earlier appellate court finding that an unpreserved error did not rise to the level of fundamental error. See *White v. State*, 559 So. 2d 1097, 1099-1100 (Fla. 1990) (rejecting ineffective assistance of counsel claim regarding counsel's failure to preserve issues for appeal in postconviction appeal based upon earlier finding by court on direct appeal that unpreserved alleged errors would not constitute fundamental error)

Penalty Phase Counsel's Failure to Object to the Prosecutor's Closing Argument Did Not Amount to Strickland Prejudice - Hayward asserts that trial court erred in finding no prejudice was shown arising from penalty phase counsel's failure to object to the prosecutorial argument comparing the victim's life choices to Hayward's life choices. The trial court's summary denial of the claim was proper because on direct appeal this Court determined the life choice comparison argument, while improper, was harmless beyond a reasonable doubt.

After noting that on direct appeal this Court had determined that the challenge to State's penalty phase closing argument was unpreserved, but did not rise to the level of

fundamental error, *Hayward*, 24 So.3d at 40-43,¹⁸ the trial court rejected the claim of ineffective assistance. It concluded that given that the error was not fundamental, "Hayward is unable to now prove prejudice under *Strickland*. See *White v. State*, 559 So. 2d 1097, 1099-1100 (Fla. 1990)." (PCR.15 at 2237). Hayward suggests that trial court erred because it found that "Hayward had failed to claim prejudice." (IB at 76) This is a misinterpretation of the trial court's order. As noted above, the trial court rejected the claim because there had been an earlier appellate court finding that the unpreserved error did not rise to the level of fundamental error, thus, *Strickland* prejudice could not be established. (PCR.15 at 2237).

A defendant is not entitled to relief on a claim of ineffective assistance of counsel where there has been an earlier appellate court finding that an unpreserved error did

¹⁸ On direct appeal, this Court found that counsel failed to object to the comparison the prosecutor drew between the victim's and Hayward's life choices and reviewed the matter for fundamental error *Hayward*, 24 So.3d at 40. This Court found that although "the victim impact evidence itself was proper, the prosecutor's use of it in his closing argument-comparing the choices made by the victim and those made by Hayward-was improper." *Id.* at 41. However, when considered "in the context of the entire closing argument and in light of the evidence presented in the penalty phase" and "given the strength of the evidence against Hayward and the gravity of the aggravators" *Id.* at 42 it could not "say that the jury would not have recommended a death sentence or that the trial court would not have imposed a death sentence if the prosecutor had not made the improper victim impact comparison." *Hayward*, 24 So.3d at 42-43.

not rise to the level of fundamental error. See *White*, 559 So.2d at 1099-1100. See also, *Lowe v. State*, 2 So.3d 21, 38 (Fla. 2008) (finding “[b]ecause the Court found no fundamental error [on direct appeal], Lowe fails to demonstrate that counsel's failure to object to the comments resulted in prejudice sufficient to undermine the outcome of the trial under *Strickland*.”); *Chandler v. State*, 848 So.2d 1031, 1046 (Fla. 2003) (recognizing “[b]ecause Chandler could not show the comments were fundamental error on direct appeal, he likewise cannot show that trial counsel's failure to object to the comments resulted in prejudice sufficient to undermine the outcome of the case under the prejudice prong of the *Strickland* test.”); *Teffeteller v. Dugger*, 734 So.2d 1009, 1019 (Fla. 1988) (finding defendant failed to meet prejudice prong of *Strickland* on issue that counsel failed to adequately argue case below given that it was rejected without discussion); *Cherry v. State*, 659 So. 2d 1069, 1072 (Fla. 1995). Here, this Court determined that the unpreserved error was not fundamental error. *Hayward*, 24 So.3d at 42-43. As a result, the trial court's summary denial was proper as Hayward is unable to prove prejudice under *Strickland*.

Counsel's Representation at the Suppression Hearing Was Not Ineffective - In summarily denying Hayward's claim that counsel ineffectively litigated the motion to suppress, the trial court

quoted this Court's entire analysis for the suppression issue raised on appeal (PCR.15 2231-36) after which it concluded: "that except for the alleged factual disputes concerning the extent of police presence at the rooming house and the police transport handcuff policy,¹⁹ the merits of the suppression and probable cause issues were already raised and rejected on direct appeal. Consequently, the Defendant cannot now show prejudice, thus these claims are summarily denied." (PCR.15 2236) Such was proper as Hayward was doing nothing more than attempting to obtain a second suppression hearing review under the guise of ineffective assistance of counsel. It is inappropriate to use a different argument, such as ineffective assistance of counsel, to re-litigate the same issue. *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, even if this Court concludes the procedural bar should not apply, Hayward is not entitled to relief as he unable to prove *Strickland* deficiency and prejudice given that this Court found on direct appeal the statements were admitted properly.

On direct appeal, this Court examined "the evidence of Hayward's statements made both at the rooming house and at the police station, as well as the observations made by the police

¹⁹ An evidentiary hearing was granted on these claims.

at the rooming house, to determine if introduction of any of the evidence violated Hayward's constitutional rights." *Hayward*, 24 So.3d at 34. Here, Hayward is challenging counsel's representation related to the statements made at the police station only. (See IB at 76-84)

On direct appeal, Hayward challenged the statements he made at the police station while chained to the floor. (PCR.8 1261-PCR.9 1277 - Hayward's Initial Brief on Direct Appeal pages 50-67). In rejecting the issue, this Court looked at each encounter Hayward had with the police from the time he exited the bathroom at his rooming house to the statement he gave at the police station and considered "whether there was probable cause to detain him and whether his Fourth Amendment rights were violated during any of these police encounters." *Hayward*, 24 So.3d at 35. This Court found that "Hayward's initial encounter with the police inside Smith's rooming house was consensual."

Id. Next, this Court reasoned:

... when Hayward and Officer Mace stepped outside while Detective Flaherty and Smith spoke, this action was not a detention. Further, since a crime had allegedly been committed against Hayward by Smith (i.e., that Smith had stabbed him), Officer Mace's subsequent request that Hayward come to the station to discuss "the cut" was not a detention.

Hayward, 24 So.3d at 35-36.

With respect to Hayward's admissions while being handcuffed outside the rooming house, this Court determined that:

Although Hayward was in the process of being handcuffed pursuant to police policy at the time of his statement, the totality of the circumstances, including the purpose of the officer's conduct and the spontaneous nature of Hayward's statement, demonstrate that his statement was not the result of any alleged illegal detention.

Hayward, 24 So.3d at 36. Further, the statement at the police cruiser was found to be "clearly spontaneous and voluntary and thus not the product of interrogation." *Id.*

Turning to the statements Hayward made at the police station after he was given his *Miranda* warning and while secured by ankle cuffs to the floor, the record reflects that at the suppression hearing, counsel asserted that all of Hayward's statements should be suppressed as the constitutional impropriety began at the rooming house. Hayward asserted he was coerced by police action and detained illegally, and as a result all of his statements should be suppressed. (ROA.11 76-81). On direct appeal, those arguments were raised again, along with a claim that probable cause for his detention was never established. Specific to the statements at the police station, Hayward asserted that his confession was obtained improperly due to his illegal detention and shackling to the floor. Also, he challenged the reliance placed on the cases the prosecutor had argued during the suppression hearing. (PCR.8 1257 - PCR.9 1277 - Hayward's Initial Brief on Direct Appeal pages 46-67).

On direct appeal, this Court reasoned that while

"detained", Hayward's "statements were properly admitted into evidence because they were made after he had been advised of his *Miranda* rights and after he indicated that he wished to proceed with the questioning." *Hayward*, 24 So.3d at 36-37. Also, this Court rejected "Hayward's contention that the police did not have probable cause to detain or arrest him, had they actually chosen to do so at the rooming house" and found "the police had reasonable grounds, and therefore probable cause, to conclude that a felony had been committed and that Hayward had committed it." *Id.* at 37.

This Court thoroughly reviewed Hayward's statements, thus, he is not permitted to re-litigate the matter under the guise of ineffective assistance of counsel. *State v. Riechmann*, 777 So.2d 342, 353, n.14 (Fla. 2000) (finding claims procedurally barred because defendant was couching them in terms of ineffective assistance when they had been raised and rejected on direct appeal); *Medina*, 573 So.2d at 295 (holding "[a]llegations of ineffective assistance cannot be used to circumvent the rule that postconviction proceedings cannot serve as a second appeal"); *Harvey v. Dugger*, 656 So.2d 1253, 1256 (Fla. 1995) (concluding claim that counsel was ineffective for failing to make several arguments in support of suppressing defendant's confession was procedurally barred).

Moreover, summary denial was proper because *Strickland*

prejudice could not be proven given this Court's review and findings on direct appeal that the statements at the rooming house, outside the rooming house, and in the police station were admitted properly. See *Lowe v. State*, 2 So.3d 21, 37-38 (Fla. 2008) (finding "[c]ounsel cannot be deemed ineffective when [defendant's] claim that his confession should have been suppressed and certain portions should not have been admitted into evidence was found to lack merit on direct appeal."); *Moore v. State*, 820 So.2d 199 (Fla. 2002) (holding that "claim under the guise of ineffective assistance of counsel was procedurally barred" because underlying claim of prosecutorial misconduct was raised and found meritless on direct appeal); *Hardwick v. Dugger*, 648 So.2d 100 (Fla. 1994) (recognizing issues that were raised on direct appeal are procedurally barred and cannot be raised in a postconviction motion); *Teffeteller*, 734 So.2d at 1019 (finding that defendant had failed to meet prejudice prong of *Strickland* on issue that counsel failed to adequately argue case below given that the issue was rejected without discussion)

"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). See *Strickland*, 466 U.S. at 697 (opining "there is no reason for a court deciding an ineffective assistance claim to

... address both components of the inquiry if the defendant makes an insufficient showing on one."); *Chandler v. United States*, 218 F.3d 1305, n. 44 (11th Cir. 2000). Because *Strickland* requires both deficient performance as well as prejudice, i.e., proof that but for that deficient performance the result of the proceeding would have been different, and this Court concluded previously that the statements were admitted properly, Hayward cannot show that had counsel argued differently, the statements would have been suppressed. The denial of relief should be affirmed.

Moreover, deficiency has not been shown as counsel moved to suppress Hayward's multiple statements, the trial court fully considered the matter, and this Court reached the merits and reviewed the constitutional claim on appeal. *Hayward*, 24 So.3d at 34-39. As noted above, trial counsel challenged whether the police had probable cause to go to the rooming house, challenged whether the show of force was an detention/arrest, and statements prior to at the police cruiser outside the rooming house. (ROA.11 76-81). Further, Hayward did not testify at the suppression hearing,²⁰ and he has not alleged that he was

²⁰ Hayward testified at trial and claimed police asked to see his hand and asked how it was injured. According to Hayward at trial, he had Smith answer how his hand became injured. (R.28 2067), although he later admits to telling officers Smith stabbed him (R.29 2114-19). However, this was again well after the time of the suppression hearing.

precluded from doing so if he had desired or that he has newly discovered evidence, thus, his after-the-fact dispute of the evidence (PCR.6 860-61, see n.5 of amended motion)²¹ does not overcome the procedural bar. The issue was presented at trial, and on direct appeal this Court reviewed the record and reached the merits of the claim finding against Hayward. Summary denial of relief was appropriate, and should be affirmed.

However, even if the statement at the police station should have been suppressed, the evidence against Hayward remains overwhelming. It includes his admissions inside and outside the rooming house, his recorded conversations with Dorothy Smith, eyewitness testimony, DNA and other forensic evidence including the murder weapon and the Victim's jeans which had Hayward's blood on them. (ROA.24 1458-61 1516-30, 1569-70, 1576-77; ROA.25 1580-92, 1604-11, 1616-30, 1637-40, 1682, 1690-94, 1696-97; ROA.27 1854-60, 1863-64, 1914-19, 1926-40, 1943-53, 1957-58, 1962-68; ROA.28 2009-20). The result of the trial would not have been different, thus *Strickland* prejudice was not shown.

²¹ With respect to the *Giglio* claim and whether a police policy exists to handcuff all who are transported, such does not call into question the result of the suppression motion. Hayward was informed by the officer that he was not under arrest and that the handcuffs were standard procedure. How the officer interpreted or understood police policy and the ultimate validity of that statement is not the issue. The ultimate question, which was resolved by the courts, was whether Hayward's statements were voluntary.

This Court should affirm.

Trial counsel rendered effective assistance with respect to Roosevelt McDowell and Dorothy Smith - Hayward claims counsel rendered ineffective assistant at trial. He alleges: (1) counsel should have moved to disqualify or more effectively cross-examined Roosevelt McDowell ("McDowell") (IB 82-83); and (2) counsel should have cross-examined Dorothy Smith ("Smith") on his alleged mental illness, police coercion she endured, and untruthful statements she gave the police. (IB 83-84). In summarily denying relief, the trial court found these claim legally insufficient as pled. (PCR.15 2236-37) Such was proper and should be affirmed.

Roosevelt McDowell - Hayward points to the conflicts identified between McDowell's statements to the police, and his trial testimony as evidence that counsel should have moved to disqualify him from testifying. Such discrepancies do not support disqualification, only the weight to be assigned the testimony by the trial of fact. As the trial court found, the claim was legally insufficient. Also, it is meritless.

As provided in *State v. Green*, 733 So.2d 583, 584 (Fla. 1st DCA 1999)

. . .every person is presumed competent to testify, a person may be disqualified to testify as a witness if he or she lacks the capacity (i) to communicate in such a manner as to be understood, (ii) to understand the duty of a witness to tell the truth, or (iii) to

perceive and recollect the facts when testifying. See, *Hawk v. State*, 718 So.2d 159, 162 (Fla. 1998) (finding no abuse of discretion in court allowing elderly deaf victim to testify without first holding a competency hearing as "witness is presumed competent to testify until the contrary is established"). In order to meet the criteria of section 90.604, Fla. Stat., the witness must have personal knowledge of the matter about he is giving testimony, i.e., matters he perceived personally, and an ability to recall the information when testifying. However, under section 90.701, Fla. Stat., it is the province of the jury to resolve conflicting facts and give weight to the testimony it finds appropriate.

Hayward failed to plead any facts which would call into question McDowell's competency to testify, i.e., Hayward has not alleged that McDowell was not capable of observing the facts, that he lacked the capacity to understand the oath to tell the truth, or that he did not personally observe the facts he reported. Such deficiencies render the claim insufficiently pled. Moreover, the conflicts in the testimony were brought out before the jury. On cross-examination, counsel pointed out that McDowell did not see a gun in the assailant's hand, did not see a stocking cap on the assailant, did not see a fight between the assailant and the victim, and did not see any faces. Further, defense counsel was able to have McDowell admit that other

people could have been present at the scene, and the discrepancies between his deposition account and trial testimony regarding McDowell's actions that morning, what awakened him, and the sequence of gun shots. (ROA.24 1536-38, 1540-43). Counsel had no legal basis for disqualifying McDowell and his cross-examination of the witness brought out those points that assisted the defense. *Strickland* deficiency has not been shown. Moreover, the forensic evidence along with Hayward's admissions, the finding of the murder weapon with Hayward's blood on it and under the gun grip. (ROA.25 1581-89, ROA.26 1753-54, 1758-61, 1830-32, 1834-36, ROA.27 1879-80, 1888-89, 1895-97, 1925, 1929-40, 1943-53, 1957, ROA.28 2017-18, 2026-31)

Dorothy Smith - Hayward maintains counsel was ineffective for failing to cross-examine Smith on her alleged history of mental illness and whether she was coerced by the police. Other than asserting the Smith had been hospitalized at an undisclosed time for mental illness Hayward is not specific about what timeframe Smith was allegedly on medication in relation to which events she witnessed and gave testimony. The crime took place in February 2005 and trial was not until March of 2007. On the same day as Hayward's arrest, Smith revised her story to the police, admitting that Hayward had come to her window early on the morning of February 1, 2005 with a gunshot wound to his hand. She also recanted her initial version that she had

stabbed him once she heard that Hayward had admitted to being shot. Hayward's lack of specificity with respect to his proof of a mental illness and whether Smith was taking medication at relevant times, support the trial court's summary denial based on legal insufficiency.²²

Hayward fails to explain how counsel was deficient and that but for the alleged deficiency, the result of the trial would have been different as required by *Strickland*. Conclusory claims merit summary denial. 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.").

Furthermore, *Strickland* prejudice could not be established. Even without Smith's testimony, the other eyewitness and forensic evidence along with Hayward's admissions established that Hayward shot and killed Destefano during the course of an armed robbery and burglary of a conveyance. (ROA.25 1581-89, ROA.26 1753-54, 1758-61, 1830-32, 1834-36, ROA.27 1879-80, 1888-89, 1895-97, 1925, 1929-40, 1943-53, 1957, ROA.28 2017-18, 2026-31). "[T]here is no reason for a court deciding an ineffective assistance claim to ... address both components of the inquiry

²² The trial court denied relief finding the claim legally insufficient because Hayward "fails to allege specific facts in relevant timeframes, and does not demonstrate prejudice in light of other evidence presented at trial." (PCR.15 2237)

if the defendant makes an insufficient showing on one." *Strickland*, 466 U.S. at 697. Hayward has failed to show that but for counsel's failure to cross-examine Smith on her alleged mental illness, use of prescription medication, and police coercion, the result of the trial would have been different. Confidence in the verdict has not been undermined.

Cumulative error - Having failed to establish that there were multiple instances of deficient performance, Hayward is unable to prove entitlement to relief under a cumulative error analysis. Where the claims, as here, are legally insufficient, procedurally barred, and/or meritless, there can be no cumulative error. See *Wike v. State*, 813 So. 2d 12, 22 (Fla. 2002); *Rose v. State*, 774 So.2d 629, 635 n. 10 (Fla. 2000); *Freeman v. State*, 761 So.2d 1055 (Fla. 2000); *Downs v. State*, 740 So.2d 506, 509 (Fla. 1999); *Melendez v. State*, 718 So.2d 746, 749 (Fla. 1998); *Chandler v. Dugger*, 634 So.2d 1066 (Fla. 1994); *Rivera v. State*, 717 So.2d 477, n.1 (Fla. 1998). Relief was denied properly and should be affirmed.

ISSUE IV

HAYWARD WAS AFFORDED A FULL AND FAIR HEARING ON HIS POSTCONVICTION CLAIM (restated)

Hayward takes issue with four of the trial court's rulings made during the course of the postconviction litigation. Hayward complains: (a) that the State Attorney's Office should

have been disqualified; (b) that the warden of a federal facility would not allow Hayward access to inmate Samuel Peaks; (c) that the trial court erred in finding intergenerational history of abuse suffered by his mother before Hayward's birth and the abuse his brother suffered irrelevant; and (d) that he should have been allowed to question trial counsel about a letter received from the Assistant State Attorney which has been held to be privileged work product. With respect to the Federal Warden's decision not to allow Hayward access to a federal inmate, Hayward has failed to show error by the State Circuit Court. With respect to the trial court's rulings, all are well within its sound discretion. Hayward had a full and fair hearing.

(a) The trial court properly denied the motion to disqualify the State Attorney's Office - Here Hayward asserts the State Attorney's Office should have been disqualified merely because it received Robert Udell's trial file. Despite conducting multiple depositions, Hayward has been unable to point to any evidence that any state employee reviewed any materials much less that the file contained any privileged documents. All Hayward offered below and here are innuendos and hyperbole. The denial of disqualification should be affirmed.

Review of a denial to disqualify a State Attorney's Office is abuse of discretion. *Rogers v. State*, 783 So.2d 980 (Fla.

2001). To disqualify an office, Hayward must show actual prejudice resulting from the prosecution. *Downs v. Moore*, 801 So.2d 906, 914 (Fla. 2001); *Rogers*, 783 So.2d at 991; *Farina v. State*, 679 So.2d 1151, 1157 (Fla. 1996), *receded from on other grounds*, *Franqui v. State*, 699 So.2d 1312 (Fla. 1997); *Bogle v. State*, 655 So.2d 1103 (Fla. 1995). "Actual prejudice is something more than the mere appearance of impropriety." *Meggs v. McClure*, 538 So.2d 518, 519 (Fla. 1st DCA 1989). Disqualification "must be done only to prevent the accused from suffering prejudice that he otherwise would not bear." *Id.*; *Kearse v. State*, 770 So. 2d 1119, 1129 (Fla. 2000). "[D]isqualification of Government counsel is a drastic measure and a court should hesitate to impose it except where necessary." *State v. Hayes*, 997 So.2d 446, 448 (Fla. 4th DCA 2009) (*quoting United States v. Bolden*, 353 F.3d 870, 878 (10th Cir. 2003)

The pith of Hayward's claim is that the State's mere possession of Udell's file was misconduct necessitating disqualification. For support Hayward insinuates that someone in the State Attorney's Office may have looked inside Udell's file, but Hayward has yet to plead that the file contained any privileged material. He also suggests that Udell was not loyal to his client as he received anonymous donations in the form of Publix gift cards when he experienced financial difficulties

following the end of his legal career. To date, Hayward has not shown anything more than feigned outrage at Udell delivering his file to the State for safe keeping when counsel could not pay for storage or copying. Hayward has not shown actual prejudice. The trial court found from the depositions taken on the matter of Udell's file, that the file was transferred from Udell's office to Stone's office then to the State Attorney's Office "where it sat completely untouched untampered with, unread, uncopied, and then it came to [the trial court's] office." (PCR.18 112). "Actual prejudice is something more than the mere appearance of impropriety." *Meggs*, 538 So.2d at 519. Hayward has failed to alleged, let alone prove, that Udell's file contained any privileged material,²³ that the State looked inside the file, or that the State's possession of the file hampered in anyway the preparation and litigation of the collateral claims. Hence, Hayward has failed to show actual prejudice and the

²³ While Hayward asserts "the State has had access to privileged and confidential materials," (IB 92) he fails to list even the type of document or proffer it to the trial court in camera. In fact, Mr. Stone advised the trial court that Udell had reported that there were no privileged materials in the file delivered to the State Attorney's Office. (PCR.16 54) Clearly, appellate counsel is speaking in theory, not with respect to an actual document. Moreover, it is well settled that the State was entitled to a copy of Udell's file once Hayward alleged ineffective assistance of counsel. *Reed v. State*, 640 So.2d 1094 (Fla. 1994); *Arbelaez v. State*, 775 So.2d 909 (Fla. 2000). The only documents withheld from such a disclosure are those related to an uncharged crime unrelated to the current postconviction litigation. *Id.*

disqualification was denied properly. See *Rogers*, 783 So.2d at 990-92 (finding disqualification unnecessary where state has not viewed any privileged material).

Federal Inmate Samuel Peaks - The record reflects that approximately a month before the evidentiary hearing was set to commence, Hayward moved to perpetuate Samuel Peaks' ("Peaks") testimony. That motion was denied as it did not comply with rule 3.190, Fla. R. Crim. P., however, during the evidentiary hearing, Hayward's motion for rehearing was discussed along with the attempts he made to secure Peaks' presence in court. (PCR.21 376-89; PCR.22 595-615; PCR.23 721-44; PCR.24 898-916; PCR.25 925-39; PCR.26 1115-32; PCR.27 1298-1309) During the hearing, the trial court was informed that the reason that the federal warden denied the request for Peaks to appear in court was that he was a security risk; he was a "behavior management problem." (PCR.21 386-87) After multiple discussions over a number of days, the trial court again determined that Hayward had not complied with rule 3.190 and had not shown that Peaks was unavailable. (PCR.27 1302-03) The trial court's final ruling relied upon *Harrell v. State*, 709 So.2d 1364 (Fla. 1998), and afforded Hayward an opportunity to make a formal request of the Warden of the federal prison where peaks was incarcerated in an attempt to secure Peaks' present in court via a video conference. (PCR.27 1302-09). Contrary to Hayward's assertion,

the State had no objection to a perpetuation of Peaks' testimony should he meet the requirement of rule 3.190 and the federal warden deny the request to allow Peaks to appear via a video conference. (PCR.26 1124-26) In his initial brief, Hayward does not indicate that he made such a formal request of the federal prison following the March 1, 2012 hearing or the results if of same if such a request were made. What Hayward notes is that "eventually" he was advised by the counsel for the federal prison "that there's no way Peaks's perpetuated testimony was not going to happen." (IB 94) However, that appears to be referencing a telephone contacts made during the evidentiary hearing and before the trial court order that formal request be made of the warden, in fact as the trial court indicated during the multi-day discussion of this issue, it appeared Hayward had abandoned all efforts to secure Peaks except for perpetuation of his testimony. (PCR.21 389; PCR.22 595-98, 602; PCR.23 743, PCR.24 899-903; PCR.25 927-29; PCR.27 1302-09)

Here, Hayward does not fault the state court, but claims a denial of due process because the federal warden denied his request to secure Peaks' testimony without explanation. Hayward offers no record proof that he made a formal request of the federal warden to have Peaks appear by video conference or by perpetuated testimony. Clearly, there can be no due process violation if Hayward failed to file the proper formal request

with the warden. While the warden denied the request to have Peaks' appear live in court, the record reflects that Peaks' was a security risk and had a "behavior management problem." Such is a valid basis. Having failed to follow up with the federal prison by seeking alternate means of securing Peaks' testimony, Hayward should not be heard to complain.

Postconviction proceedings must comport with due process. See, e.g., *Teffeteller v. Dugger*, 676 So.2d 369, 371 (Fla.1996) "Whether Appellant was denied the right of due process 'will depend upon the materiality of the evidence, the likelihood of mistaken interpretation of it by governmental witnesses or the jury, and the reasons for its nonavailability to the defense.'" *Rogers v. State*, 788 So.2d 331, 333 (Fla. 1st DCA 2001).

Here, it appears that the federal warden refused to release Peaks due to his "behavior management problem." Moreover, Hayward has not shown that he made a proper, formal request or that he was deprived of the evidence Peaks allegedly would have offered. As alleged in his amended motion, Peaks would offer testimony related to Hayward's feeling of displacement when Peaks five years his junior was taken into the Hayward family and raised by Hayward's mother. Although not explicitly stated, at the evidentiary hearing, Hayward indicated Peaks would discuss Hayward's life as a child. As the trial court noted in questioning the value of Peaks' suggested testimony, the

witnesses relevant to Hayward's feeling once Peaks entered the home were Hayward and his mother. Likewise, being five years Hayward's junior and Hayward having left home at age 14, it is questionable whether Peaks could add any substantial evidence. The trial court already found that Hayward was abused/neglected as a child and the record reflects that his mother was struggling with two jobs and many children to raise, and that some of the child care responsibilities fell to Hayward's siblings. Hayward has failed to show that his postconviction hearing was unfair merely because a federal warden would not release Peaks to testify. Furthermore, Hayward has failed to show that the state court had jurisdiction of the federal penal system and could require Peaks' presence. Hayward has failed to set forth what remedy available from the state court. Relief must be denied.

The Trial Court Considered All Relevant Evidence - It is Hayward's claim that the trial court erred in finding that his multi-generational history of domestic abuse was not relevant to the *Strickland* claim that counsel failed to present evidence of childhood abuse and neglect Hayward suffered. The pith of Hayward's claim is that it is necessary to investigate and present testimony related to a defendant's grandparents to show that the defendant's parents were abused, thus, they abused the defendant which is mitigation. The trial court did not abuse

its discretion in excluding such evidence as it was not relevant to Hayward's character, record, or crime.

Standard of review - Admission of evidence is within the court's discretion, and its ruling will be affirmed unless there has been an abuse of discretion. *Ray v. State*, 755 So.2d 604 (Fla. 2000); *Zack v. State*, 753 So.2d 9 (Fla. 2000); *Cole v. State*, 701 So.2d 845 (Fla. 1997); *Jent v. State*, 408 So.2d 1024 (Fla. 1981).

With respect to mitigation, the Supreme Court in *Lockett v. Ohio*, 438 U.S. 586, 604 (1978), held that the sentencer must "not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." This Court has determined *Lockett* requires the "admission of evidence that establishes facts relevant to the defendant's character, his prior record, and the circumstances of the offense in issue." *Hess v. State*, 794 So.2d 1249, 1269 (Fla. 2001) (quoting *Herring v. State*, 446 So.2d 1049, 1056 (Fla. 1984), receded from on other grounds by *Rogers v. State*, 511 So.2d 526, 533 (Fla. 1987)). In *Hill v. State*, 515 So.2d 176, 177-78 (Fla. 1987) drew the line at evidence related to the defendant's character, not his ancestors.

In *Hill*, this Court reasoned:

The record reflects that five persons, including Hill's mother and father, testified as character witnesses for the defense. The judge refused to permit appellant's mother to testify that she cared for appellant's cousins, as well as her own children. Similarly, the judge declined to allow defense counsel to question appellant's father regarding his own ill health and past job responsibilities. In our view, the excluded evidence focused substantially more on the witnesses's character than on appellant's. There has been no showing that the trial judge abused his discretion in excluding the testimony and we find no violation of the United States Supreme Court's recent decision in *Hitchcock v. Dugger*, 481 U.S. 393, 107 S.Ct. 1821, 95 L.Ed.2d 347 (1987), or *Eddings v. Oklahoma*, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982), or *Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978).

Hill, 515 So.2d at 177-78.

Hayward asserts that his multi-generational history²⁴ revealing that his mother was abused by his grandmother, thus, his mother abused him is relevant to his mitigation presentation to establish ineffectiveness. Similarly, other than giving a reason to excuse the mother's actions, Hayward has failed to show how his character, record, or murder were shaped by events which occurred before he was born beyond the fact that he was neglected. As the focus is on Hayward's character, record and offense, it matters not why his mother abused him, merely that

²⁴ In making his claim, Hayward points to Ms. Alfonso to support his assertion that multi-generational history is relevant. However, as this Court will recall, the trial court found Alfonso to be not credible and rejected her testimony. (PCR.15 2244)

she did.²⁵ The trial court found that the abuse/neglect Hayward experienced was mitigation which was then assessed for the impact would have had on the sentencing to determine if *Strickland* prejudice was proven. As such, even had Hayward been permitted to delve into his parents' multi-generational social history, he would not have been entitled to postconviction relief. This Court should find that the trial court did not abuse its discretion, but followed this Court precedent in *Hill*, and affirm.

The trial court properly sustained the State's objection to Hayward inquiring into the letter the prosecutor sent to Robert Udell as it was work product - Hayward asserts that he should have been permitted to ask Udell about the letter the prosecutor sent to him as preparation for his testimony in this litigation. It is Hayward's position that his request was different from previous requests this Court found to be work product exempt from public records. He claims that the trial court's reliance on *Kearse v. State*, 969 So.2d 976 (Fla.) was misplaced because he was seeking to have Udell merely describe the letter. (IB 99). Contrary to that assertion, postconviction counsel asked

²⁵ It would seem that excusing an abusive mother and shifting the blame to an abusive grandmother is sought to make it more palatable for the mother to maintain she abused her son in hopes of obtaining a life sentence for the defendant. As *Lockett* provides, the focus is on the defendant - his character, record, and offense, not on those with whom he has come in contact.

Udell "And what did the letter say?" (PCR.22 520). Obtaining a copy of the letter and asking the witness what the letter said is a distinction without a difference in this case. This Court has reviewed this issue numerous times and has found that the contents of the letter are privileged work product which does not have to be disclosed. The trial court properly sustained the State's objection.

Standard of Review - This Court applies an abuse of discretion standard when reviewing public records rulings. "A circuit court's ruling on a public records request filed pursuant to a rule 3.850 motion will be sustained ... absent an abuse of discretion." State v. Coney, 845 So.2d 120 (Fla. 2003). See Pietri v. State, 885 So.2d 245 (Fla. 2004); Mills v. State, 786 So.2d 547 (Fla. 2001); Glock v. Moore, 776 So.2d 243 (Fla. 2001). Admission of evidence is within the trial court's discretion, and its ruling will be affirmed unless there has been an abuse of discretion. Ray v. State, 755 So.2d 604 (Fla. 2000); Zack v. State, 753 So.2d 9 (Fla. 2000); Cole v. State, 701 So.2d 845 (Fla. 1997); Jent v. State, 408 So.2d 1024 (Fla. 1981). Opinion work product has a nearly absolute privilege not subject to disclosure. State v. Rabin, 495 So.2d 257 (3d DCA 1986).

Argument - In Reaves v. State, 639 So.2d 1, 6 (Fla. 1994), this Court reasoned: "We also find no error in the trial judge's

determination that letters between the prosecutor and an expert witness that contained work product were privileged and not subject to discovery." Additionally, Fla.R.Crim.P 3.220(g)(1) provides that "*Work Product*. Disclosure shall not be required of legal research or of records, correspondence, reports, or memoranda to the extent that they contain the opinions, theories, or conclusions of the prosecuting or defense attorney or members of their legal staffs." Here, the trial court reviewed the letter in camera²⁶ and determined that it was privileged work product not subject to disclosure under. Such comported with this Court's procedure announced in *State v. Kokal*, 562 So.2d 324, 327 (Fla. 1990) (stating where there is any doubt as to the propriety of disclosure of a particular document, the party should "furnish[] it in camera to the trial judge for a determination"). This Court has reviewed the same form of letter to postconviction counsel from the same State Attorney's Office previously and found the letter was work product which did not have to be disclosed. See *Evans v. State*, 995 So.2d 933, 941 (Fla. 2008); *Kearse v. State*, 969 So.2d 976 (Fla. 2007) receded from on other grounds, *Wyatt v. State*, 71

²⁶ As the record following relinquishment provides, the letter reviewed during the evidentiary hearing was the letter addressed to Jerome Stone, but was "substantially the same letter" sent to Udell. The trial court concluded "that these facts do not disturb the evidentiary hearing ruling that the letter sent by ASA Butler to co-counsel Udell is privileged work product.) (2SPCR.12 1665; 2SPCR.13 10-16)

So.3d 86 (Fla. 2011). The trial court did not error by following this Court precedent.

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 has been furnished to Paul Kalil, Esq. Office of the Capital Collateral Counsel-South, One East Broward Boulevard, Suite 444, Fort Lauderdale, FL 33301 by electronic mail to KalilP@ccsr.state.fl.us this 26th day of November, 2013.

CERTIFICATE OF FONT COMPLIANCE

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

Respectfully submitted,

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