IN THE SUPREME COURT OF FLORIDA

WILLIAM JAMES DEPARVINE,

Appellant,

v.

STATE OF FLORIDA,

Appellee.
_____/

CASE NO. SC12-407
L.T. No. 04-CF-000774
DEATH PENALTY CASE

ON APPEAL FROM THE CIRCUIT COURT
OF THE THIRTEENTH JUDICIAL CIRCUIT,
IN AND FOR HILLSBOROUGH COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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STATEMENT OF THE CASE AND FACTS

On January 28, 2004, a Hillsborough County grand jury indicted William Deparvine for the first degree murders of Richard Van Dusen and Karla Van Dusen, as well as two counts of armed kidnapping,[1] and armed carjacking. (DAR V1:71-74).[2] At trial, Deparvine was represented by the Public Defender's Office, specifically, John Skye, Debra Goins, and Samantha Ward. In affirming Deparvine's convictions and two sentences of death on direct appeal, this Court set forth the facts as follows:

> According to testimony at trial, the Van Dusens placed an ad in the St. Petersburg Times ("Times") seeking to sell their truck from February 11, 2003, to March 14, 2003. In March 2003, Rick placed the truck on consignment with auctioneer Stuart Myers, who testified that Rick placed a reserve price of $17,000 on the truck and rejected a bid of $15,000. Unable to sell the truck, the Van Dusens ran another ad from July 8, 2003, to August 8, 2003, asking for $14,500. The Van Dusens ran a final ad in the Times from November 20, 2003, to December 21, 2003, asking for "$13,700 or partial trade for four wheel drive jeep."
>
> The State presented the testimony of Christopher Coviello, the Van Dusens' neighbor, who stated that on November 25, 2003, the day before the Van Dusens' bodies were discovered, he saw the Van Dusens driving

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[1] The trial court granted Deparvine's motion for judgment of acquittal on the two counts of kidnapping during trial. (DAR V37:3109-10).

[2] The direct appeal record consists of 42 volumes and 10 volumes containing exhibits. The State will cite to the direct appeal record by referring to the volume number (DAR V__:___), or exhibit volume (EV:__), and then the page number, and will cite to the postconviction record as (PCR V__:___), followed by the appropriate page number.

away from their house in Tierra Verde, which is approximately twenty minutes southwest of the St. Petersburg area, between 5:15 p.m. and 5:45 p.m. Coviello saw Rick driving the truck by himself and Karla driving a Jeep, also owned by them, by herself and following Rick. The State was able to use the Van Dusens' cell phone records which indicated the cell towers used to track the Van Dusens' movement on November 25, 2003. The Van Dusens' phone records indicated that between the times of 4:45 p.m. and 6:37 p.m., they moved northeast from their home in Tierra Verde through the St. Petersburg area and ended up north of St. Petersburg around the Oldsmar area. Their bodies were discovered on November 26, some 3.4 miles from the last recorded cell tower used by the Van Dusens in Oldsmar.

One of the phone calls Karla made during this time period was to her mother, Billie Ferris, which began at approximately 5:54 p.m. This phone call began by using a cell tower located on Central Avenue in St. Petersburg and lasted approximately thirty-seven minutes, ending with the use of the cell tower in Oldsmar. Over defense counsel's objections, Ferris testified that during this conversation, when she heard the motor of the car running in the background, she asked Karla whether she was in the car, and Karla responded:

> A: I'm following Rick and the guy that bought the truck. He knows where to get the paperwork done tonight.
>
> ....
>
> Q: [State]: Did Karla Van Dusen tell you how the guy was going to pay for the truck that night?
>
> A: She said he's got cash.

The very next morning, on November 26, the bodies of Rick and Karla were found along a dirt road next to a residence, approximately one mile east of Oldsmar. Rick was shot once in the back of the head. He was found with his wallet and money clip containing

eighty-three dollars, two gold rings, a cell phone, and a watch. Karla was shot twice in the head and stabbed twice in the chest. She was found with four gold rings, gold hoop earrings, and a watch. Detective Chuck Sackman testified that he discovered a knife blade and a nine millimeter shell casing under her body.

The Jeep, owned by the Van Dusens, was discovered 1.3 miles away from their bodies at a local business. Detective Sackman testified that the windshield was cracked and that he recovered a bullet fragment from the dashboard, a shell casing between the passenger front seat and the doorway, a bullet fragment on the front passenger floorboard, a global positioning system (GPS) device and an address book on the front passenger seat floorboard, a black purse on the passenger seat, and two cell phones from the center console. On the ground floor next to the Jeep on the driver's side was a Florida identification (ID) card belonging to Henry Sullivan. Castings were made from the footprints and tire marks around the Jeep.

Chief forensic print analyst Mary Ellen Holmberg analyzed the prints lifted from the interior and exterior of the Jeep and one lifted from Sullivan's ID card, but none of them matched Deparvine. Latent print analyst Kimberly Cashwell analyzed the knife blade discovered under Karla's body, but was not able to lift any prints of value for comparison. Footwear and tire crime scene analyst Lynn Ernst eliminated Deparvine's shoes as a match with the castings taken from the scene. Ernst also eliminated the Van Dusens' truck as having made the tire marks around the Jeep.

Blood stains were found throughout the driver and passenger sides of the Jeep. Susannah Ulrey, a laboratory analyst for the Florida Department of Law Enforcement, testified that she analyzed five blood samples taken from different points on the steering wheel of the Jeep, and four of them matched Deparvine's DNA, including one mixture blood stain containing Deparvine's and Rick's DNA. Amber Moss, a supervisor of forensic case work at Orchid-Cellmark, a private laboratory, testified that the two blood samples she analyzed, which were taken from different

locations on the steering wheel of the Jeep, matched Deparvine, thus totaling six different blood stains on the steering wheel that were linked to Deparvine's DNA. Numerous other blood samples were taken from inside the Jeep and the Van Dusens' clothing, but none of those matched Deparvine.

On November 27, 2003, Professor Raymonda Letrice Burgman, who lived near Deparvine's apartment complex, discovered the 1971 Chevrolet truck parked there, and called the police. Detective Charles Keene secured and executed a search warrant for Deparvine's apartment on December 24, 2003. He discovered a document indicating a 1971 Chevy Cheyenne pickup truck for sale and a handwritten note with a phone number and a list of fourteen questions regarding the truck. One of the documents indicated that the Van Dusens' truck was being sold for $18,900. Detective Keene also found an affidavit, dated December 12, 2003, wherein Deparvine was requesting a vehicle title application for the truck, an insurance policy for the truck in Deparvine's name, and old truck repair documents indicating Rick's name. A notarized bill of sale from Rick to Deparvine, dated November 25, 2003, was also discovered indicating a purchase price of $6,500. Susan A. Kienker, who notarized this bill of sale, later testified that Rick, whom she knew personally, asked her to notarize the bill of sale on November 25, 2003, and handwriting expert Don Quinn confirmed Rick's handwriting on the bill of sale as authentic. No guns were discovered at Deparvine's apartment.

George Harrington testified that he came into contact with Deparvine in August 2003, when Harrington was seeking to sell his 1996 F-150 pickup truck for approximately $7,800. Harrington testified that Deparvine wanted to purchase the truck, but before he did, he asked to take the truck to Oldsmar where his mechanic friend would inspect it. Deparvine indicated that he would pay for the truck in cash, which he kept at his friend's house in Oldsmar. Deparvine gave Harrington a blank bill of sale and told him to have it notarized, which he did, but the sale was never completed, and Harrington never met or spoke with Deparvine's Oldsmar friend.

Deparvine testified in his own defense and stated that prior to November 2003, he was looking to purchase a pickup truck during a six-month period. He said that he saw the Van Dusens' February, July, and November ads and inquired about the truck in February, July, September, and November. Deparvine testified that on the Sunday morning of November 23, 2003, he spoke with Rick, who gave him directions to his house in Tierra Verde. When Deparvine arrived, Rick offered to let Deparvine test drive the truck. Deparvine drove the truck and Rick came along, but within three-quarters of a mile, the truck ran out of gas and the two men abandoned the truck on the side of the road and walked back to the Van Dusen home. At the home, Rick picked up a can of gas, which already contained approximately three-quarters of a gallon of gas, and the two men rode in the Jeep back to the truck with Rick driving. [FN1] Rick poured gas in the gas tank, but the truck did not start. They decided to "prime the carburetor," which Deparvine testified involves pulling the air cleaner assembly off the carburetor, and pouring gas into the carburetor while another person turns the key in the ignition. Rick turned the key in the ignition while Deparvine primed the carburetor. During this process, Deparvine states that he opened a wound and scab under his right index finger, which originated as a cut he received at work. After they were able to start the truck, Rick drove the truck to the gas station while Deparvine followed driving the Jeep. Rick then put gas in the truck and the two drove back to the Van Dusens' home, with Deparvine still driving the Jeep. Deparvine testified that he stayed at the home for approximately two hours during which Rick showed him an original title to the truck. Deparvine told Rick that he only had $6,500 in cash to pay for the truck, which Rick accepted because he just wanted to get rid of the truck. Rick was able to show Deparvine that there were no liens on the truck; and Deparvine then paid $1,500 in cash as a deposit, for which Rick wrote out a receipt. Deparvine gave Rick a blank bill of sale for Rick to complete and they agreed that the Van Dusens would deliver the truck to Deparvine's apartment complex in central St. Petersburg on Tuesday, November 25, 2003, after 5 p.m.

[FN1] In its rebuttal case, the State recalled Detective Hoover, who testified that on November 27, 2003, he interviewed Deparvine. Hoover testified that Deparvine stated that when the truck ran out of gas, he and Rick walked back to the house to get a can of gas. When they arrived, "he, Rick and Karla drove back to get gas and filled the truck up."

Deparvine testified that on November 25, 2003, at approximately 5:30 p.m., Rick arrived at the apartment complex driving the truck and Karla followed driving the Jeep. Deparvine told the Van Dusens to drive around to the back parking lot of the complex to complete the sale. Deparvine then noticed a person driving a red vintage truck that was similar to the 1971 Chevrolet and seemed to be with the Van Dusens. Deparvine described the driver of the similar truck as a white male in his mid-fifties with a salt-and-pepper-colored beard, a receding hairline, and wearing sunglasses. On cross-examination, Deparvine admitted that this description was consistent with his own appearance. Once at the back parking lot, Rick exited his truck and entered the passenger side of the Jeep. Deparvine entered the Jeep and sat in the backseat behind Karla. Deparvine then paid the $5,000 remaining balance of the sales price in cash and Rick gave him a notarized bill of sale indicating a purchase price of $6,500. According to Deparvine, Rick had not been able to find the title but agreed to send it to Deparvine after Thanksgiving. After Deparvine exited the Jeep, Rick entered the similar red vintage truck Deparvine had seen and the two vehicles left, with Karla following the red truck in the Jeep. Deparvine testified that after the Van Dusens left, he did not leave the vicinity of his apartment complex. He denied killing the Van Dusens.

When asked how he obtained funds to purchase the truck, Deparvine testified that he sold a Rolex watch that he inherited while he was in prison from a terminally ill inmate named Bill Jamison, whom he had befriended. Deparvine testified that because the Rolex was not on his prison personal property list, he had to smuggle the watch outside of the correctional

> facility by hiding it in the ground in the visitors park. Joseph Fish, a customer service manager with the St. Petersburg Times, testified that Deparvine placed a one-day advertisement on October 26, 2003, to sell a Presidential Rolex watch. Deparvine testified that he sold the watch for $7,000 to the first people that came by his house, who were "a couple of Hispanic guys." Deparvine could not give any other description of these buyers. Instead of depositing the funds from the sale in his bank account, Deparvine testified that he kept the cash at his apartment. The highest balance ever recorded in Deparvine's bank account between June 27, 2003, and December 31, 2003, was $826.21.
>
> The defense also presented testimony from Martha Baker, who lived behind the Van Dusens and shared the fence to the back end of their respective homes. Baker testified that on the night of November 25, 2003, between 7:15 p.m. and 7:50 p.m., while she was entertaining guests, she heard Karla's voice coming from the Van Dusen home.
>
> Deparvine's cell phone records revealed that he received a call on the night of November 25, 2003, from his ex-wife at 8:57 p.m., but because the call went unanswered, the cell phone did not record any cell tower. Nevertheless, Deparvine received a text message that night at 9:13 p.m., which used a tower on Central Avenue in St. Petersburg. At 5:35 a.m. on November 26, 2003, Deparvine's phone records indicate that he checked his voice mail using the same St. Petersburg tower.

Deparvine v. State, 995 So. 2d 351, 356-60 (Fla. 2008).

After hearing these facts, the jury found Deparvine guilty on both counts of first degree murder under both the premeditated and felony murder theories, and also found Deparvine guilty on the single count of armed carjacking. (DAR V40:3737). Following the penalty phase proceedings, the jury

returned an advisory recommendation of death by votes of 8-4 on both counts. (DAR V41:3930-31).

The trial court followed the jury's recommendation and sentenced Deparvine to death. The court found the following four aggravating circumstances and gave each "great weight": (1) each capital felony was especially cold, calculated and premeditated without any pretense of legal or moral justification; (2) the capital felonies were committed for pecuniary gain; (3) the capital felonies were committed by a person previously convicted of a felony and under sentence of imprisonment, or placed on community control, or on felony probation; and (4) the defendant was previously convicted of another capital felony. (DAR V15:2558-61). The court gave "little weight" to the following mitigating circumstances: Deparvine (1) suffered from serious emotional deprivation as a child because of family dysfunction; (2) suffered from inability to form and maintain close relationships with others; (3) suffered from estrangement from some family members; (4) persevered after marrying his teenage girlfriend, who had become pregnant, and worked hard to put himself through college and law school; and (5) was once a true family man and his children grieve at the predicament they find him in. (DAR V15:2561).

Deparvine appealed his convictions to this Court and raised eight issues:

> ISSUE I: THE TRIAL COURT ERRED IN ALLOWING THE STATE TO INTRODUCE, UNDER THE "SPONTANEOUS STATEMENT" HEARSAY EXCEPTION, EVIDENCE OF OUT-OF-COURT STATEMENTS MADE BY KARLA VAN DUSEN DURING A TELEPHONE CONVERSATION WITH HER MOTHER, BILLIE FERRIS.
>
> ISSUE II: APPELLANT WAS TRIED UNDER A CAPITAL INDICTMENT WHICH WAS FATALLY, FUNDAMENTALLY, AND JURISDICTIONALLY DEFECTIVE, WHERE THE COUNTS PURPORTING TO CHARGE FIRST-DEGREE MURDER FAILED TO ALLEGE EITHER PREMEDITATION OR FELONY MURDER.
>
> ISSUE III: THE TRIAL COURT COMMITTED FUNDAMENTAL ERROR, AND CONSTRUCTIVELY AMENDED THE GRAND JURY INDICTMENT, BY GIVING THE JURY THE OPTION TO CONVICT APPELLANT OF PREMEDITATED MURDER.
>
> ISSUE IV: THE EVIDENCE WAS LEGALLY INSUFFICIENT TO PROVE CARJACKING; IN ADDITION THE TRIAL COURT COMMITTED FUNDAMENTAL ERROR BY FAILING TO ENSURE JURY UNANIMITY ON THE CARJACKING COUNT, WHERE THE INDICTMENT AND INSTRUCTIONS FAILED TO SPECIFY WHICH VEHICLE - - THE JEEP CHEROKEE OR THE CHEVY PICKUP TRUCK - - WAS THE SUBJECT OF THE ALLEGED CARJACKING.
>
> ISSUE V: THE TRIAL COURT ERRED IN ALLOWING THE STATE TO INTRODUCE EXCESSIVE AND UNDULY EMOTIONAL "VICTIM IMPACT" EVIDENCE, WHICH DOMINATED THE PENALTY PROCEEDING AND RENDERED IT FUNDAMENTALLY UNFAIR.
>
> ISSUE VI: THE TRIAL COURT ERRED, AND VIOLATED THE APPLICABLE CONSTITUTIONAL STANDARD, BY EXCLUDING FOR CAUSE JUROR DARYL RUCKER, WHOSE VIEWS ON THE DEATH PENALTY WOULD NOT HAVE PREVENTED OR IMPAIRED THE PERFORMANCE OF HIS DUTIES AS A JUROR IN ACCORDANCE WITH HIS OATH AND THE COURT'S INSTRUCTIONS.
>
> ISSUE VII: FLORIDA'S CAPITAL SENTENCING SCHEME, WHICH EMPHASIZES THE ROLE OF THE CIRCUIT JUDGE OVER THE TRIAL JURY IN THE DECISION TO IMPOSE A SENTENCE OF DEATH, IS CONSTITUTIONALLY INVALID UNDER RING V. ARIZONA, 536 U.S. 584 (2002).

ISSUE VIII: THE TRIAL COURT'S SENTENCING ORDER IS DEFECTIVE FOR FAILURE TO CLEARLY INDICATE WHAT MITIGATING CIRCUMSTANCES HE FOUND.

This Court affirmed Deparvine's convictions and sentences on September 29, 2008. Deparvine v. State, 995 So. 2d 351 (Fla. 2008). Deparvine's motion for rehearing was denied November 18, 2008, and the mandate issued on December 4, 2008. Deparvine did not seek certiorari review in the United States Supreme Court.

On February 5, 2010, Deparvine filed a motion for postconviction relief in the trial court and raised twenty-eight claims, and subsequently amended a number of his claims. (PCR V3:363-500; V6:934-63). On February 7-9, 2011, the trial court conducted an evidentiary hearing on the vast majority of Deparvine's ineffective assistance of counsel claims.[3] Following the evidentiary hearing, the trial court issued a detailed 85-page order denying postconviction relief. (PCR V9-10:1634-1718). This appeal follows.

[3] The trial court summarily denied amended claims 5 and 16, and claims 20 through 27, and found that these claims did not require factual development. (PCR V5:873-96; V7:1083-88).

PRELIMINARY LEGAL STANDARDS

Appellant raises twenty-one claims in his Initial Brief, a number of which allege ineffective assistance of guilt phase counsel. In order for a defendant to prevail on a claim of ineffective assistance of counsel pursuant to the United States Supreme Court's decision in Strickland v. Washington, 466 U.S. 668 (1984), a defendant must establish two general components.

> First, the claimant must identify particular acts or omissions of the lawyer that are shown to be outside the broad range of reasonably competent performance under prevailing professional standards. Second, the clear, substantial deficiency shown must further be demonstrated to have so affected the fairness and reliability of the proceeding that confidence in the outcome is undermined.

Maxwell v. Wainwright, 490 So. 2d 927, 932 (Fla. 1986). Furthermore, as the Strickland Court noted, there is a strong presumption that counsel's performance was not ineffective. Id. at 690. A fair assessment of an attorney's performance requires that every effort be made to eliminate the distorting effects of hindsight and to evaluate the conduct from counsel's perspective at the time. Id. at 689. The defendant carries the burden to "overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" Id. Finally, "[w]When a defendant fails to make a showing as to one prong, it is not necessary to delve into whether he has made a showing as to the other prong." Waterhouse v. State, 792 So.

2d 1176, 1182 (Fla. 2001); Zakrzewski v. State, 866 So. 2d 688, 692 (Fla. 2003).

Furthermore, claims that either were or could have and should have been raised on direct appeal are procedurally barred in postconviction proceedings. Dufour v. State, 905 So. 2d 42, 69 (Fla. 2005); Francis v. Barton, 581 So. 2d 583, 584 (Fla.), cert. denied, 501 U.S. 1245 (1991); Smith v. State, 445 So. 2d 323, 325 (Fla. 1983); see also Medina v. State, 573 So. 2d 293, 295 (Fla. 1990) (postconviction proceedings are not to be used as a second appeal and it is inappropriate to use a different argument to relitigate the same issue). Couching such a claim in terms of ineffective assistance of counsel does not lift that bar. Robinson v. State, 707 So. 2d 688, 697-99 (Fla. 1998); Kight v. Dugger, 574 So. 2d 1066, 1073 (Fla. 1990).

On appeal, when this Court reviews a trial court's ruling on an ineffectiveness claim following an evidentiary hearing, this Court defers to the trial court's findings on factual issues, but reviews the trial court's ultimate conclusions on the deficiency and prejudice prongs *de novo*. Bruno v. State, 807 So. 2d 55, 62 (Fla. 2001). Appellant also raises a number of issues which were summarily denied by the trial court; Issue 12, and Issues 15 through 20. This Court reviews the propriety of such summary denials *de novo*. Henyard v. State, 992 So. 2d 120,

125 (Fla. 2008) (postconviction motion denied solely on the pleadings presents a legal issue, reviewed *de novo*).

SUMMARY OF THE ARGUMENT

Issue I: The postconviction court correctly found that trial counsel did not perform deficiently by failing to call Daryl Gibson as an alibi witness. Trial counsel interviewed the witness and determined that he was unreliable given his inconsistent statements. Furthermore, the witness unequivocally indicated that he would not testify for the defense and counsel factored the witness's attitude into his decision not to present his testimony. Finally, Deparvine failed to establish that he was prejudiced by trial counsel's decision not to call Gibson.

Issue II: Trial counsel was not ineffective for seeking further comparisons of an unknown latent fingerprint found on Henry Sullivan's ID card located outside the victims' Jeep. During the postconviction proceedings, it was determined that the print belonged to a law enforcement officer. Trial counsel explained that it was much more beneficial for the defense theory that the print remained unidentified rather than establishing that it belonged to law enforcement.

Issue III: The postconviction court properly rejected Deparvine's claim that counsel was ineffective for failing to call Wendy Dacosta as a defense witness. Trial counsel investigated her potential testimony and determined that she would not be a beneficial witness.

Issue IV: The court properly found that Deparvine failed to carry his burden of proving deficient performance and prejudice on his claim that trial counsel was ineffective in arguing for a judgment of acquittal on the charge of armed carjacking.

Issue V: Trial counsel was not ineffective for failing to present evidence from Paul Lanier's girlfriend, Assunta Fisher, or for failing to further impeach Lanier. Trial counsel was aware of the inconsistencies in Lanier's various statements and extensively impeached his testimony at trial. Counsel also investigated and deposed Assunta Fisher and was aware of her potential testimony which did not unequivocally impeach Lanier's testimony. Additionally, Ms. Fisher's testimony, like Paul Lanier's testimony, was equivocal on the timing of their visits to the Van Dusens. Finally, trial counsel was not ineffective for failing to argue to the jury in closing argument that records, which trial counsel introduced into evidence, indicated that Paul Lanier did not obtain a college degree from the University of South Florida as he claimed.

Issue VI: Trial counsel was not ineffective for failing to argue that the business records for the auction of the victims' truck were unreliable because one of the forms contained a typographical error. Furthermore, the victim set a reserve price for the auction price of his truck at $17,000, and when the

highest bid only reached $15,000, the truck was not sold. Trial counsel properly noted that it was simply a matter of semantics that the victim did not personally refuse the offer given the nature of the auction.

Issue VII: The trial court properly rejected Deparvine's argument that newly discovered evidence of the market value of the victims' truck entitled him to a new trial. Rick Van Dusen's daughter, Michelle Kroger, as trustee for the victims' estate, sold the 1971 truck shortly after Deparvine's conviction for $6,500. Ms. Kroger testified that she was not interested in obtaining fair market value for the truck because of the circumstances, and simply accepted the $6,000 purchase price so she could finalize the estate. The court properly found that this information was not of such a nature that it would have resulted in an acquittal on retrial.

Issues VIII & IX: The postconviction court properly rejected Deparvine's claim that trial counsel was ineffective for failing to challenge Billie Ferris's testimony regarding her recollection of her phone conversation with her daughter, victim Karla Van Dusen. Trial counsel impeached the witness on her recollection and purposefully did not attack her in an overly aggressive manner as she was a sympathetic witness. Furthermore, even had counsel impeached her on whether the buyer of the truck

had purchased the tuck, or was in the process of purchasing the truck, it would not have affected the outcome in any manner because the key point in her testimony was that Karla Van Dusen was following her husband and the man that bought the truck, Deparvine, while they drove from St. Petersburg to Oldsmar.

Issue X: Trial counsel was not ineffective for failing to cross-examine Peter Wilson regarding his observations while riding in the victims' Jeep Cherokee. Although Deparvine testified at trial that he had driven the Jeep earlier and had bleed from his hand at the time, Mr. Wilson did not observe any blood stains on, or around, the steering wheel when he was with Rick Van Dusen. Crime scene technicians testified that some of the blood stains found after the murder were clearly visible from outside the passenger window, and thus, would have easily been seen by Mr. Wilson if they had actually been there at the time.

Issue XI: The trial court properly found that trial counsel was not ineffective for failing to call two inmate witnesses who lacked credibility.

Issue XII: Deparvine's argument that trial counsel was ineffective for failing to request a limiting instruction regarding the voluntariness of the victims' association with Deparvine is without merit as trial counsel successfully moved

for a judgment of acquittal on the two counts of armed kidnapping and thus, the instruction was not relevant to the remaining charges.

Issue XIII: Trial counsel was not ineffective for failing to challenge Henry Sullivan on his testimony that he first noticed that he lost his Florida Identification card in June, 2003.

Issue XIV: The postconviction court properly rejected Deparvine's claim that trial counsel was ineffective for failing to present evidence and argue that detectives failed to conduct a proper investigation.

Issues XV-XX: The trial court properly denied Deparvine's legal claims challenging aspects of Florida's death penalty statute and the rules governing juror interviews. This Court has consistently rejected these identical claims and Deparvine has offered no reasons to recede from this prior precedent.

Issue XXI: Because Deparvine failed to establish any individual error, his claim of cumulative error must fail.

ARGUMENT

ISSUE I

THE POSTCONVICTION COURT PROPERLY DENIED APPELLANT'S CLAIM THAT TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO CALL DARYL GIBSON AS AN ALIBI WITNESS.

In his first claim, Deparvine alleges that trial counsel was ineffective for failing to call Daryl Gibson, a resident of Appellant's apartment complex, as an alibi witness. Prior to trial, the State filed a Notice of Exculpatory Information notifying defense counsel of Daryl Gibson's statement that he saw Deparvine carrying a backpack and entering Rick Van Dusen's truck on the afternoon of November 25, 2003, and later saw Deparvine standing outside the apartment complex around dusk without the backpack. (DAR V12:2108-09). Gibson saw Deparvine and Rick Van Dusen drive away in the truck, followed by a woman in an SUV, and they did not turn off on any side streets.[4]

Appellant asserted in his postconviction motion that trial counsel was ineffective for failing to call Gibson as an alibi witness at trial because Gibson would have testified that Deparvine was in front of his apartment complex around dusk and

[4] Trial counsel John Skye noted in a memorandum that he received this notice regarding Gibson's statement to the prosecutor on or about June 29, 2005. As trial counsel noted in his memo, he had previously interviewed Gibson at the Pinellas County Jail several months earlier and counsel was under the impression that Gibson knew more than he was saying and Gibson's version would not be helpful to the defense. (PCR V17:3040-43).

could not have been with the victims during the time of Karla Van Dusen's phone call with her mother from 5:54 p.m. to 6:20 p.m. After conducting an evidentiary hearing on Deparvine's claim and hearing testimony from Assistant Public Defender John Skye, Daryl Gibson, and Deparvine, the trial court denied his claim and found that Appellant failed to establish deficient performance and prejudice as required by Strickland. (PCR V9:1641-52).

In rejecting Appellant's claim, the trial court relied on the "very credible" testimony of trial counsel John Skye, an extremely experienced capital trial attorney, that he was fully aware of Gibson's various statements and potential testimony, but made the strategic decision not to call Gibson due to counsel's "genuine and significant" concerns about Gibson's ultimate testimony.[5] (PCR V9:1651). Trial counsel was aware that

[5] John Skye has been practicing criminal law since 1974, including handling numerous first degree murder cases as both a prosecutor and a defense attorney. (PCR V33:505-10). At the time of Deparvine's trial, Skye had handled over twenty murder trials as a defense attorney. In addition to Skye, Deparvine was represented at trial by Assistant Public Defenders Samantha Ward and Debra Goins. As courts have often recognized, the presumption that defense counsel's decisions were reasonable is even stronger when dealing with a highly experienced capital defense counsel such as Assistant Public Defender John Skye. See Reed v. Secretary, Fla. Dept. of Corr., 593 F.3d 1217, 1244 (11th Cir. 2010) (noting defense counsel's "extensive experience as a trial lawyer" where counsel had thirteen years' experience and had tried more than thirty homicide cases, most of which were capital cases and explaining that the presumption that

Gibson was initially interviewed by law enforcement officers shortly after the murders, but stated that he had seen no red trucks or anything involving the Van Dusens. (PCR V17:3041; V33:521-22). Almost a year later, on October 14, 2004, while incarcerated, Gibson was again interviewed by law enforcement officers and this time gave a detailed statement that he was sitting with his friend "Derrick" and he saw a red truck pull up to Deparvine's apartment complex, followed by a gold Jeep, and saw Deparvine speaking to an older white man and gesturing towards 5th Street. (PCR V17:3025-27). Gibson overheard the white lady driving the Jeep ask how far they had to go, but did not hear a reply. According to Gibson, Deparvine was wearing a backpack and a baseball hat. Gibson saw Deparvine get into the passenger seat of the red truck with the white male and saw both vehicles head south on 2nd Street but did not see where they went from there. Gibson stated that he did not want to say anything the first time he was interviewed by police. (PCR V17:3026).

Deparvine wrote a letter to defense counsel Skye stating that he thought Gibson was not being truthful with police and

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counsel's performance is reasonable is "even stronger" when counsel is particularly experienced, citing Chandler v. United States, 218 F.3d 1305, 1316 & n.18 (11th Cir. 2000)(en banc)).

Deparvine thought Gibson saw "both" red trucks.[6] (PCR V17:3038). Trial counsel went to the Pinellas County Jail to interview Gibson before deciding whether to depose him. (PCR V17:3029). Gibson reiterated that his statements to law enforcement in October, 2004, were accurate and Gibson again denied seeing a second red truck -- even though he was aware Deparvine was claiming that a second red truck was at the apartment complex. (PCR V17:3033). Gibson further told trial counsel that he did not see the victims' red truck again until two days later on Thanksgiving.[7] Gibson was also adamant that he would not testify at Deparvine's trial. (PCR V17:3033-36).

On June 29, 2005, an investigator with the State Attorney's Office interviewed Gibson and he added to his statement and claimed to have seen Deparvine around dusk on Tuesday, November 23, 2003. The State immediately provided this information to

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[6] Appellant testified at trial that on November 25, 2003, the Van Dusens delivered the 1971 truck to his apartment at about 5:30 p.m. (DAR V38:3329). Appellant stated that he got into the truck with Rick Van Dusen and drove to the back of the apartment complex and Karla followed in the Jeep Cherokee. After they parked the truck, Appellant entered into the back seat of the Jeep and gave the Van Dusens $5,000. (DAR V38:3329-37). According to Appellant, another man, matching Appellant's physical description, driving a similar red vintage truck, followed the Van Dusens and gave Rick Van Dusen a ride after the transaction was complete. (DAR V38:3331, 3337-39; V39:3440-43).

[7] At trial, Appellant claimed that he bought the truck two days before Thanksgiving and it remained parked in the back of the apartment complex from that point; secured by a chain he had carried in his backpack. (DAR V38:3336).

defense counsel and filed it with the court. After defense counsel received the notice of exculpatory information, trial counsel attempted to re-interview Gibson, but Gibson would not speak to him. Trial counsel testified that he made the strategic decision not to depose Gibson because he was fearful of creating "adverse evidence," and he did not attempt to compel Gibson's testimony at trial because counsel did not know what Gibson would say and the bulk of his prior statements were extremely devastating to the defense theory because Gibson essentially corroborated the State's theory of the case.

After hearing all of the testimony at the evidentiary hearing, the trial court found trial counsel did not perform deficiently by making the strategic decision not to call Gibson and, even if he did, Deparvine did not establish prejudice:

> The Court finds the testimony of Mr. Skye to be very credible. **The Court further finds Mr. Skye considered his alternatives and made a reasonable tactical decision in not calling Mr. Gibson as an alibi witness only after he considered the potential value of Mr. Gibson's testimony, including the fact that Mr. Gibson did not see a second red truck, as well as Mr. Gibson's refusal to testify, his impeachability with prior inconsistent statements, and Defendant's failure to confirm to counsel that he was outside his apartment complex later that evening. Given Mr. Gibson's various statements and omissions, the evidence clearly reflects Mr. Skye had genuine and significant concerns as to what Mr. Gibson's ultimate testimony would be if he were forced to testify at trial.** Consequently, the Court finds Defendant has failed to show that counsel performed deficiently in failing to call Mr. Gibson as a defense witness. See

> Occhicone v. State, 768 So. 2d at 1048 ("[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."). **Moreover, even if counsel had called Mr. Gibson as a witness and he testified that he saw Defendant at the apartment complex at dusk, the Court agrees Mr. Gibson would have been "roundly and soundly impeached" due to his various statements and Defendant has failed to demonstrate that counsel's failure to call Mr. Gibson prejudiced the outcome of the proceedings.**

(PCR V9:1651-52) (emphasis added).

Appellant repeatedly argues in his brief that Gibson could have been compelled to testify at trial and points to Gibson's testimony at the evidentiary hearing as proof of his willingness to testify.[8] The fact that Gibson reluctantly testified years after the murders at a non-jury, postconviction evidentiary hearing does not contradict the unrefuted testimony from trial counsel Skye and Gibson himself that he would not have testified at Deparvine's trial. Obviously, this Court need not even address trial counsel's valid strategic reasons for his decision not to call Gibson given the witness' unequivocal statements that he would not testify at Deparvine's trial. Trial counsel cannot render ineffective assistance of counsel for failing to

[8] The record clearly demonstrates Gibson's reluctance to testify at the evidentiary hearing. (PCR V32:319-24). Gibson reiterated at the evidentiary hearing that there was never a second red truck at the apartment complex as claimed by Deparvine and he also reaffirmed that he would have never testified at trial. (PCR V32:328-330).

call an unavailable witness. See White v. State, 964 So. 2d 1278, 1286 (Fla. 2007) ("A defendant cannot establish ineffective assistance of counsel based on counsel's failure to call a witness who is unavailable.").

However, even if this Court addresses the merits of Deparvine's claim, it is clear that he has failed to establish deficient performance and prejudice. As trial counsel explained in great detail, he had valid strategic reasons for not calling Gibson, including the fact that he was a devastating witness against Deparvine. See Fennie v. State, 855 So. 2d 597, 605-06 (Fla. 2003) (noting that trial counsel was not ineffective for failing to call an "unpredictable witness," and had trial counsel gambled and presented such a witness only to have the witness inculpate the defendant, collateral counsel would now be claiming ineffective assistance of counsel for presenting the witness). "This Court has 'consistently held that a trial counsel's decision to not call certain witnesses to testify at trial can be reasonable trial strategy.'" Johnston v. State, 63 So. 3d 730, 741 (Fla. 2011) (quoting Everett v. State, 54 So. 3d 464, 474 (Fla. 2010)). Gibson's statements essentially confirmed the prosecution's theory of how the murders occurred; Deparvine entered the victims' classic red truck while wearing his backpack and they drove away with Karla Van Dusen following in

the Jeep. Gibson did not see another red truck similar to the classic, show quality truck owned by the Van Dusens at the apartment complex as claimed by Deparvine, nor did Gibson see them circle around to the back parking lot where Deparvine allegedly parked the truck for the next few days (also not noticed by Gibson). Although Gibson eventually claimed that he saw Deparvine outside of the apartment complex around dusk without the backpack, trial counsel noted that Deparvine had never claimed that he was outside at that time, nor had he ever mentioned wearing a backpack. (PCR V33:413-15).

In the instant case, trial counsel made a strategic decision not to depose or call Gibson as a witness because Gibson provided numerous statements regarding his observations and counsel was "extremely reluctant" to call Gibson because counsel did not know what version of the "facts" Gibson would give to the jury. Appellant erroneously asserts that the State could not have impeached Gibson based on his earlier statements to law enforcement claiming he knew nothing of the events and his subsequent statement omitting any reference to seeing Deparvine at dusk.[9] To the contrary, Gibson was aware that law

[9] As previously noted Gibson gave two statements to law enforcement; the first one to detectives shortly after the murders in November, 2003, where Gibson claimed he knew absolutely nothing about the murders; the second statement to Officer Esquinaldo in October, 2004, when he gave a detailed

enforcement were investigating Deparvine's involvement with the two murders and *any* observation of Deparvine on the day of the murders would have been relevant information to convey to law enforcement. As defense counsel opined, Gibson likely made a last minute change in his statement and claimed that he saw Deparvine at dusk simply to avoid being called as a witness by the State at trial. Even if this Court were to find deficient performance for failing to call an "unavailable" and unpredictable witness, Deparvine failed to establish prejudice because Gibson would have been soundly impeached with his various statements. Furthermore, Gibson would have likely confirmed the State's theory of prosecution and testified that Deparvine entered the victims' red truck with a backpack (trial counsel noted that this would likely be considered his "murder kit"), and there was no second red truck as claimed by Deparvine. Accordingly, this Court should affirm the trial court's ruling denying Deparvine's ineffective assistance of counsel claim.

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statement regarding his observations. (PCR V17:3025-27). Gibson also spoke to defense counsel on February 23, 2005, where he reiterated the accuracy of his October, 2004 statement (PCR V17:3029-36), and lastly, Gibson gave an "exculpatory" statement to an investigator with the State Attorney's Office on June 29, 2005. Following this last statement, Gibson declined to speak with defense counsel when he attempted to re-interview him. (PCR V17:3040-44).

ISSUE II

THE POSTCONVICTION COURT PROPERLY DENIED APPELLANT'S CLAIM THAT TRIAL COUNSEL WAS INEFFECTIVE IN DEALING WITH AN UNKNOWN PRINT LOCATED ON HENRY SULLIVAN'S IDENTIFICATION CARD.

Deparvine claims that trial counsel was ineffective for his handling of witnesses regarding an unidentified fingerprint located on Henry Sullivan's ID card which was found next to the victims' Jeep Cherokee.[10] At trial, defense counsel elicited testimony on cross-examination from crime scene detective Steven Young that at least two other law enforcement officers had handled the ID card prior to the card being collected.[11] (DAR V29:2023-25).

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[10] At trial, the State introduced evidence that Appellant lived at the same apartment complex as Henry Sullivan in May, 2003. Sometime during the summer, Henry Sullivan lost his identification card and had to obtain a replacement. (DAR V32:2369-77; 2415-23). In order to establish that Appellant placed Henry Sullivan's identification card outside the Jeep as a red herring, the State introduced an abundance of evidence establishing that Henry Sullivan, or his brother who had occasionally utilized Henry's name, were not involved in the homicides.

[11] At trial, the State introduced a photograph of Sullivan's ID card with a thumb visibly touching a portion of the card. See PCR V7:1201. Deputy Young did not know whose thumb was in the photograph. (DAR V29:2024). Trial counsel possessed a police report written by Deputy Poore which indicated that she had picked up the identification card to get information off the card, but did not touch any other items at the crime scene. (PCR V19:3463-64). A different report authored by Deputy Sepulveda indicated that the ID card was found by the Jeep's driver door and "Dep. Poore stated she had picked it up by the edges." (PCR V19:3461).

Hillsborough County Sheriff's Office fingerprint analyst Mary Ellen Holmberg testified at trial that she recovered a print of comparable value from the ID card, but it did not match Deparvine, Henry Sullivan, Justin Sullivan, David Reid (the victims' handyman), or Greg Cornell (an employee of Artistic Doors who also touched the ID card when he discovered the victims' Jeep). (DAR V33:2475-78). According to Ms. Holmberg, the Florida Department of Law Enforcement ran the unidentified print through its Automated Fingerprint Identification System (AFIS), but she was not aware of the results. (DAR V33:2477-78).

In his postconviction motion, Deparvine alleged that trial counsel was ineffective for failing to demand that the State compare the unidentified fingerprint to law enforcement officers at the crime scene.[12] Prior to the evidentiary hearing, the trial court granted Appellant's motion to compare the unidentified print to certain law enforcement personnel, and that comparison indicated that the unidentified print belonged to Deputy Kristin Poore. (PCR V7:1186-1203; V19:3441). At the evidentiary hearing,

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[12] Appellant also briefly raises a Brady/Giglio claim in his Initial Brief, but he did not raise this claim in his postconviction motion and the trial court properly denied his claim when raised for the first time in his written closing argument following the evidentiary hearing. See PCR V10:1690; citing Darling v. State, 966 So. 2d 366, 379 (Fla. 2007) (trial court properly summarily denied claim that was insufficiently pled in 3.851 motion and only raised in written closing argument after the conclusion of the evidentiary hearing).

trial counsel Skye explained in detail why he did not seek further testing of an unidentified print which was beneficial to his defense theory. (PCR V33:453-70). Trial counsel expressed his reasoning for not seeking further testimony:

> [POSTCONVICTION COUNSEL]: And did you think about pursuing -- there were a number of officers. There were actually five or six other officers, deputies, were talked about in the discovery in the various reports who had access to the Jeep scene probably before the card was preserved. Did you think about asking for further investigation, further comparison?
>
> [MR. SKYE]: No. I may have thought about it, but at the bottom, I was probably - - I figured I was probably as happy as I was going to get with the fact that we had an apparently potentially important piece of evidence that had an unidentifiable print on it that wasn't Mr. Deparvine's. I was you know, pretty pleased with that part. I don't know that I would have been particularly interested in demonstrating that was a deputy, that would have perhaps proved that they did a shoddy investigation or they didn't handle that card properly. But it's not clear to me how proving that was Detective Poore's fingerprint helps Mr. Deparvine.
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> . . .
>
> [MR. SKYE]: . . . But it seemed to me then and seems to me now, that it was more valuable to have an unknown print on this supposedly potential important piece of evidence rather than proving they didn't do a good investigation.

(PCR V33:461-63). Trial counsel explained that he did not see any advantage in trying to show that there were issues with the collection and preservation of evidence based on the officers' handling of the ID card when there was no other evidence to support such a theory. (PCR V33:461-70).

In denying Deparvine's ineffective assistance of counsel claim, the trial court properly found that trial counsel "considered his alternatives and made a reasonable tactical decision in not submitting the identifiable latent print for further identification. Mr. Skye considered the defense of a sloppy investigation as well as the defense of an unknown print belonging to the real killer, and strategically opted for the latter." (PCR V10:1689). Additionally, the court correctly noted that Deparvine failed to establish prejudice. (PCR V10:1689). As trial counsel explained, it was much more beneficial to his defense theory to have an unidentified latent print on Sullivan's ID card rather than establishing that it was a law enforcement officer's fingerprint. Because Deparvine has failed to establish any error in these findings, this Court should affirm the trial court's denial of this claim.

ISSUE III

TRIAL COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO INVESTIGATE AND CALL WENDY DACOSTA AS A WITNESS.

In his next claim, Deparvine argues that trial counsel was ineffective for failing to investigate and present the testimony of Wendy Dacosta, a witness who observed an older red pickup truck driving around 7:30 a.m. on November 26, 2003, in an area

near the spot where the victims' abandoned Jeep was discovered.[13] Deparvine alleged that Dacosta's testimony would have supported his defense theory at trial that Rick Van Dusen left his apartment with a man similar to his appearance who also drove an older red pickup truck.

At the evidentiary hearing, trial counsel Skye testified that the defense team investigated Ms. Dacosta's statements and determined that she would not be a beneficial witness because she seemed to indicate that the truck she observed was the Van Dusens' truck,[14] but according to Deparvine's story, she could not have seen the Van Dusens' truck because he had purchased it the day before and it was parked at his apartment complex at 7:30 a.m. on November 26, 2003. (PCR V33:434-37; V34:558). Counsel also addressed with Deparvine the possibility of Dacosta identifying a second red pickup truck and noted that "[w]e

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[13] The witness testified that she saw the red truck pull out of a shopping plaza parking lot onto Memorial Highway at about 7:30 a.m. (PCR V32:301-04).

[14] Contrary to Appellant's assertions, trial counsel did not "change his story" at the evidentiary hearing regarding Dacosta's possible identification of the truck. According to trial counsel's investigator's report, Dacosta described the truck as red with silver stripes on the tailgate and the word "Chevrolet" written in silver. (PCR V17:3059). When shown a picture of the Van Dusens' truck, Dacosta indicated "she believed it was the same truck." As trial counsel noted in a memorandum following a meeting with Deparvine, the witness could not have identified the Van Dusens' truck because, according to Deparvine, it was sitting behind his apartment complex. (PCR V17:3066-67).

discussed with the defendant the fact that there were many pickup trucks around, and potentially whatever red pickup truck Ms. Dacosta saw was the same pickup truck that the defendant saw Rick Van Dusen get into near his apartment. **However, the defendant, himself, was the first to mention that there was no way to tell and know whether or not that was any particular pickup truck.**" (PCR V17:3066) (emphasis added). Trial counsel testified that "with respect to the second red truck that Mr. Deparvine talked about it just seemed to me that the balance, the timing was wrong, was bad. It struck me as somewhat grasping at straws. . . as something that would not enhance my credibility with the jury."[15] (PCR V33:434). Trial counsel explained to Deparvine his rationale for not further investigating or calling Wendy Dacosta as a witness and Deparvine agreed with trial counsel's decision.[16] (PCR V17:3066-67; V34:558-59).

After hearing all the testimony, the postconviction court made factual findings based on trial counsel Skye's "very credible" testimony and found that Deparvine failed to establish

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[15] Collateral counsel makes the incredible assertion that Skye did not need to concern himself with credibility issues because "defense credibility was not critical." Initial Brief at 39.

[16] Deparvine testified at the evidentiary hearing that he wanted Ms. Dacosta to testify and he thought trial counsel was going to call her. (PCR V35:670).

both deficient performance and prejudice as required by Strickland. (PCR V9:1664). Trial counsel considered the value of Dacosta's potential testimony and made a strategic decision not to call her after determining that her testimony would "not be helpful at worst and confusing at best." This Court has recognized that "tactical decisions regarding whether or not a particular witness is presented are 'subject to collateral attack only in rare circumstances when the decision is so irresponsible as to constitute ineffective assistance of counsel.'" Fennie v. State, 855 So. 2d 597, 605-06 (Fla. 2003) (quoting Jackson v. State, 711 So. 2d 1371, 1372 (Fla. 4th DCA 1998)); see also Occhicone v. State, 768 So. 2d 1037, 1048 (Fla. 2000) ("Strategic 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.").

In addition to failing to establish deficient performance, the court also found that Deparvine failed to establish prejudice:

> At trial, the State presented the testimony of Michael Arcarola, a waste management driver who serviced the trash bin at Artistic Doors on the morning of November 26, 2003. Mr. Arcarola testified that he saw the Jeep behind Artistic Doors at approximately 5:00 a.m. to 5:30 a.m., and it appeared that it had been there awhile as condensation had already formed on the passenger side window. He also testified that he did

> not see any other vehicles or anyone on foot in that area. **Therefore, the Court agrees that even if Ms. Dacosta had testified about the similar red pickup driving by at least 2 hours after the Jeep had been left at Artistic Doors and hours after the murder, there is not a reasonably probability that the outcome would have been different.**

(PCR V9:1664) (emphasis added and record citations omitted). Because Deparvine has failed to establish both deficient performance and prejudice based on trial counsel's strategic decision not to call Wendy Dacosta, this Court should affirm the postconviction court's denial of the instant claim.

ISSUE IV

THE POSTCONVICTION COURT PROPERLY DENIED APPELLANT'S ARGUMENT THAT TRIAL COUNSEL WAS INEFFECTIVE WHEN ARGUING FOR A JUDGMENT OF ACQUITTAL ON THE ARMED CARJACKING CHARGE.

In his fourth issue, Deparvine alleges that the postconviction court erred in denying his ineffective assistance of counsel claim based on his allegation that trial counsel ineffectively argued for a judgment of acquittal on the charge of armed carjacking. Deparvine presents a number of sub-issues on this claim, all of which were rejected by the trial court. (PCR V10:1690-95). Appellant asserts that trial counsel failed to argue the following: the State misrepresented the timeline of events in arguing that the Jeep had been taken in a continuous

episode;[17] the State misidentified the object of the carjacking; the Van Dusens no longer had control over the truck when they were killed; and there was no carjacking because the taking of the Jeep was not the motive for the murders. Appellant claims that if counsel had presented these arguments, the trial court would have entered a judgment of acquittal on the armed carjacking charge. In his postconviction motion, Deparvine also alleged that counsel was ineffective for failing to move to dismiss the indictment or for a bill of particulars as to which vehicle was the object of the carjacking.

At the evidentiary hearing, trial counsel testified that Deparvine had written him letters regarding his concern over the carjacking charge in the indictment not specifying the vehicle, and trial counsel explained his strategic reasons for not moving for a bill of particulars or filing a motion to dismiss the indictment. (PCR V33:470-86; V34:571-75). Trial counsel testified that he purposefully did not file a motion to dismiss or for a bill of particulars as to the carjacking charge because it would have been "extremely easy" for the State to remedy the issue by amending the indictment, and of greater importance, it would have alerted the State to the problems trial counsel perceived with the charging language on the two first degree

[17] Appellant fails to identify in his brief how the prosecutor "misrepresented" the timeline. Initial Brief at 46-47.

murder counts. (PCR V33:477); see also Deparvine v. State, 995 So. 2d 351, 372-74 (Fla. 2008) (rejecting Deparvine's argument that the indictment was void for failing to specify whether the State was pursuing a conviction under a theory of prosecution of premeditation or felony murder). Trial counsel did not want to tip off the State to the indictment issues prior to trial when the issues with the indictment could easily be fixed, but rather, made the strategic decision to wait until the State rested its case to make the argument at the motion for judgment of acquittal. Trial counsel conducted extensive research on this issue and thought it would best be raised in this manner. As the lower court properly noted when denying this aspect of Deparvine's claim, trial counsel cannot be deficient for failing to move for a statement of particulars or to dismiss the indictment when counsel researched the issue and made a reasonable tactical decision not to alert the State to potential reversible error regarding the two murder counts. (PCR V10: 1690-95).

Likewise, the trial court properly rejected Deparvine's argument that trial counsel was ineffective for arguing the judgment of acquittal on the armed carjacking charge. Collateral counsel, with the benefit of hindsight and this Court's decision discussing this issue on direct appeal, id. at 374-76, fails to

recognize that trial counsel's performance must be judged at the time of the trial. See Strickland, 466 U.S. at 689 ("A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from the counsel's perspective at the time. Because of the difficulties inherent in making evaluations, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'"). As trial counsel testified at the postconviction hearing, he thought he effectively argued the motion for judgment of acquittal regarding the armed carjacking charge and raised the relevant arguments to the trial judge without being repetitive. (PCR V33:477-82). In rejecting Deparvine's claim, the postconviction court properly found:

> Mr. Skye acknowledged that it could have been [argued] differently, but believed he essentially argued that the truck could not be carjacked because it was not in the Van Dusens' possession or control. As to why he did not argue that under the timeline of events, there was a temporal break such that the taking did not occur during a continuous episode, Mr. Skye further testified he argued the [sic] as to the lack of evidence that either vehicle was taken from the Van Dusens contemporaneously or as part of the continuous

> series of events. He did not feel the need to be redundant and did not see how there was anything more to be said without repeating himself. Mr. Skye also testified that he did not argue that the truck could not have been taken because Defendant had the bill of sale because such argument "would have been wasting the judge's time" in light of the State's theory of the case.

(PCR V10:1694). The court noted that trial counsel "extensively argued for a motion of judgment of acquittal on the carjacking charge," and "presented essentially the same arguments suggested by Defendant." (PCR V10:1695; see also DAR V37:3080-3110).

In addition to failing to establish deficient performance, the postconviction court also properly found that Deparvine failed to establish prejudice. Deparvine failed to demonstrate that, had trial counsel made the arguments now urged by collateral counsel, there would have been a different result. Furthermore, because this Court determined on direct appeal that the evidence was sufficient to support the armed carjacking charge, even when faced with these similar arguments, Deparvine is incapable of establishing prejudice as required by Strickland in an ineffective assistance of counsel claim. See Deparvine v. State, 995 So. 2d 351, 375-76 (Fla. 2008) ("[W]e reject Deparvine's argument that there was insufficient evidence to support his conviction of carjacking"); see also Cox v. State, 966 So. 2d 337, 347-48 (Fla. 2007) (stating that a finding on direct appeal that error was harmless was "fatal" to defendant's

subsequent postconviction claim because defendant was unable to meet Strickland's prejudice standard given previous finding of harmlessness).

ISSUE V

THE POSTCONVICTION COURT PROPERLY DENIED DEPARVINE'S VARIOUS INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS RELATING TO STATE'S WITNESS PAUL LANIER.[18]

A. Whether Trial Counsel Was Ineffective For Failing To Present Evidence Rebutting And Impeaching Paul Lanier On His Claim That He Followed Appellant And Rick Van Dusen Back To The House?

In his postconviction motion, Deparvine alleged that trial counsel was ineffective for failing to call Paul Lanier's girlfriend, Assunta Fisher, to testify that she and Lanier did not follow the Van Dusens' truck back to the Van Dusens' home, and for failing to impeach Paul Lanier's trial testimony by questioning Detective Harry Hoover regarding his interview with Mr. Lanier on November 26, 2003. After hearing testimony at the postconviction evidentiary hearing from Paul Lanier, Assunta Fisher, and trial counsel Skye, the trial court denied Deparvine's claim and found that he failed to carry his burden under Strickland of proving deficient performance and prejudice. (PCR V9:1669-70).

At the evidentiary hearing, Assunta Fisher testified that she could not recall the exact dates she visited the Van Dusens'

[18] In Issue V, Deparvine combines five of his separate postconviction claims, Claims 6-10, into one issue.

home, and after having her memory refreshed with her deposition from 2004, she testified that she and Paul Lanier had been to the Van Dusens' home on two separate occasions. (PCR V32:351-67). On one of these two occasions, she observed another man looking at the victims' truck and the man acted "strange." (PCR V32:362, 367-68). When Mr. Lanier indicated that he would buy the Van Dusens' truck for the asking price but he needed time to come up with the cash, the other man looking at the truck acted strange, "like it was an issue" that Mr. Lanier might buy the truck. (PCR V32:367-68). Ms. Fisher also could not recall if she ever saw the Van Dusens' truck being driven down the road in Tierra Verde. (PCR V32:361-62).

Paul Lanier testified at the evidentiary hearing that he went to the Van Dusens' on two occasions before Thanksgiving; the first time he thought was on a weekend with Assunta Fisher. On this occasion, Mr. Lanier observed Rick Van Dusen outside waxing his truck and they spoke about the possibility of Mr. Lanier purchasing the truck. (PCR V32:334-38). Lanier testified that the next time he went to the Van Dusens' home, on Tuesday, November 25, 2003, he was driving with Assunta Fisher and her kids and he saw the red truck drive by with Deparvine driving

and Rick Van Dusen in the passenger seat.[19] (PCR V32:338). Mr. Lanier took a different route, he did not follow the truck, and arrived at the Van Dusens' home and saw Deparvine and Rick Van Dusen in the driveway. (PCR V32:338-41). Mr. Lanier acknowledged that his memory of the events was fresher at the time of the trial in 2005 than at the evidentiary hearing in 2011. (PCR V32:349).

Trial counsel Skye testified at the evidentiary hearing regarding his knowledge of the inconsistencies in Paul Lanier's statements to Detective Hoover after the murders,[20] Lanier's deposition testimony, and Lanier's trial testimony. Trial counsel was also aware of Assunta Fisher because he took her deposition prior to trial. (PCR V33:437-46). At trial, defense counsel extensively impeached Lanier on a number of issues, including the dates that he was at the Van Dusens' home and his statements to Detective Hoover. (DAR V34:2731-61). Trial counsel

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[19] At trial, Lanier testified that he had been to the victims' home on Tuesday, November 25, 2003, and he *thought* that the other time he had been there was about a week earlier. Lanier testified that it was on the earlier occasion that he observed the truck drive by and then saw Appellant exiting from the driver's side and Rick Van Dusen exit from the passenger side. (DAR V34:2724-27).

[20] Detective Hoover testified at trial that he interviewed Lanier on Wednesday, November 26, 2003, and Lanier said he had been at the victims' home on Sunday, November 23, 2003, but Lanier never indicated that he had been at their house on either Tuesday, November 18, 2003, or Tuesday, November 23, 2003. (DAR V37:3191-94).

also called Detective Hoover at trial as a defense witness and the detective testified that he interviewed Paul Lanier late in the evening on Wednesday, November 26, 2003, and Lanier only mentioned going to the Van Dusens' home on one occasion, Sunday, November 23, 2003. (DAR V37:3191-95).

Appellant asserts that trial counsel was ineffective for failing to call Assunta Fisher because she would have refuted Paul Lanier's testimony about seeing Appellant driving Rick Van Dusen in the truck. The significance of Lanier's testimony was that it was inconsistent with Appellant's version of the events. Appellant testified at trial that his blood got on the victims' Jeep Cherokee steering wheel when he drove the Jeep to the victims' home following a test drive of the pickup truck. According to Appellant, shortly after he and Rick Van Dusen left for a test drive of the truck, they ran out of gas. (DAR V38:3310-20). The two men walked back to the Van Dusens' home and Rick Van Dusen grabbed a can of gas from his garage and they drove back to the truck in the Jeep Cherokee. According to Appellant's version of events, while he was pouring gas on the truck's carburetor, Richard Van Dusen cranked the truck to get it started and Appellant's hand jerked backed and he ripped off a scab from a previous cut on his hand. (DAR V38:3313-18; V39:3403-04, 3421-22, 3427-28, 3464-68). After he cut his hand

and wiped the blood off, Appellant stated that he got in the Van Dusens' Jeep Cherokee and followed Rick Van Dusen in the 1971 truck to the gas station and then back to the Van Dusens' residence.[21]

In denying this claim, the postconviction court correctly noted that Assunta Fisher "did not unequivocally deny that she saw the truck driven, but only that she did not recall it." (PCR V9:1669-70). The testimony from Paul Lanier indicated that he was with Fisher when they saw the truck drive by, but they took a different route to the Van Dusens' home and once they arrived, Appellant and Rick Van Dusen had already arrived and parked in the driveway. Thus, it is not surprising that Paul Lanier, who wanted to buy the victim's truck, recalled seeing it drive by, but Fisher did not have any recollection except seeing Deparvine at the victims' home after they all arrived there. Accordingly, Assunta Fisher would have corroborated Paul Lanier's testimony about seeing Deparvine at the victims' home and she would have further testified how Deparvine acted "strange" because Mr. Lanier was interested in buying the truck that Deparvine coveted. Such evidence would certainly have been prejudicial to

[21] Trial counsel Skye testified that Appellant did not initially tell him this version of events, but after Deparvine had a chance to review the police reports, he told counsel that he had forgotten to tell him that he cut his hand while working on the truck and the Van Dusens surprisingly allowed Deparvine to drive the Jeep back to their house. (PCR V33:439-40; V34:566-68).

Deparvine's defense theory, regardless of any confusion over the relevant dates. Thus, the trial court properly found that Deparvine failed to establish that trial counsel was deficient for failing to call Assunta Fisher or for failing to further impeach Lanier with testimony from Detective Hoover.

Additionally, the postconviction court found that Deparvine failed to establish prejudice based on trial counsel's handling of Paul Lanier's statements because he failed to prove that the results of the proceedings would have been different had counsel called Fisher or questioned Detective Hoover further about Lanier's statements. As the court noted, trial counsel "extensively impeached" Lanier's testimony, including by calling Detective Hoover to testify regarding Lanier's statements. When considering the extensive evidence against Deparvine and the substantial impeachment of Lanier, the trial court correctly concluded that Deparvine could not establish prejudice as required by Strickland.

B. Whether Trial Counsel Was Ineffective For Failing To Present Evidence That Paul Lanier Never Made Rick Van Dusen A $13,000.00 Offer For His 1971 Chevrolet Pickup Truck?

In claim seven of his postconviction motion, Deparvine alleged that trial counsel was ineffective for failing to present evidence that Paul Lanier never made an offer to buy Rick Van Dusens' truck for $13,000 as Lanier's testimony tended

to call into question Deparvine's claim that the victim accepted his offer of only $6,500. At trial, however, Lanier testified that he observed Deparvine and the victim returning from a test drive of the truck, and while Deparvine was in the victim's driveway standing beside the truck, Lanier told Rick Van Dusen that he would have "no problem" paying the $13,000 list price for the truck, but he needed about a week or so to get his finances together.[22] (DAR V34:2729-30). Assunta Fisher confirmed at the evidentiary hearing that she heard Lanier offer to buy the truck with cash for Rick Van Dusens' asking price, but he needed time to get the money. (PCR V32:367-68).

Obviously, as the postconviction court properly found, trial counsel was not ineffective for failing to call Assunta Fisher to further corroborate Lanier's testimony that he offered to buy the victim's truck for $13,000. (PCR V9:1671). Furthermore, by Deparvine's own admission at trial, Paul Lanier was at the victim's house on Sunday, November 23, 2003, looking at the victims' truck and Deparvine also acknowledged that Rick Van Dusen told him that Mr. Lanier had offered the full asking price for the truck. (DAR V39:3321-22; 3448-49). Because Deparvine failed to establish deficient performance or prejudice

[22] At the 2011 evidentiary hearing, Lanier testified that Van Dusen was asking $12,000 for the truck and Lanier indicated that he would love to have the truck for his son, and he thought buying it for $10,000 would be nice. (PCR V32:336-37).

based on counsel's alleged deficiency, this Court should affirm the court's denial of the instant claim.

C. Whether Trial Counsel Was Ineffective For Failing To Present Evidence And Argument That Paul Lanier Was Actually At The Van Dusens' Home On Both Tuesday, November 18, 2003, And Sunday, November 23, 2003?

Collateral counsel next alleges that Deparvine's trial counsel was ineffective for failing to present evidence and argument that Paul Lanier was at the Van Dusens' home on Tuesday, November 18, 2003, and on Sunday, November 23, 2003. Specifically, collateral counsel argues that trial counsel was ineffective for failing to present the testimony of Assunta Fisher, Paul Lanier's girlfriend, because she would have refuted Paul Lanier's testimony regarding the timing of their visits to the Van Dusens' home. As previously discussed in Sub-Claims A & B, supra, Assunta Fisher's testimony regarding the timing of the visits to the Van Dusens' residence, like Paul Lanier's testimony, was equivocal.

During the State's case-in-chief, Paul Lanier testified that he met Rick Van Dusen about a month before the murders at a gas station and expressed interest in Rick Van Dusen's classic truck. (DAR V34:2720-21). On direct examination, Lanier testified that approximately a week before the victims' murders, he was in a car with Assunta Fisher and he observed Deparvine and Rick Van Dusen test driving the 1971 Chevrolet truck that

Rick Van Dusen had placed for sale. (DAR V34:2724-26). After taking a different route and arriving at the Van Dusens' home, Lanier saw the truck pull into the driveway and observed Deparvine exiting the driver's side of the truck and Rick Van Dusen exiting the passenger side. (DAR V34:2725-27). Lanier inspected the truck while Deparvine stood to the side. The truck had a for sale sign in the window indicating an asking price of $13,000. (DAR V34:2728-29). As previously noted, Lanier told Rick Van Dusen that he would have no problem paying the $13,000, but he needed about a week or so to get his finances together. (DAR V34:2729-30).

At the evidentiary hearing, Assunta Fisher testified that she did not recall if she observed the truck being driven by Deparvine with Rick Van Dusen in the passenger seat, but she did corroborate Paul Lanier's testimony about making an offer to buy the truck. (PCR V32:361-62, 367-68). Although both Paul Lanier and Assunta Fisher gave equivocal statements regarding the timing of their visits to the Van Dusens' residence, it was undisputed at trial that they were there at the same time as Deparvine on Sunday, November 23, 2003.[23] Thus, Deparvine cannot establish any prejudice as a result of trial counsel's failure

[23] Deparvine admitted at trial that Lanier and Fisher were at the Van Dusens' on Sunday, November 23, 2003, looking at the truck.

to introduce evidence from Assunta Fisher establishing that Lanier was there on Sunday, November 23, 2003.

As to the other "Tuesday" visit to the Van Dusens' residence, the postconviction court noted:

> During the evidentiary hearing, both Mr. Lanier and Ms. Fisher had difficulty remembering the dates they visited the Van Dusens but each testified to only two visits. The Court notes that Ms. Fisher did not unequivocally deny that she saw the truck driven, but only that she did not recall that. Therefore, her testimony would not have clearly impeached Mr. Lanier's as to that issue. Additionally, Ms. Fisher's testimony would have placed Mr. Lanier at the Van Dusens' home on Sunday, when they saw Defendant, as well as the following Tuesday before the Van Dusens left to deliver the truck. Consequently, the Court finds Defendant has failed to establish that counsel performed deficiently or that the result of the proceedings would have been different had counsel called Ms. Fisher to testify at trial.

(PCR V9:1673) (record citations omitted). A review of Assunta Fisher's evidentiary hearing testimony clearly supports the trial court's finding that she had "difficulty" remembering the dates. Likewise, Paul Lanier freely admitted that his recollection at the evidentiary hearing was not as good as at the time of trial, and even at that time, Lanier was equivocal on the timing of the events. As previously noted, trial counsel extensively impeached Lanier at trial regarding his observations and his statements to the prosecutor and Detective Hoover regarding the timing of events. (DAR V34:2731-61). Given the witnesses' equivocal testimony, the court properly concluded

that Deparvine failed to establish both deficient performance and prejudice.

D. Whether Trial Counsel Was Ineffective For Failing To Call Assunta Fisher To Refute Paul Lanier's Claim That The Van Dusens Were Still Home As Late As 6:00 P.M. On Tuesday Evening, November 25, 2003?

Deparvine asserts that trial counsel was ineffective for failing to call Assunta Fisher to testify that she and Paul Lanier left the victim's home at 5:20 p.m. on November 25, 2003. Paul Lanier testified at trial that they were at the victims' home between "5:50 and quarter to six."[24] (DAR V34:2721). At the evidentiary hearing, Assunta Fisher could not recall any of the details, but after reviewing her deposition, indicated that she recalled having to leave the Van Dusens' home on one occasion around 5:20 to pick up her child, but she could not recall if the Van Dusens were leaving "then or later." (PCR V32:360-67).

At trial, the State introduced evidence establishing that Richard Van Dusen returned home from work on November 25, 2003, at approximately 4:45 p.m. while driving the couple's Jeep Cherokee (DAR V29:1854-55; V31:2158-59). After Paul Lanier and Ms. Fisher had toured the Van Dusens' Tierra Verde home, Chris Coviello saw Richard and Karla Van Dusen leaving their residence, with Richard driving the classic truck and Karla

[24] The "5:50" notation in the record is likely the result of an error by the court reporter given the unusual time reference of "between the hours of 5:50 and quarter to six."

following in the Jeep Cherokee; there were no other passengers in either car. (DAR V29:1855-56). Mr. Coviello testified that he saw the Van Dusens leaving between 5:15 - 5:45 p.m. (DAR V29:1856). The State also introduced cell phone records indicating the Van Dusens' movement after they left their Tierra Verde home on November 25, 2003. The evidence established that Richard Van Dusen received a call on one of his two cell phones at 5:45 p.m. near downtown St. Petersburg where Deparvine resided. (DAR V33:2558-73). He made two calls on one cell phone at 5:50 and 5:55 p.m. that utilized the downtown St. Petersburg cell tower, and then he had calls between 6:11 and 6:17 p.m. that were in the Clearwater area. (DAR V33:2572-73; V36:3041-42). His final call at 6:37 p.m. utilized a cell phone tower in Oldsmar, Florida. (DAR V36:3048-49).

Karla Van Dusen's cell phone indicated that she began a call at 5:33 p.m. within a mile of the cell tower on Tierra Verde, and her next two calls utilized cell towers in downtown St. Petersburg. (DAR V36:3038-40). Karla's last phone call on November 25th also utilized a cell tower in Oldsmar. (DAR V36:3040). Thus, based on this evidence, it was clear that the victims were either at, or very close to, their home at 5:33 p.m., and near Deparvine's apartment in downtown St. Petersburg at 5:45 p.m. According to collateral counsel's allegations, Ms.

Fisher would have testified that she and Paul Lanier left the Van Dusens' home at 5:20 p.m., and the Van Dusens left right behind them. Deparvine argues that he was prejudiced by this failure because Ms. Fisher's testimony would have corroborated Deparvine's testimony that the victims arrived at his apartment around "5:30-ish." (DAR V38:3329).

The victims' cell phone records clearly demonstrate that the victims were near their home in Tierra Verde at 5:33 p.m. and close to Deparvine's apartment in St. Petersburg at 5:50 p.m. Even if Ms. Fisher would have testified regarding her vague recollection of the time frame, it would not have refuted the victims' cell phone records. As such, the postconviction court properly found that Deparvine could not establish deficient performance or prejudice because "Ms. Fisher's testimony was not necessary to impeach Mr. Lanier's testimony or establish the time the Van Dusens were at Defendant's place and would not have corroborated [Deparvine's] testimony that they arrived around 5:30 p.m." (PCR V9:1675).

E. Whether Trial Counsel Was Ineffective For Failing To Introduce Evidence Impeaching Paul Lanier's False Representation Of His Educational Background?

In Claim 10 of his postconviction motion, Deparvine claimed that trial counsel was ineffective for failing to impeach Paul Lanier regarding his educational background by failing to

introduce into evidence a document from the University of South Florida (USF) indicating that the university had no record of Paul Lanier attending USF.[25] (DAR EV8:1185-86). After the State pointed out that Deparvine's hindsight claim was without merit as trial counsel did in fact introduce this evidence during trial, collateral counsel amended his claim and argued that counsel was ineffective for failing to further discuss this inconsequential impeachment during closing argument. Trial counsel testified at the evidentiary hearing that if he did not mention it in his closing argument, it was because he had only a limited amount of time and focused on more important arguments. (PCR V32:446-49).

In denying this claim, the postconviction court properly noted that Deparvine could not establish deficient performance and prejudice:

> A review of the record reflects that Defense Exhibit 4, a signed notarized certificate from the University of South Florida, was received into

[25] At trial, Deparvine's trial counsel attempted to impeach Mr. Lanier on a nonmaterial, collateral matter related to his graduating from the University of South Florida. (DAR V34:2743-44). Mr. Lanier testified that he graduated from USF, and when defense counsel showed the witness a document to refresh his recollection, Mr. Lanier reviewed the document and continued to maintain his position that he graduated from USF. Defense counsel requested that the trial court take judicial notice of the letter, but the trial court declined. (DAR V34:2744). Trial counsel subsequently moved to introduce the document into evidence as self-authenticating, and over the State's objection, the trial court admitted the document into evidence.

> evidence at trial. Although the record reflects that counsel did not publish it to the jury and did not reference the document during closing argument, the Court finds Defendant has failed to demonstrate counsel performed deficiently or that he was prejudiced by counsel's failure to do so. As Mr. Skye noted, the document was entered into evidence, the jury had it at its disposal, and he perceived there were other more significant issues to raise during closing argument. Additionally, a review of the cross-examination of Mr. Lanier reflects Mr. Skye thoroughly impeached Mr. Lanier regarding the following: he had 14 prior felony convictions as opposed to 13 as he claim [sic] on direct examination; he was currently on probation for burglary and providing a false name to law enforcement even though he did not initially state he was on probation for providing a false name; he had a pending domestic violence charge which could still violate his probation; and he met with Assistant State Attorney Pruner the weekend before his testimony although he initially denied it. Counsel further impeached Mr. Lanier on other issues, i.e., his previous description of Defendant and statements he made to law enforcement. Although counsel impeached Mr. Lanier every which way, it is clear the jury still chose to believe at least a portion of his testimony and/or to not believe Defendant's testimony. The Court finds that there is not a reasonable probability that the outcome of the proceeding would have been different if counsel had entered or published the document from USF during cross-examination or highlighted it at closing argument.

(PCR V9:1676-77) (record citation omitted); see also Brown v. State, 846 So. 2d 1114, 1121 (Fla. 2003) (rejecting collateral counsel's hindsight argument that trial counsel was ineffective for failing to impeach a witness on insignificant matters).

ISSUE VI

THE POSTCONVICTION COURT PROPERLY REJECTED DEPARVINE'S CLAIM THAT TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO PRESENT EVIDENCE AND ARGUMENT THAT RICK VAN DUSEN DID NOT TURN DOWN A $15,000 BID AT AUCTION AND FOR FAILING TO CHALLENGE STUART MYERS' TESTIMONY THAT RICK VAN DUSEN SET A RESERVE AUCTION PRICE OF $17,000.

Deparvine asserts that trial counsel was ineffective for failing to challenge testimony related to Rick Van Dusen's attempt to sell his 1971 Chevrolet truck at auction with Kruse International. Deparvine makes two separate arguments in this claim: (1) that trial counsel was ineffective for failing to challenge the admissibility of the Kruse International business records and Stuart Myers' testimony related to these documents because the documents were unreliable as there was a typographical error on the business records regarding the reserve price which indicated a reserve price of $1,700, as opposed to $17,000;[26] and (2) that counsel was ineffective for failing to argue that Rick Van Dusen did not *personally* reject a $15,000 bid for the truck.

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[26] When the State had unsuccessfully attempted to introduce some of the Kruse International business records during the testimony of Detective Hoover, the prosecutor noted a typographical error on an unidentified document, but stated that the typed document stated $17,000. (DAR V31:2196-97). When the State actually introduced the business records during Stuart Myers' testimony, over trial counsel's objections, the documents clearly reflected a reserve price of $17,000.00. See DAR V33:2597, EV5:716-18. Furthermore, the other document admitted, State's Exhibit 100A, shows that the truck did not sell because the final bid was only $15,000. (DAR EV5:719-20).

Trial counsel Skye acknowledged at the evidentiary hearing that he was aware of the $1,700 notation on one of the auction forms, but indicated that he would have "looked foolish" trying to introduce that document given that the other documents clearly indicated that the $1,700 figure was a typographical error. (PCR V33:486-88). The postconviction court agreed with trial counsel's assessment and noted that counsel did not perform deficiently as counsel "objected to and argued extensively against the introduction of the auctions records based on hearsay, reliability, authentication and business records grounds." (PCR V10:1697). The court further found that Deparvine failed to establish prejudice because, even had counsel challenged the admissibility of the documents based on the typographical error, it would not have resulted in a different outcome.

As to Deparvine's claim that trial counsel was ineffective for failing to argue that Rick Van Dusen did not personally reject a $15,000 bid when such a bid did not reach his minimum reserve auction price, trial counsel noted that it was simply a matter of semantics without a significant distinction:

> And whether you want to parse it as a rejection of the $15,000 offer or a $15,000 offer not meeting the $17,000 minimum. I think the jury got the point, unfortunately. And, like I say, over my objection, and I therefore probably didn't want to spend the time on that issue or raise it again in front of the jury.

(PCR V33:490-92). Deparvine has failed to make any cogent argument showing how this distinction was prejudicial to his case. As the court noted, even if trial counsel had performed as alleged and made such an argument, it would not have resulted in a different outcome.

ISSUE VII

DEPARVINE'S CLAIM OF NEWLY DISCOVERED EVIDENCE CONCERNING THE MARKET VALUE OF THE 1971 CHEVROLET PICKUP TRUCK IS WITHOUT MERIT.

Deparvine next alleges that the court erred in denying his claim that newly discovered evidence regarding the value of the victims' 1971 Chevrolet truck entitled him to postconviction relief. Specifically, Deparvine claimed that the victims' truck was sold by a representative of their estate for $6,000 on October 18, 2005, less than three months after his trial. Deparvine claimed that, because the State introduced evidence establishing that the truck was worth around $13,000 - $15,000, this newly discovered evidence would have supported Deparvine's testimony that he purchased the truck for $6,500 and resulted in his acquittal had the jury been aware of it.

At the evidentiary hearing, Rick Van Dusen's daughter, Michelle Kroger, testified that, as trustee for the victims' estate, she sold the 1971 pickup truck shortly after the trial for $6,000. (PCR V34:717-18). Ms. Kroger viewed the truck as the

reason why the victims were murdered. Furthermore, at the time of the sale, she was seven months pregnant with her first child and the truck was one of the final items that needed to be sold so she could finalize the estate and attempt to "move on."[27] (PCR V35:717-19). Ms. Kroger testified that she was not interested in selling the truck for fair market value, but simply wanted to get rid of it. The truck did not garner much interest and she had one offer for $9,000, but the person did not have all the funds available, so she sold it to someone who had $6,000. (PCR V35:718-20).

In order to establish a claim of newly discovered evidence, the defendant must show: (1) that the newly discovered evidence was unknown by the trial court, by the party, or by counsel at the time of trial and it could not have been discovered through due diligence, and (2) that the evidence is of such a nature that it would probably produce an acquittal on retrial. Jones v. State, 591 So. 2d 911 (Fla. 1991). As the postconviction court properly noted, Deparvine failed to establish the second prong of Jones requiring that the evidence be of such a nature that it

[27] Ms. Kroger was aware that the truck was the reason for Deparvine to have committed the murders in this case and the truck held absolutely no sentimental family value whatsoever. She was also obviously concerned with the process of selling the truck given the manner of the instant murders; a so-called "buyer" of the truck luring the victims to a remote area under the pretext of getting paperwork done, only to commit two cold-blooded murders. (PCR V35:717-19).

would probably produce an acquittal on retrial.[28] (PCR V10:1701-03). The defense presented detailed expert testimony at trial that the victims' truck was worth only $7,500 at the time of the victims' murder. (DAR V39:3480-3528). Thus, as the trial court correctly noted, when the circumstances surrounding the sale of the truck for $6,000 by the victims' estate were considered, it would not have affected the jury's verdict. Because Deparvine failed to establish the elements of his newly discovered evidence claim, this Court should affirm the trial court's denial of the instant claim.

Following the evidentiary hearing, collateral counsel once again raised a completely new and improper argument in his written closing arguments that was never presented in his postconviction motion. (PCR V8:1445-48). Contrary to counsel's assertions in his brief, the instant due process claim was never raised in his initial postconviction motion or his amended

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[28] Although the lower court did not address the State's argument that Deparvine failed to establish the first prong of Jones, the State would reiterate that the instant claim is procedurally barred because the "newly" discovered evidence relates to an event which occurred in October, 2005, before Deparvine's judgment and sentence were rendered. Deparvine was not sentenced to death until January, 2006. Thus, defense counsel could have easily learned about this alleged event with due diligence and raised this issue prior to the entry of the judgment and sentence in this case. Trial counsel Skye conceded that he was aware that the truck was involved in litigation based on a lawsuit filed by Deparvine, but counsel did not know the truck had been sold prior to the Spencer hearing. (PCR V34:498).

motion. (PCR V3:404-06). Rather, collateral counsel merely alluded to Deparvine's separate civil lawsuit in a "reply" to the State's Response to Motion for Postconviction Relief.[29] (PCR V5:847). Counsel, however, never raised a due process claim until his written closing argument following the evidentiary hearing. Thus, the trial court correctly found that this argument had not been properly raised in Deparvine's postconviction motion. (PCR V10:1703); see Darling v. State, 966 So. 2d 366, 379 (Fla. 2007) (trial court properly summarily denied claim that was insufficiently pled in 3.851 motion and only raised in written closing argument after the conclusion of the evidentiary hearing).

ISSUE VIII

DEFENSE COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO CHALLENGE BILLIE FERRIS ON THE ACCURACY OF HER RECOLLECTION OF KARLA VAN DUSEN'S STATEMENTS.

Deparvine next alleges that trial counsel was ineffective for failing to challenge Karla Van Dusen's mother, Billie Ferris, on her testimony. Specifically, Deparvine claims that trial counsel was ineffective when he failed to object to the

[29] At the evidentiary hearing, the State introduced a copy of a letter Deparvine wrote to Michelle Kroger accusing her of illegally obtaining and selling "his" truck. In the letter, Deparvine stated that he was going to file a civil lawsuit against the estate for triple the value of the truck - which Deparvine claimed had a value of $20,600. (PCR V17:3085-86, V35:720-22).

prosecutor's allegedly "leading" question to the witness and when counsel failed to impeach Ms. Ferris with a statement she made to Detective Hoover. Collateral counsel further argues that trial counsel should have challenged Ms. Ferris' recollections at trial based on the fact that she had suffered a stroke three months prior to trial.

During the State's case-in-chief, victim Karla Van Dusen's mother, Billie Ferris, testified regarding phone conversations she had with her daughter shortly before the murders. Ms. Ferris testified that Karla Van Dusen told her she was "following Rick and the guy that bought the truck. He knows where to get the paperwork done tonight." (DAR V29:1879). The prosecutor then asked Ms. Ferris if Karla Van Dusen indicated "how the guy was going to pay for the truck," and she responded, "she said he's got cash." (DAR V29:1879).

At the evidentiary hearing, Detective Harry Hoover testified that he spoke with Billie Ferris on the telephone and she informed him of her phone conversations with Karla Van Dusen. According to his report, Ms. Ferris stated that Karla Van Dusen stated that "she was following her husband and the guy that bought the pickup truck, that they were on their way to do some paperwork to close the deal. . . . This guy knew a person who could get the paperwork done for them tonight." (PCR

V31:217). Karla Van Dusen told her mother that her husband was satisfied with the price "and the guy paid them cash." (PCR V31:218).

At the evidentiary hearing, collateral counsel questioned trial counsel John Skye regarding his cross-examination of Billie Ferris, and Skye indicated that he thought he had impeached Ms. Ferris regarding her inconsistent statements and he also recalled calling Detective Hoover to impeach her "to the extent that he could with any prior inconsistent statements." (PCR V33:402-08). Mr. Skye explained that he impeached Ms. Ferris as best he could, but he purposefully did not take an aggressive approach with her because she had the jury's sympathy as the elderly mother of the victim. (PCR V33:518-21).

After hearing the evidence, the postconviction court denied Deparvine's claim and found that he failed to establish deficient performance and prejudice based on trial counsel's handling of Billie Ferris' testimony.

> The Court finds the testimony of Mr. Skye to be very credible and finds Mr. Skye considered his alternatives when impeaching Ms. Ferris and made a reasonable strategic decision to not aggressively impeach her testimony. Additionally, Ms. Ferris denied any memory problems as a result of her stroke. Consequently, the Court finds Defendant has failed to show that counsel performed deficiently in failing to further impeach Mrs. Ferris. See Occhicone v. State, 768 So. 2d 1037, 1048 (Fla. 2000) ("[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.").

The Court further finds that even if counsel had objected or impeached Ms. Ferris as to whether the buyer had purchased or was in the process of purchasing the truck, or called Detective Hoover to impeach her testimony, Defendant has failed to show that the outcome of the proceedings would have been different. First, Mrs. Van Dusen's cell phone records reflected that her cell phone moved north from St. Petersburg to Oldsmar, as follows: at 5:33 p.m. on the afternoon of November 25, 2003, Mrs. Van Dusen made a cell phone call within a 1 mile radius of a cell tower in Tierra Verde; at 5:54 p.m. the cell phone makes an outgoing phone call that bounces off of a tower in downtown St. Petersburg and that phone call lasts approximately 2228 seconds or 37 minutes; at 6:37 p.m. her cell phone makes a final outgoing call that bounces off a tower in Oldsmar. Similarly, Mr. Van Dusen's cell phone records reflect the following: at 5:50 p.m. and 5:55 p.m. on November 25, 2003, his cell phone makes outgoing calls that bounce off of the downtown St. Petersburg tower; his phone received a phone call at 6: 12 p.m. that bounced off a tower in the Feather Sound area; another call off his phone bounced off of a tower on the Bayside Bridge at 6:17 p.m.; an outgoing call at 6:18 p.m. bounced off of a tower in Safety Harbor; and then, finally, his phone receives a call that bounces off a tower in Oldsmar at 8:26 a.m. on November 26, 2003. It is during that 37-minute phone call between downtown St. Petersburg and Oldsmar, that Mrs. Van Dusen told her mother that she was following Rick and the man who purchased the truck. As the Florida Supreme Court previously explained:

> Ferris testified that Karla told her over the phone that she was "following Rick and the guy that bought the truck." This statement, which we have already held was properly admitted, was especially damaging to Deparvine because it placed him with the victims traveling north from St. Petersburg to Oldsmar on the evening in question and it directly contradicted Deparvine' s testimony

> that he did not travel with the victims after he purchased the truck.
>
> Indeed, at oral argument, appellate counsel acknowledged that although the State may have referenced the other statements, the "key to the whole thing" and the "main harm" was on Karla's statement placing Deparvine with the victims. As noted above, the record reflects that the State's primary focus in relying on this evidence was on Karla's statement that she was following Rick and the truck's buyer, hence identifying the buyer as being with them at a critical time and location in relationship to their deaths. Thus, the major benefit to the State's case and the damage to the defense arose from the properly admitted evidence. The statement "[h]e knows where to get the paperwork done tonight" is unimportant insofar as proof of the crimes being charged. Furthermore, the statement "[h]e's got cash" is likewise of little consequence because Deparvine himself testified at trial that he paid with cash.

Deparvine v. State, 995 So. 2d 351, 372 (Fla. 2008). The Court agrees that the most damaging portion of Ms. Ferris's testimony was Karla Van Dusen' s spontaneous statement to her that she was following Rick and the man who purchased the truck. Even if counsel had impeached her testimony that the buyer was going to pay cash instead of that he had already paid cash, her testimony would still have reflected that Mrs. Van Dusen was following behind Rick and the buyer of the truck – Defendant. And that testimony would still have clearly conflicted with Defendant's trial testimony. Counsel's failure to impeach Ms. Ferris on this issue does not undermine confidence in the verdict. Consequently, the Court further finds Defendant has failed to establish that he was prejudiced by counsel's failure to further cross-examine or impeach Ms. Ferris.

(PCR V9:1638-41). As the trial court properly found, trial counsel did not perform deficiently by failing to challenge Ms. Ferris on the accuracy of her testimony. Furthermore, even if this Court were to find deficient performance, the record clearly supports the court's finding that Deparvine failed to establish prejudice as the evidence showed that Karla Van Dusen was following her husband and Deparvine from downtown St. Petersburg to Oldsmar where Deparvine ultimately murdered both of them.

ISSUE IX

TRIAL COUNSEL WAS NOT INEFFECTIVE IN DEALING WITH THE ADMISSION OF HEARSAY TESTIMONY BY BILLIE FERRIS, OR IN FAILING TO PRESERVE ERROR OR EMPHASIZE THE EXCULPATORY ELEMENTS OF THE TESTIMONY WHICH WAS ALLOWED.

In Issue IX of his Initial Brief, Appellant appears to reassert the claim he raised in Claim Seventeen of his postconviction motion, but the argument in his brief is devoid of any relevant facts or legal argument relating to his claim. Although his argument is vague, the State will attempt to address the claim as it was raised below.

The instant claim is very similar to Claim VIII, supra, and Appellant appears to again argue that if trial counsel would have stressed the fact that Karla Van Dusen referred to the truck as already having been purchased, the jury would have acquitted Deparvine and found that another person committed the

murders. However, collateral counsel's hindsight argument that trial counsel was ineffective for failing to argue the semantics of Karla Van Dusen's statements to her mother is unavailing and without merit. As the postconviction court properly noted, even had trial counsel impeached Billie Ferris or argued to the jury that the buyer had completed the purchase, the outcome of the proceedings would not have been any different because the key point of her testimony was that Karla Van Dusen was following her husband and Deparvine when travelling from St. Petersburg to Oldsmar. (PCR V10:1699-1701).

ISSUE X

THE POSTCONVICTION COURT PROPERLY REJECTED DEPARVINE'S CLAIM THAT TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO DEVELOP EVIDENCE AND CROSS-EXAMINE STATE WITNESS, PETER WILSON.

During the State's case-in-chief, the prosecution presented the testimony of Peter Wilson, a co-worker of the victim Rick Van Dusen. On the day of the murders, Rick Van Dusen had met with Mr. Wilson prior to lunch, and the two men travelled together to Lake Wales in Rick Van Dusen's recently-purchased Jeep Cherokee. Mr. Wilson noted that the Jeep was in immaculate condition and he did not notice any blood stains on the steering wheel. (DAR V32:2380-81). In his postconviction proceedings, Deparvine claims that trial counsel was ineffective for failing to cross-examine Mr. Wilson regarding his ability to detect

Deparvine's blood stains which were found on the Jeep's steering wheel after the murders.[30]

At the evidentiary hearing, collateral counsel called Peter Wilson as a witness and he testified that Rick Van Dusen's Jeep Cherokee was in immaculate condition on the day he travelled with Rick Van Dusen. Collateral counsel showed the witness a photograph of the steering wheel with dark brown stains on it, and Wilson stated that he did not observe the stains on the day he was with Rick Van Dusen. (PCR V31:136-39). Furthermore, Mr. Wilson specifically testified that he observed the dashboard side of the steering wheel because he leaned over to see Rick Van Dusen's GPS unit that was on the dashboard. (PCR V31:139-40).

Crime scene detective Ronald Cashwell testified that he first observed the blood stains on the steering wheel while standing in the passenger's side doorway, without the benefit of any illumination from a flashlight. (PCR V32:291). He also indicated that a flashlight was not necessary to observe most of the bloodstains from an arm's length distance. (PCR V32:292). He testified that, based on his observations, a passenger sitting

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[30] As previously noted, Deparvine testified at trial that his blood got on the Jeep's steering wheel on the Sunday prior to the murders when he drove the Jeep following a test drive of the victims' pickup truck.

in the Jeep's passenger seat would be able to see the blood on the steering wheel without any illumination. (PCR V32:292).

Trial counsel Skye explained in detail his reason for not asking Peter Wilson any questions on cross examination regarding his ability to observe any blood stains:

> My whole thought process was I did not want to fall into - you always like to get up and cross-examine somebody even if you don't know what you're standing there cross-examining him for. My thought process was I don't want to be falling in the trap that many younger and somewhat inexperienced attorneys of getting up and cross-examining someone when I didn't really have anything to ask them. I didn't have anything to say, nothing to jam them on, nothing to mitigate the damaging thing that they had said on direct.
>
> And what you end up merely doing is getting a witness to reiterate yet again, what they had said damaging on the record. And then the person who called the witness gets up on redirect and gets to do it all over again.
>
> So while I wasn't thrilled and happy with what Mr. Wilson had said, I felt that if I cross-examined him, he's going to say, well, you know, I was in the car for an hour and a half, a substantial period of time. It was broad daylight. And no, I wasn't looking for any blood on the steering wheel, but I didn't see any either. And then the State would have gotten back up and gone all over it again, so we would have heard the same testimony not once, not twice, but three times.

(PCR V34:564).

The postconviction court properly found that trial counsel did not perform deficiently by "falling into the trap" of asking Peter Wilson the questions asked by collateral counsel at the

postconviction evidentiary hearing. (PCR V9:1677-80). Peter Wilson clearly stated, both at trial and again at the postconviction evidentiary hearing, that he did not observe the dark brown blood stains on the victim's immaculately-clean vehicle, despite the fact that he was in the car for an extended period of time and had a vantage point to observe the stains had they actually been there. Likewise, crime scene technician Cashwell testified that some of the larger blood stains were clearly visible from outside the passenger side window and from an arm's length without a flashlight. Additionally, the court noted that Deparvine failed to demonstrate how he was prejudiced by trial counsel's failure to cross-examine Peter Wilson. Because Deparvine failed to establish that trial counsel was ineffective in dealing with Peter Wilson, this Court should affirm the trial court's denial of this claim.

ISSUE XI

THE POSTCONVICTION COURT PROPERLY REJECTED APPELLANT'S CLAIM THAT TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO CALL INMATES PAUL DOMBROWSKI OR NICHOLAS KLEIN AS WITNESSES CONCERNING DEFENDANT'S ROLEX WATCH.

At trial, Deparvine testified that he obtained the money to purchase the victims' truck by selling a Rolex watch he had obtained while incarcerated in prison. According to Deparvine's trial testimony, a terminally ill inmate at Everglades Correctional Institution gave him the Rolex watch before he died

in 2000. Deparvine testified that he managed to conceal the watch for three years and smuggled the watch out of prison and the work release center by burying it underground. (DAR V38:3299-3301; V39:3393-99).

In his postconviction proceedings, Deparvine claims that trial counsel was ineffective for failing to call Paul Dombrowski or Nicholas Klein, fellow inmates, to testify that Deparvine had a "very nice" watch while in prison. At the evidentiary hearing, collateral counsel presented testimony from Dombrowski and he stated that both he and Deparvine were law clerks in the correctional facility's law library. (PCR V31:146-48). When asked to describe the watch Deparvine owned while in prison, Dombrowski stated that "this is where it gets a little unusual." According to Dombrowski, he did not initially know what the "really nice" watch looked like (he could not even describe the color), and that is what he told Deparvine's trial counsel prior to trial. (PCR V31:149-51). However, Dombrowski claimed that, after being transported to Tampa for Deparvine's trial, and after speaking with trial counsel Skye, he saw a magazine ad for a gold Rolex watch with diamonds and recognized the watch as the one Deparvine wore while in prison. (PCR V31:151). On cross-examination, Dombrowski acknowledged writing letters to Deparvine's trial counsel offering to provide any

help he could and requesting information from Deparvine's counsel, including a copy of the indictment, Deparvine's prior criminal history, and the arrest probable cause affidavit. (PCR V31:162-67).

Inmate Nicholas Klein testified that he was incarcerated with Deparvine at Everglades Correctional Institution in the late 1990's. (PCR V31:184-84). Klein testified that Deparvine had a gold watch, but Klein did not know if it was a "real good" watch, but described it as "better than average." (PCR V31:185, 195). Klein could not describe the watch by brand, whether it had jewels, or the color of its face, and testified that he did not really pay any attention to other people's watches. (PCR V31:185, 196-97). Klein testified that jewelry in that prison was common and there were numerous drug dealers with expensive jewelry; there was also a grandfather clause allowing jewelry for those who had it prior to a specific date. (PCR V31:186-89). Klein acknowledged that he probably told the defense investigator, Ms. Anderson, that he did not remember ever seeing Deparvine with a Rolex watch. (PCR V31:194-95). Klein is currently in prison and testified that he has approximately 20 prior felony convictions. (PCR V31:191).

Trial counsel Skye testified regarding his investigation into the possibility of calling Dombrowski as a defense witness.

Trial counsel spoke to Dombrowski over the telephone prior to trial and did not find his statements helpful because Dombrowski merely described the watch as "nice," and could not give any more specific description. (PCR V33:424-25). Nevertheless, trial counsel transported Dombrowski to Tampa so that he could meet him face-to-face. After the State rested its case, trial counsel met with Dombrowski in person and concluded that he would not call him because he would be a "horrible witness." (PCR V33:428-29, 550). Trial counsel testified that he was concerned with Dombrowski's motivation to testify for Deparvine and tailor his testimony for Deparvine. Counsel was also concerned over the witness's refusal to acknowledge the number of prior convictions he had. (PCR V17:3054-58; V33:539-51). Trial counsel further testified that he did not personally speak to inmate Nicholas Klein because his investigator had contacted Klein, and Klein told her that he knew nothing about Deparvine's watch.[31] (PCR V33:425-26, 539-40).

After hearing the testimony of the relevant witnesses, the postconviction court properly made a factual finding that Dombrowski and Klein were simply not credible witnesses and

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[31] Trial counsel also investigated the terminally ill inmate Deparvine claimed to have obtained a Rolex watch from. The inmate, Bill Jamieson, had passed away prior to the murders, but the defense team contacted his surviving spouse and she stated that, to her knowledge, her husband never owned a Rolex watch. (PCR V33:538-40; V34:576-78).

trial counsel was not ineffective for failing to present their testimony. (PCR V9:1660-61). Trial counsel thoroughly investigated Dombrowski's potential testimony, which boiled down to an extremely vague description of a "nice" watch until Dombrowski's miraculous last-minute discovery of a magazine ad which conveniently triggered his memory of the watch. Clearly, as the court found, trial counsel was not deficient for failing to present this witness given his incredible testimony. Likewise, the court properly found that Deparvine failed to establish prejudice based on counsel's failure to call these unreliable inmate witnesses.

ISSUE XII

THE TRIAL COURT PROPERLY SUMMARILY DENIED DEPARVINE'S CLAIM THAT TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO REQUEST A LIMITING JURY INSTRUCTION ADDRESSING THE VOLUNTARINESS OF THE VAN DUSEN'S ASSOCIATION WITH DEFENDANT AFTER THE COURT HAD GRANTED HIM A JUDGMENT OF ACQUITTAL ON THE TWO ARMED KIDNAPPING CHARGES.

Deparvine next asserts that trial counsel was ineffective for failing to request an unidentified limiting instruction for the jury addressing the voluntariness of the victims' association with him. Deparvine argues that trial counsel should have requested a jury instruction that Deparvine did not 'confine, abduct or imprison' the Van Dusens and that, if the Van Dusens were with Deparvine, they were with him freely and voluntarily.

In summarily denying Deparvine's claim, the postconviction court stated:

> The Court agrees with the State's argument that Defendant has failed to establish counsel performed deficiently or that he was prejudiced. Counsel successfully obtained a judgment of acquittal on the kidnapping charges and, therefore, it was not necessary for counsel to further seek a limiting instruction regarding the voluntariness of the Van Dusens' association with Defendant. Additionally, Defendant cannot establish that he was prejudiced by counsel's failure to request a limiting instruction where the kidnapping counts were not presented to the jury. The Court further notes Defendant was found guilty of both premeditated and felony first degree murder; not only is it unlikely that the trial court would have granted such a limiting instruction, but the Court finds there is not a reasonable probability that the result of the proceedings would have been different if counsel had requested such an instruction. As such, relief is not warranted on claim 16.

(PCR V10:1699). As the court correctly noted, because the trial court granted a motion for judgment of acquittal on the two armed kidnapping charges, trial counsel had no reason to address this aspect of the case with the jury as it was not a consideration for them. Furthermore, as the court noted, any alleged deficiency based on trial counsel's failure to seek such an instruction cannot be deemed prejudicial as the kidnapping counts were never presented to the jury.

ISSUE XIII

TRIAL COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO CHALLENGE HENRY SULLIVAN'S CLAIM THAT HE LOST HIS FLORIDA ID CARD IN JUNE 2003.

Deparvine asserts that trial counsel was ineffective for failing to challenge Henry Sullivan's testimony at trial regarding when he first noticed that he had lost his Florida ID card.[32] Deparvine claimed in his postconviction motion that trial counsel was ineffective for failing to question Henry Sullivan regarding his statements to Detective Keene wherein Sullivan stated that "he first noticed that his Florida ID card was missing after his brother, Justin Sullivan, had come to visit him after Justin had first gotten out of prison" on October 13, 2002. According to collateral counsel, "[s]killful utilization of the timing of the brother's visit would have contributed to a reasonable doubt that Mr. Deparvine was the only person likely to have come into possession of Henry Sullivan's lost ID card."

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[32] Law enforcement officers found Henry Sullivan's Florida ID card, issued November 26, 2002, lying next to the driver's side door of the Van Dusens' Jeep Cherokee after the murders. The State introduced evidence that Deparvine lived at the same apartment complex as Henry Sullivan in May, 2003. Sometime during the summer of 2003, Henry Sullivan lost his identification card (the November 26, 2002-issued card) and had to obtain a replacement. (DAR V32:2369-77, 2415-23; EV1:95). In order to establish that Deparvine placed Henry Sullivan's identification card outside the Jeep as a red herring, the State introduced an abundance of evidence at trial establishing that Henry Sullivan, or his brother who had occasionally utilized Henry's name, were not involved in the homicides.

Initial Brief at 88.

At trial, Henry Sullivan testified on direct examination that he thought he obtained two Florida ID cards in the summer of 2003 because he melted one in the dryer and lost one. (DAR V32:2421-22). On cross-examination, Sullivan testified that when confronted by law enforcement officers after the murders, he told them he had lost his ID card sometime around June, 2003. (DAR V32:2432). Defense counsel asked Henry Sullivan if his brother, Justin Sullivan, had come around his apartment in the spring or early summer of 2003, and he responded, "No. I hadn't seen my brother in probably a year before they came with this foolishness." (DAR V32:2433).

At the evidentiary hearing, Henry Sullivan testified that he told Detective Keene that he lost his ID cards all the time, and that he had lost one when his brother had visited about a year and a half before the murders. (PCR V33:377-78). As he testified at trial, and as was established at the evidentiary hearing, Sullivan lost an ID card in the summer of 2003 and obtained a replacement on August 5, 2003. (PCR V33:382-83). The evidence also established that Sullivan obtained a replacement ID card on November 26, 2002, more than a month after his brother had been released from prison. (PCR V33:383-84). Sullivan testified that his brother came to his house "a couple

weeks" after being released from prison. (PCR V33:381).

As the postconviction court correctly noted when denying this claim:

In its written closing argument, the State argues:

> If Justin Sullivan stole an ID card soon after his release on October 13, 2002, it would have caused Henry Sullivan to obtain the replacement ID card issued on November 26, 2002. Henry Sullivan subsequently lost the November 26, 2002-issued ID card during the summer of 2003 when Deparvine and Sullivan lived in the same apartment complex, causing him to obtain another replacement card on August 5, 2003. Thus, contrary to collateral counsel's assertion, no amount of "skillful utilization" of the timing of events would have benefited Deparvine's defense theory.

The Court agrees with the State's argument. **It is the November 26, 2002 ID card – the one which *replaced* the ID card lost around the time of Justin Sullivan's release from prison in October 2002 - that was found near the Van Dusen Jeep. Given that Henry Sullivan lost the November 26, 2002 replacement ID card around June 2003, the same time he lived in the same apartment complex as Defendant, there is not a reasonable probability that such cross-examination would have affected the verdict.** Consequently, the Court finds Defendant has failed to show how counsel performed deficiently in cross-examining Mr. Sullivan regarding the timing of the loss of his identification card or how such failure to cross-examine prejudiced the outcome of the proceedings.

(PCR V10:1682) (emphasis added). Because Deparvine has failed to establish deficient performance and prejudice as required by Strickland, this Court should affirm the lower court's denial of the instant claim.

ISSUE XIV

THE POSTCONVICTION COURT PROPERLY REJECTED DEPARVINE'S CLAIM THAT TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO PRESENT EVIDENCE AND ARGUMENT THAT THE DETECTIVES FAILED TO CONDUCT A PROPER INVESTIGATION.

In his final ineffective assistance of counsel claim, Deparvine alleges that trial counsel was ineffective for failing "to develop the evidence and present to the jury the fact that the investigation was fatally flawed because detectives focused solely on him and failed to follow up on other leads in the case." Initial Brief at 88. The trial court rejected Deparvine's argument and found that he failed to demonstrate that trial counsel performed deficiently or that he was prejudiced by counsel's alleged deficiencies. (PCR V10:1706).

Deparvine's hindsight complaints about trial counsel's performance are clearly refuted by the testimony at the postconviction evidentiary hearing and the direct appeal record. A review of the trial record establishes that trial counsel extensively cross-examined law enforcement officers regarding their investigation into the victims' murders. (DAR V39:3567-71). Collateral counsel argues that law enforcement failed to properly investigate the story given by Deparvine that there was a second red truck with a person matching his description waiting for the Van Dusens after they sold Deparvine their truck for cash. However, as shown by the testimony of Detective

Hoover, law enforcement thoroughly investigated the murders and conducted neighborhood surveys of Deparvine's apartment complex, but there was never any evidence developed to potentially corroborate Deparvine's story. Likewise, there was no evidence to corroborate Deparvine's story that he had $6,500 in cash available to purchase the truck from the sale of a Rolex watch.[33] (DAR V33:2611-15; PCR V31:259-68). Similarly, there was no evidence after searching the victims' residence to indicate that Deparvine ever paid them any money for the truck.

Collateral counsel further faults law enforcement for their post-arrest interrogation techniques, and alleges that trial counsel was ineffective for failing to adequately cross-examine the detectives regarding their interrogation techniques. However, collateral counsel fails to acknowledge that the State never introduced any evidence of Deparvine's post-arrest statements to detectives and fails to specifically allege how trial counsel performed deficiently in this regard.[34]

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[33] The State introduced Deparvine's bank records at trial and they revealed that in the five (5) months leading up to the murders, Appellant never had more than $827 in his bank account.

[34] In rebuttal, after Deparvine testified and gave his version of events, the State presented evidence from Detective Hoover regarding statements Deparvine made immediately after the murders on November 27, 2003. This testimony was not related to Deparvine's separate statements to detectives following his arrest in January, 2004.

Finally, trial counsel did introduce evidence to support Deparvine's story, including calling eighteen defense witnesses and presenting the testimony from Deparvine himself in an attempt to convince the jury of his innocence. Trial counsel also argued to the jury that law enforcement immediately focused on Deparvine to the exclusion of other suspects. The State's evidence, however, did not support Deparvine's defense theory regarding his alleged purchase of the victims' truck, and the jury properly rejected his defense based on the substantial evidence establishing his guilt beyond a reasonable doubt. As the postconviction court properly noted when denying this claim, "Defendant has not demonstrated that counsel performed deficiently and, contrary to Defendant's assertion, there is not a reasonable probability that the outcome of the proceeding would have been different - either through a not guilty verdict or a recommendation of a life sentence - had counsel investigated or inquired into any of the areas described above." (PCR V10:1706). The State submits that the postconviction court properly found that none of Deparvine's allegations of ineffective assistance of counsel, either in this claim or any of the other numerous ineffective assistance of counsel claims presented herein, entitled him to relief because he has failed to carry his burden under Strickland of demonstrating deficient

performance and prejudice. Accordingly, this Court should affirm the trial court's order denying Deparvine postconviction relief.

ISSUE XV

FLORIDA'S LETHAL INJECTION PROCEDURES DO NOT VIOLATE DEPARVINE'S CONSTITUTIONAL RIGHTS.

Deparvine challenges lethal injection as a method of execution.[35] As this Court has consistently rejected constitutional challenges to Florida's lethal injection procedures, the postconviction court properly summarily denied Deparvine's claim. Reynolds v. State, 88 So. 3d 459, 486 (2012); Valle v. State, 70 So. 3d 530, 541 (Fla. 2012); Marek v. State, 8 So. 3d 1123, 1130 (Fla. 2009); Tompkins v. State, 994 So. 2d 1072, 1080-82 (Fla. 2008); Lightbourne v. McCollum, 969 So. 2d 326 (Fla. 2007); Schwab v. State, 969 So. 2d 326 (Fla. 2007). Because Deparvine's argument provides no basis for retreating from this Court's precedent, the judgment of the postconviction court must be affirmed.

[35] Deparvine acknowledges his claim has been decidedly adversely to him by this Court. Appellant's Initial Brief at 91.

ISSUE XVI

FLORIDA STATUTES, SECTION 945.10, WHICH EXEMPTS FROM DISCLOSURE THE IDENTITY OF EXECUTION TEAM MEMBERS, IS NOT UNCONSTITUTIONAL.

Deparvine claims that Florida Statutes, section 945.10, which exempts from disclosure information about the identity of the executioner, violates his constitutional rights. Deparvine's claim is without merit and was properly summarily denied by the postconviction court. As Deparvine recognizes, his claim has been squarely rejected by this Court in Bryan v. State, 753 So. 2d 1244, 1250-51 (Fla. 2000); see also Provenzano v. State, 761 So. 2d 1097, 1099 (Fla. 2000); Henyard v. State, 992 So. 2d 120, 130 (Fla. 2008). Deparvine's argument provides no basis for retreating from this Court's precedent. The judgment of the postconviction court must be affirmed.

ISSUE XVII

DEPARVINE'S CONSTITUTIONAL CHALLENGE TO THE RULES GOVERNING JUROR INTERVIEWS IS WITHOUT MERIT.

Deparvine next mounts a constitutional attack to the rules governing juror interviews. This claim was properly summarily denied as procedurally barred and meritless. Johnson v. State, ___ So. 3d ___, 2012 WL 5439163, *14 (Fla. Nov. 8, 2012); Reese v. State, 14 So. 3d 913, 919 (Fla. 2009); Barnhill v. State, 971 So. 2d 106, 116-17 (Fla. 2007). Because Deparvine's argument

provides no basis for retreating from this Court's precedent, the judgment of the postconviction court should be affirmed.

ISSUE XVIII

DEPARVINE'S CLAIM THAT THE JURY INSTRUCTIONS VIOLATED CALDWELL V. MISSISSIPPI, 472 U.S. 320 (1985), IS WITHOUT MERIT.

Deparvine claims the jury was unconstitutionally instructed because they were told their role was merely "advisory." Deparvine relies on Caldwell v. Mississippi, 472 U.S. 320 (1985), to support his legal argument.[36] This claim was properly summarily denied as procedurally barred and meritless. Lukehart v. State, 70 So. 3d 503, 521-22 (Fla. 2011); Troy v. State, 57 So. 3d 828, 842-43 (Fla. 2011); Lebron v. State, 982 So. 2d 649, 666 (Fla. 2008); Card v. State, 803 So. 2d 613, 628 (Fla. 2001); Brown v. State, 721 So. 2d 274, 283 (Fla. 1998). Deparvine's argument provides no basis for retreating from this Court's prior precedent. Therefore, the postconviction court's summary denial of this claim must be affirmed.

[36] Deparvine presented this claim to the postconviction court to preserve it for federal review. (PCR V3:419).

ISSUE XIX

DEPARVINE'S CONSTITUTIONAL CHALLENGE TO FLORIDA'S DEATH PENALTY STATUTE IS WITHOUT MERIT.

Deparvine alleges that Florida's death penalty statute is unconstitutional and violates Apprendi v. New Jersey, 530 U.S. 466 (2000), and Ring v. Arizona, 536 U.S. 584 (2002).[37] Deparvine argues that his indictment was constitutionally infirm as it failed to allege the aggravating circumstances, and that his recommendations of death run afoul of the Constitution as it is unknown whether the jurors unanimously found any one aggravating circumstance. Deparvine's argument was properly summarily denied as meritless as this Court has consistently rejected these identical arguments. Pham v. State, 70 So. 3d 485, 496 (Fla. 2011); Hernandez v. State, 4 So. 3d 642, 665 (Fla. 2009).[38]

Lastly, Deparvine's citation to the "apparent confusion" as expressed by the jury in Question (1) to bolster his argument adds nothing to his claims as no such question existed in the

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[37] Deparvine presented this claim to the postconviction court to preserve it for federal review, and acknowledged that an evidentiary hearing was not required. (PCR V3:422).

[38] Deparvine's Ring argument was raised in his direct appeal and thus was procedurally barred and could have and should have been denied on this additional ground. Deparvine v. State, 995 So. 2d 351, 379 (Fla. 2008) (rejecting argument that Florida's death penalty statute is unconstitutional because it does not require jury unanimity in making its recommendation); see generally Medina v. State, 573 So. 2d 293, 295 (Fla. 1990) (issue raised on direct appeal procedurally barred in postconviction proceedings).

instant case. Appellant's Initial Brief at 97 (citing DAR V6:1011). The jury did not ask any questions in this case at the guilt or penalty phases. Thus, because Deparvine's argument provides no basis for retreating from this Court's precedent, this Court should affirm the postconviction court's order denying the instant claim.

CLAIM XX

DEPARVINE'S CONSTITUTIONAL CHALLENGES TO FLORIDA'S CAPITAL SENTENCING STATUTE ARE WITHOUT MERIT.

Deparvine's challenges to Florida's death penalty statute were not raised in his direct appeal and therefore were properly summarily denied as procedurally barred.[39] Furthermore, his claim that Florida's capital sentencing statute is unconstitutional due to the "arbitrary and capricious" application of the death penalty is without merit, and was properly summarily denied on this additional ground. See Knight v. State, 923 So. 2d 387, 414 (Fla. 2005); Hodges v. State, 885 So. 2d 338, 359 n.9 (Fla. 2004). The judgment of the postconviction court must be affirmed.

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[39] Deparvine presented this claim to the postconviction court to preserve it for federal review, and acknowledged that an evidentiary hearing was not required. (PCR V3:426).

ISSUE XXI

CUMULATIVE ERROR

In his last enumeration of error, Deparvine asserts he is entitled to relief because of cumulative error. However, where the individual errors alleged are either procedurally barred, or without merit, the claim of cumulative error also fails. Downs v. State, 740 So. 2d 506, 509 n.5 (Fla. 1999). As argued throughout this Brief, Deparvine's claims are either procedurally barred or without merit. As such, his cumulative error claim is also without merit and was properly denied. The judgment of the postconviction court must be affirmed.

CONCLUSION

In conclusion, Appellee respectfully requests that this Honorable Court affirm the lower court's order denying Appellant postconviction relief.

CERTIFICATE OF SERVICE

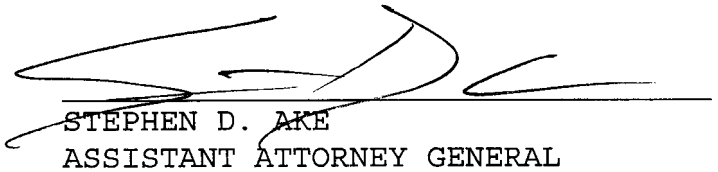
I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by email to David R. Gemmer, Assistant Capital Collateral Regional Counsel, Middle Region, at gemmer@ccmr.state.fl.us and support@ccmr.state.fl.us, this 21st day of December, 2012.

CERTIFICATE OF FONT COMPLIANCE

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

Respectfully submitted,

PAMELA JO BONDI
ATTORNEY GENERAL



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