FILED
2012 DEC 12 PM 1:59
CLERK SUPREME COURT
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IN THE SUPREME COURT OF FLORIDA

CASE NO. SC12-482

TROY VICTORINO

Appellant,

v.

STATE OF FLORIDA

Appellee.

ANSWER BRIEF OF APPELLEE

ON APPEAL FROM THE SEVENTH JUDICIAL CIRCUIT
IN AND FOR VOLUSIA COUNTY, FLORIDA

PAMELA JO BONDI
ATTORNEY GENERAL

COUNSEL FOR RESPONDENT
KENNETH S. NUNNELLEY
Fla. Bar No. 998818
ASSISTANT ATTORNEY GENERAL
444 SEABREEZE BLVD., SUITE 500
DAYTONA BEACH, FLORIDA 32114
(386)238-4990
FAX - (386) 226-0457

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STATEMENT OF THE CASE

This is an appeal from the denial of Victorino's first motion for post-conviction relief under *Florida Rule of Criminal Procedure* 3.851. That motion was filed on December 9, 2010, and amended on August 1, 2011. The State filed its Answer, and, on March 23, 2011, the case management conference took place. (V1, R19-58). The trial court conducted an evidentiary hearing on certain claims, and, on January 3, 2012, issued its amended order denying all relief. (V6, R803-911). Notice of appeal was filed on March 5, 2012, and Victorino filed his *Initial Brief* on October 3, 2012.

THE GUILT AND PENALTY PHASE FACTS

On direct appeal, this Court described the facts of the murders and of the penalty phase in the following way:

> On August 27, 2004, Victorino was charged in a fourteen-count superseding indictment that included six counts of first-degree murder in the deaths of Erin Belanger, Roberto Gonzalez, Michelle Nathan, Anthony Vega, Jonathon Gleason, and Francisco "Flaco" Ayo-Roman. Victorino, with codefendants Jerone Hunter and Michael Salas, went to trial on July 5, 2006. [FN1] Codefendant Robert Anthony Cannon previously pleaded guilty as charged.
>
> > [FN1] Codefendants Hunter and Salas were convicted of six first-degree murders. Hunter received four death sentences and two life sentences; Salas received life sentences. We have affirmed Hunter's convictions and sentences. *Hunter v. State*, 8 So. 3d 1052 (Fla.), *cert. denied*, --- U.S. ----, 129 S.Ct. 2005, 173 L.Ed.2d 1101 (2008). The Fifth District has also affirmed

Salas's convictions and sentences. *Salas v. State*, 972 So. 2d 941 (Fla. 5th DCA 2007).

A. The Guilt Phase

The evidence presented at trial established that the August 6, 2004, murders were the culmination of events that began several days before. On Friday, July 30, Erin Belanger contacted police concerning suspicious activity at her grandmother's vacant house on Providence Boulevard in Deltona. Without the owner's permission, Victorino and Hunter had recently moved into the home with their belongings. On Saturday, Belanger again contacted police; this time she reported that several items were missing from her grandmother's house.

Late Saturday night, Victorino appeared at Belanger's own residence on Telford Lane. He demanded the return of his belongings, which he believed Belanger had taken from the Providence Boulevard residence. Shortly after leaving Belanger's residence early on the morning of Sunday, August 1, Victorino contacted law enforcement to report the theft of his belongings from the Providence Boulevard residence. The responding officer advised Victorino that he had to provide a list of the stolen property. This angered Victorino, and he said, "I'll take care of this myself."

A short time later, Victorino met Brandon Graham and codefendants Cannon and Salas, who were in Cannon's Ford Expedition (the SUV). Codefendant Hunter and several young women were also in the SUV. Victorino told them that Belanger and the other occupants of the Telford Lane house had stolen his belongings and that he wanted them to go fight Belanger and the others. According to Graham, Victorino and the occupants of the SUV all went in the SUV to the Telford Lane residence. While Victorino remained in the SUV, the young women went into the residence armed with knives. The young men stood outside holding baseball bats, and Hunter yelled for the occupants to come out and fight. The group left in Cannon's SUV, however, after victim Ayo-Roman yelled "policia."

A few days later, on the evening of Wednesday, August 4, Victorino went to a park with Graham and the three

codefendants to fight another group. Evidence was presented that some of the members of that group were affiliated with the victims at Telford Lane and would have knowledge of Victorino's allegedly stolen property. When their foes failed to show up, Victorino and his associates drove back to a house on Fort Smith Boulevard in Deltona where Victorino and Hunter now lived. As they arrived, however, Victorino spotted the car of the group with which the fight was planned and directed Cannon, who was driving, to chase the car. Victorino fired a gunshot at the fleeing car and then told Cannon to take him home.

The following morning, Thursday, August 5, Graham, Salas, and Cannon met with Victorino and Hunter at their residence. There, Victorino outlined the following plan to obtain his belongings from Belanger. Victorino said that he had seen a movie named Wonderland in which a group carrying lead pipes ran into a home and beat the occupants to death. Victorino stated that he would do the same thing at the Telford Lane residence. He asked Graham, Salas, and Cannon if they "were down for it" and said to Hunter, "I know you're down for it" because Hunter had belongings stolen as well. All agreed with Victorino's plan. Victorino described the layout of the Telford Lane residence and who would go where. Victorino said that he particularly wanted to "kill Flaco," and told the group, "You got to beat the bitches bad." Graham described Victorino as "calm, cool-headed." Hunter asked if they should wear masks; Victorino responded, "No, because we're not gonna leave any evidence. We're gonna kill them all."

Victorino and his associates then left in Cannon's SUV to search for bullets for the gun that Victorino fired the previous night. While driving, the group further discussed their plan and decided that each of them needed a change of clothes because their clothes would get bloody. The group dropped Graham off at his friend Kristopher Craddock's house. Graham avoided the group's subsequent calls and did not participate in the murders.

Around midnight on Thursday, August 5, a witness saw Victorino, Salas, Cannon, and Hunter near the murder scene on Telford Lane. Cannon, a State witness,

testified that he and Salas went because they were afraid Victorino would kill them if they did not. Cannon further testified that he, Victorino, Hunter, and Salas entered the victims' home on the night of the murders armed with baseball bats.

On the morning of Friday, August 6, a coworker of two of the victims discovered the six bodies at the Belanger residence and called 911. Officers responding to the 911 call arrived to find the six victims in various rooms. The victims had been beaten to death with baseball bats and had sustained cuts to their throats, most of which were inflicted postmortem. Belanger also sustained postmortem lacerations through her vagina up to the abdominal cavity of her body, which were consistent with having been inflicted by a baseball bat. The medical examiner determined that most of the victims had defensive wounds. The front door had been kicked in with such force that it broke the deadbolt lock and left a footwear impression on the door. Footwear impressions were also recovered from two playing cards, a bed sheet, and a pay stub. All of these impressions were linked to Victorino's Lugz boots. Furthermore, DNA testing linked bloodstains on Victorino's Lugz boots to several of the victims. A dead dachshund, a knife handle, and a bloody knife blade were also recovered from the crime scene.

On Saturday, August 7, the day after the murders were discovered, Victorino was arrested on a probation violation at his residence on Fort Smith Boulevard. Hunter, who was present at the time, complied with the officers' request that he come to the sheriff's office. Once there, Hunter described his role in the murders. That same day, Cannon's SUV was seized. From it, officers recovered a pair of sunglasses containing victim Ayo-Roman's fingerprint. In addition, glass fragments found in the vehicle were consistent with glass from a broken lamp at the crime scene.

When questioned by officers, Salas admitted to being at the crime scene on the night of the murders and stated that Cannon drove there with Victorino, Hunter, and Salas. Salas also described his role in the murders and told officers where the bats had been discarded at a retention pond. Based on that

information, law enforcement authorities recovered two bats from the pond and two bats from surrounding trees. The two bats recovered from surrounding trees contained DNA material that was linked to at least four of the victims.

At trial, Victorino testified in his defense. He admitted that he believed that Belanger had taken his property from the Providence Boulevard residence. However, he denied meeting Graham, Cannon, or Salas at his residence on August 5, testifying instead that he was at work. He further denied committing the murders and offered an alibi—that he was at a nightclub on the night of the murders. Two friends testified on behalf of Victorino and corroborated his alibi.

Hunter and Salas also testified in their defense. Each described his role in the murders and corroborated the other testimony and evidence offered at trial, including the evidence of the meeting at which Victorino planned the murders and the agreement to participate. They further testified that Victorino attempted to establish an alibi by making an appearance at the nightclub.

On July 25, 2006, Victorino was convicted of six counts of first-degree murder (Counts II-VII); one count of abuse of a dead human body (Count VIII); one count of armed burglary of a dwelling (Count XIII); one count of conspiracy (to commit aggravated battery, murder, armed burglary of a dwelling, and tampering with physical evidence) (Count I); and one count of cruelty to an animal (Count XIV).

B. The Penalty Phase

At the beginning of the penalty phase, the trial court informed the jury of the parties' stipulation that Victorino was on felony probation for aggravated battery at the time of the murders. After the State introduced victim impact statements by the victims' family members, the defendant presented several witnesses.

Victorino began by presenting the testimony of three expert witnesses. Dr. Joseph Wu, a psychiatrist, concluded that a PET (Positron Emission Tomography)

scan revealed Victorino's brain was abnormal, evidencing lower than normal frontal lobe activity. While he did not make a diagnosis, he said that the scan was consistent with traumatic brain injury or mental health conditions, such as bipolar disorder or schizophrenia. After reviewing Victorino's records and conducting numerous tests, Dr. Charles Golden, a neuropsychologist, determined that Victorino has some frontal lobe impairment and severe emotional problems. Although Victorino has average intelligence and knows right from wrong, he performed poorly on executive function tests, has difficulty with interpersonal relationships, and has poor coping skills. Dr. Golden opined that the test results were consistent with Victorino's personal history of physical abuse, difficulty in controlling his aggression, and lack of mental health treatment. Finally, the third defense expert, Dr. Jeffrey Danziger, a psychiatrist, testified that Victorino has an IQ of 101 and outlined Victorino's long history of physical and emotional abuse by his father, an incident of sexual abuse, his history of mental health problems (including his several suicide attempts), and his time in prison.

Several relatives and friends also testified. Victorino's brother and mother also told of Victorino's mental health problems, an instance of sexual abuse, and the frequent physical abuse by his father. In addition, two friends testified about their regard for him.

In rebuttal, the State presented Dr. Lawrence Holder, an expert in radiology and nuclear medicine. He testified that Victorino's PET scan was normal. Further, he stated that use of a PET scan to suggest that a patient has a specific mental health problem, such as bipolar disorder, is not an established clinical use of such scans.

The jury recommended life sentences for the murders of Michelle Nathan and Anthony Vega and death sentences for the murders of Erin Belanger (by a vote of ten to two), Francisco Ayo-Roman (by a vote of ten to two), Jonathan Gleason (by a vote of seven to five), and Roberto Gonzalez (by a vote of nine to three). At the subsequently held *Spencer* [FN2] hearing, the State submitted an additional written victim impact

statement. Victorino did not present any additional evidence.

> [FN2] *Spencer v. State*, 615 So. 2d 688 (Fla. 1993).

On September 21, 2006, the trial court followed the jury's recommendations by imposing four death sentences. [FN3] The trial court found the following five aggravating factors applicable to each of the four murders and accorded them the weight indicated: (1) the defendant had a prior felony conviction and was on probation at the time of the murders (moderate weight); (2) the defendant had other capital felony convictions (very substantial weight); (3) the defendant committed the murders in the course of a burglary (moderate weight); (4) the murders were especially heinous, atrocious, or cruel (HAC) (very substantial weight); and (5) the murders were cold, calculated, and premeditated (CCP) (great weight). In addition, the court found a sixth aggravator in the murders of Gleason and Gonzalez–that the murders were committed to avoid arrest (substantial weight). The trial court found no statutory mitigation but did find the following nonstatutory mitigating factors: (1) Victorino had a history of mental illness (some weight); (2) he suffered childhood physical, sexual, and emotional abuse (moderate weight); (3) he was a devoted family member with family support (little weight); (4) he did some good deeds (very little weight); (5) he exhibited good behavior at trial (very little weight); (6) he was a good inmate (little weight); (7) he was a good student who earned awards (little weight); (8) he had an alcohol abuse problem (very little weight); and (9) he had a useful occupation (very little weight). The trial court determined that the aggravating factors far outweighed the mitigating circumstances and, in accord with the jury's recommendation, sentenced Victorino to death for each of the four murders.

> [FN3] The court also sentenced Victorino as a habitual offender to the following terms to be served consecutively: (1) ten years for Count I, conspiracy (to commit aggravated battery, murder, armed burglary, and tampering with evidence); (2) two life

> sentences for Counts VI and VII, the murders of Michelle Nathan and Anthony Vega; (3) thirty years for Count VIII, the abuse of a dead human body with a weapon (Belanger); (4) life for Count XIII, the armed burglary of a dwelling; and (5) ten years for Count XIV, cruelty to an animal.

Victorino v. State, 23 So. 3d 87, 91-95 (Fla. 2009). This Court affirmed the convictions and sentences.[1]

THE EVIDENTIARY HEARING FACTS

The evidentiary hearing was held December 14, 2011. (V2, R84-236).[2]

Dorona Edwards, Victorino's cousin, said she and Victorino grew up together in Deltona, Florida. (V2, R97, 98, 101). Victorino was "very loving, very fatherly" to her two children. (V12, R98). Edwards never saw Victorino do anything illegal. She never saw him abuse marijuana and never noticed any disturbing behavior. (V2, R99). Victorino was not an angry-type person. (V2, R99-100).

Edwards visited Victorino while he was incarcerated in the county jail. However, she never visited him in prison. (V2, R100). Edwards was not aware that Victorino had been convicted of numerous felonies before this case. (V2, R101). Nonetheless,

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[1] The direct appeal claims are addressed, where relevant to this appeal, in the argument section, *infra*.

[2] Cites to the 3.851 appeal record will be V_, R _ for volume number followed by page number. Cites to the direct appeal record will be DAR, V_, R_.

her opinion of Victorino would not change as she "absolutely" wanted to help him. (V2, R102).

Jeff Dowdy, trial counsel, has been practicing law for twenty-two years. (V2, R104, 116). He has participated in 150 trials and defended between 1000 to 3000 defendants charged with a felony. "Maybe more. I'm not really sure." (V2, R116-17). In at least 48 of his cases, the State filed notice of intent to seek the death penalty. (V2, R117). Dowdy attends continuing legal education classes[3] every year which typically includes updates on mental health issues, DNA analysis, forensic analysis, mitigation, and investigations. (V2, R117).

Dowdy and co-counsel Michael Nielsen divided the responsibilities for examining witnesses for the trial. (V2, R107, 122). Either Dowdy or Nielsen objected if the need arose during the State's closing arguments. (V2, R122).

Dowdy did not recall utilizing a particular strategy when he did not object to an "emotional 911 call recording"[4] that was published for the jury. He said, "As I recall, it was a normal -

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[3] Dowdy has attended the "Death is Different" seminar for 17 years and also attends seminars conducted by the Public Defender's Office. (V2, R117-18).

[4] Christopher Carroll testified at trial that he arrived at the victims' home to pick up two co-workers. After knocking several times and noticing that the front door appeared to have been kicked in, Carroll entered the home. When he saw blood all over a bed in the front part of the house, he called 911. (DAR, V29, R1798).

- I mean, it wasn't like he was screaming or yelling, or - - it did come under the excited utterance hearsay exception, so we didn't object." Further, "It just seemed a typical 911 phone call, he was reporting something." (V2, R105, 118). Dowdy said, "We'll always object when need be. Sometimes we feel it might be better not to object if we don't feel it's really going to get us anywhere and I guess that would be an example of the 911 call." (V2, R119).

In addition, Dowdy did not recall a strategic or tactical decision in not objecting to testimony that elicited speculation or opinions from lay witnesses about what the co-defendants were thinking. (V2, R104, 105, 106). Dowdy would have objected if there had been any basis and it was appropriate to do so. (V2, R121).

Dowdy recalled moving for a mistrial when Victorino's co-defendant Robert Cannon testified against Victorino but refused to be cross-examined. Dowdy moved for a mistrial "as soon as it happened" although "the record doesn't show it." Dowdy said, "It was pretty chaotic in the courtroom" during that time. Dowdy renewed his motion for mistrial the following morning. (V2, R105-06). Nonetheless, "The record speaks for itself." Dowdy did everything he could to protect Victorino's interests with respect to Cannon's testimony. (V2, R120).

Dowdy did not object to the State's DNA expert's power point display as Nielsen was responsible for cross-examining that witness. (V2, R107, 130). However, if he felt an objection was proper, Dowdy would have alerted Nielsen. (V2, R131).

Dowdy could not recall utilizing a strategic or tactical decision in not objecting to the prosecutor's statements regarding what the victims felt. (V2, R107, 109). Dowdy interpreted these statements as "the victims could not have imagined what they were going to go through **in the next evening**." (V2, R122). Dowdy said the State did not make an improper "golden rule" argument and therefore did not object. (V2, R122).

Dowdy did not recall why he did not rebut the State's argument that Victorino entered the victims' home to commit armed burglary. (V2, R109). Dowdy said, "the facts were the facts." (V2, R123). The bats used to murder the victims were recovered. As a result, Dowdy said there would have been "nothing to gain at all" in objecting to the armed burglary argument. (V2, R123). Had the defense argued against this charge, Dowdy said it might have "anger(ed) the jurors ... we've always been very cautious about what we do and say during trial so as not to upset the jurors when we get to the penalty phase, should we get there." (V2, R124).

Dowdy made the statement in his closing argument that "the prosecution has done a wonderful job here, but have they proven Mr. Victorino's guilt beyond a reasonable doubt?". Dowdy made this statement in order to argue that the State **had not** proven its case. (V2, R109-10). Dowdy always compliments the State as well as the trial judge "in virtually every trial" in order to make the jury comfortable and to ensure the jury does not "dislike us." (V2, R124).

Dowdy said the defense team was given surviving families' written statements in advance that were going to be offered as victim impact evidence. (V2, R112). The State and Defense team discussed the statements and Dowdy only objected to one statement by a family victim that referred to Victorino as a "coward." (V2, R112, 126). The court instructed the witness not to use that expression. Dowdy did not recall having any other objections to victim impact evidence. (V2, R112, 126). Dowdy said the United States Supreme Court's decision in *Payne v. Tennessee*[5] is very broad in what it allows to be presented as victim impact evidence. (V2, R125). Given that there were six victims in this case, there were only eight to ten witnesses that presented impact statements -- not an excessive number. (V2, R126-27).

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[5] *Payne v. Tennessee*, 51 U.S. 808 (1991).

Dowdy said Victorino told him that he had an alibi for the night of he murders. Victorino said he was at a restaurant when the murders were committed. Victorino was "adamant" about this albi defense. (V2, R112-13, 127). Dowdy's investigators looked into the alibi and the team then "developed all the possible leads" in order to go forward with that defense. (V2, R113). In addition, Victorino testified at trial that his shoes were at the crime scene, but someone else's feet were in them. (V2, R113). Dowdy and Victorino had several discussions about testifying at trial but it was never discussed that Victorino's alibi defense was "unbelievable." (V2, R113-14).

Dowdy said a pre-trial hearing was held with regard to photographs that the State was prepared to use. Dowdy said, "all of the photographs were gruesome, just because it was a murder case." (V2, R114, 128). All of the photographs "were brutal" and accurately depicted the crime scene. (V2, R128). As a result, the trial court selected a few photographs that the State could admit at trial. Dowdy did not recall objecting at trial or if he renewed his objections at trial. (V2, R114).

Dowdy did not recall a strategic reason why Dorona Edwards was not called as a mitigation witness. However, "I know our investigators interviewed every possible witness we could bring. I mean we were going for everything, any possible witness we

could have." (V2, R115, 129). Dowdy said, "We needed all the help we could get." (V2, R129).

Dowdy did not recall a strategic reason why he did not object to the State's argument that the State pre-screens cases and only prosecutes people who are truly guilty. (V2, R115). Although he could not recall if one of the other defendant's attorneys objected to the State's argument, he did not believe there was a basis for an objection. (V2, R130).

Michael Nielsen,[6] co-counsel with Dowdy, has been practicing law since 1989. (V2, R132, 162). He has defended "thousands" of felony cases and represented defendants in 80 felony trials. Of those 80 felony cases, 19 were first degree murder cases with 7 of those involving the death penalty. Only 2 of the 7 cases that went all the way through a penalty phase were sentenced to death. (V2, R163-64).

Nielsen did not recall utilizing a particular strategy in not objecting to the 911 call that was published for the jury. (V2, R132-33). Nonetheless, there was no basis to make an objection at that time. (V2, R162).

Nielsen said co-defendant Robert Cannon was his witness for cross-examination. (V2, R133, 166). Nielsen attempted to cross-

[6] Nielsen has attended a number of continuing education seminars regarding the death penalty that include extensive discussion of the preparation and presentation of mitigation. (V2, R164).

examine Cannon but Cannon refused. Nielsen requested that the trial judge force Cannon to answer his questions but Cannon continually refused. (V2, R133-34, 166). Nielsen made "very strong objections" in asking the court for some relief for Victorino. (V2, R133-34). In Nielsen's opinion, he did the best he could with the witness. (V2, R166). Nielsen thought he had moved for a mistrial but there is no such motion in the trial transcripts. (V2, R134).

Nielsen said that, as a general rule, he makes strategic or tactical decisions when he does not object to lay witnesses speculating or offering opinions. (V2, R134-35). Nielsen and his partner Dowdy have a tremendous amount of respect for each other and trust each other's judgment when examining witnesses. (V2, R168). Nielsen objected on cross-examination for his witness and Dowdy did the same. (V2, R136). Further, "There's a lot of times during a trial where there's things that you could technically object to, but for strategic reasons and so forth you may not do it." (V2, R137). Nielsen protected Victorino from his co-defendants. (V2, R139).

Nielsen did not object to the State's DNA witness's power point graphic that said "DNA has been used and exonerates persons wrongfully convicted on death row" because, "we probably liked it, quite frankly." (V2, R140). In Nielsen's opinion, this demonstrative aid assisted the defense because "the State's

using DNA to convict ... but they've also just told us that sometimes DNA is used to exonerate people, or find them not guilty." Further, "It's good for (the jury) to know it can cut both ways." (V2, R140, 142). Nielsen knew the DNA results were not favorable to Victorino. (V2, R169). Nielsen and Dowdy asked Victorino about the results to which Victorino said, "They're wrong ... I wasn't there." (V2, R176). As a result, Nielsen hired a DNA expert to review the State's findings. The expert suggested questions for Nielsen to ask the State's expert, which Nielsen said, "I did study up, and I thought I did a really effective job." (V2, R169). Nielsen said the power point slide discussed DNA in general -- not that it related to Victorino's case. (V2, R142). Nonetheless, the DNA power point presentation was "good for the defense. So I'm not going to object to something I like." (V2, R169).

Nielsen said that if the need arises to object during the State's closing arguments, he only objects if he is doing the defense's closing, pursuant to established protocol by the court. (V2, R143, 144, 147, 169). However, it is Nielsen's strategy not to object as much during closing arguments because "it's kind of a time for both sides to be able to tell the jury their case ... there's some things that I let go on closing that I might object to other times." (V2, R146). Nielsen does not

object at times based upon years of expertise and "on just logic sometimes." (V2, R146).

Nielsen said he does not think it is wrong to pay respects to opposing lawyers. Therefore, he did not take issue with his partner saying during the defense's closing arguments, "the prosecution has done a wonderful job here." (V2, R148, 172-73).

Nielsen did not object to victim impact testimony pertaining to "grief and mourning" because "there is a certain amount of leeway you're going to give to a victim's relative if you have any sense of how to play a jury." If a witness says something that disparages his client, Nielsen objects. (V2, R149, 151). Nielsen objects if a statement comes close to being objectionable. "I'm not going to let that go in front of the jury. But a little bit here and a little bit there, we're trying to save the man's life ... we're trying to get a life recommendation." (V2, R151). The defense took proper steps to limit presentation of victim impact evidence. (V2, R173). The number of witnesses per victim was very limited. (V2, R174-75).

Nielsen said Victorino denied any involvement in these crimes and claimed that he had "an airtight alibi." (V2, R154). Nielsen, Dowdy, and their investigators visited the places where Victorino claimed he had been during the commission of the murders. Nielsen said it was important to understand "exactly what it is that (Victorino) was explaining to us to be able to

prove it to the jury." Further, "At no time did we feel it was our place to tell Mr. Victorino what in fact occurred, Okay? That's not my job." (V2, R155). Nielsen does not tell a client what to do with his defense when it is an affirmative defense. (V2, R156). As a result, the defense did not object to the armed burglary charge because "what they did in the house doesn't concern us. We had nothing to do with it." Victorino was not there "according to our defense." (V2, R171). The defense took a position regarding Victorino's alibi defense and stayed with it. (V2, R172).

Nielsen recalled a pre-trial hearing where the defense asked the State to stipulate to the cause and manner of death for the victims. The State refused. The defense asked the court to limit the presentation of photographs "for maybe one or two per victim" which the court denied. However, "the Court did put some reins on the State. They didn't come close to putting everything they had." (V2, R156-57, 176).

Nielsen said Victorino provided "a huge list" of potential mitigation witnesses. After talking to them, Nielsen chose not to call several for different reasons. (V2, R157). He chose witnesses where Victorino could get the maximum benefit from their testimony. (V2, R178). Nielsen did not recall why the defense did not call Dorona Edwards a possible mitigation witness. However, if she would have been helpful, the defense

would have called her to testify. (V2, R157, 177, 178). Victorino was "very involved" in every aspect of his defense. (V2, R180).

Nielsen did not object to the State's closing argument regarding "prescreening cases" and "prosecuting only those that are guilty" pursuant to the court's protocol. "If you had a witness, you do the objections. If you're doing the closing, then you're going to be objecting during their closing." However, Nielsen said, "It's strategy ... you don't want to get up and object to every statement that's being made." Further, "I'm sure it was a strategical move." (V2, R158-59).

Nielsen said Victorino's involvement in every aspect of his defense was "more so than you might normally encounter. He's a smart guy." (V2, R180).

SUMMARY OF THE ARGUMENT

With the exception of a claim based on *Ring v. Arizona*, all of Victorino's claims allege ineffectiveness of counsel in one form or another. Those claims were denied by the collateral proceeding trial court following an evidentiary hearing, and that denial of relief is supported by competent substantial evidence. None of those numerous claims demonstrate deficient performance on the part of counsel, nor do any of those claims establish prejudice to Victorino -- in order to prevail under

Strickland, he must establish both factors to carry his burden of proof. The denial of relief should be affirmed.

Insofar as the *Ring v. Arizona* claim is concerned, that claim was properly denied because it had been raised and decided against Victorino of direct appeal. Nothing has called that result into question, and relief was properly denied.

ARGUMENT

THE STANDARD OF REVIEW

Because the motion was denied following an evidentiary hearing, the standard of review is: "As long as the trial court's findings are supported by competent substantial evidence, 'this Court will not "substitute its judgment for that of the trial court on questions of fact, likewise of the credibility of the witnesses as well as the weight to be given to the evidence by the trial court."'" *Blanco v. State*, 702 So. 2d 1250, 1252 (Fla. 1997), *quoting Demps v. State*, 462 So. 2d 1074, 1975 (Fla. 1984), *quoting Goldfarb v. Robertson*, 82 So. 2d 504, 506 (Fla. 1955; *Melendez v. State*, 718 So. 2d 746 (Fla. 1998).

THE LEGAL STANDARD FOR INEFFECTIVENESS CLAIMS[7]

[7] At various points in his brief, Victorino says that the ineffectiveness analysis of *United States v. Cronic*, 466 U.S. 648 (1984), is appropriate in his case. That claim is legally incorrect -- nothing occurred at Victorino's trial which would bring his case under *Cronic*.

In order to prevail on a claim of ineffective assistance of counsel, a defendant must show both (1) that trial counsel's performance was deficient; and (2) that the deficient performance prejudiced the defendant so as to deprive him of a fair trial. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

To establish the deficiency prong under *Strickland*, the defendant must prove that "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.* The defendant carries the burden to "overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" *Id.* at 689, 104 S.Ct. 2052 (*quoting Michel v. Louisiana*, 350 U.S. 91, 101, 76 S.Ct. 158, 100 L.Ed. 83 (1955)). Counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.' *Hurst v. State*, 18 So.3d 975, 1008 (Fla.2009) (*quoting Strickland*, 466 U.S. at 691, 104 S.Ct. 2052). With respect to the investigation and presentation of mitigation evidence, the United States Supreme Court observed in *Wiggins v. Smith*, 539 U.S. 510, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003), that "*Strickland* does not require counsel to investigate every conceivable line of mitigating evidence no matter how unlikely the effort would be to assist the defendant at sentencing. Nor

does *Strickland* require defense counsel to present mitigating evidence at sentencing in every case." *Wiggins,* 539 U.S. at 533, 123 S.Ct. 2527. Rather, in deciding whether trial counsel exercised reasonable professional judgment with regard to the investigation and presentation of mitigation evidence, a reviewing court must focus on whether the investigation resulting in counsel's decision not to introduce certain mitigation evidence was itself reasonable. *Id.* at 523, 123 S.Ct. 2527; *Strickland,* 466 U.S. at 690-91 104 S.Ct. 2052.

Second, the defendant must prove that the deficient performance resulted in prejudice. *Id.* Thus, the defendant must demonstrate that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694, 104 S.Ct. 2052.

As the United States Supreme Court recently summarized:

> There is no dispute that the clearly established federal law here is *Strickland v. Washington.* In *Strickland,* this Court made clear that "the purpose of the effective assistance guarantee of the Sixth Amendment is not to improve the quality of legal representation ... [but] simply to ensure that criminal defendants receive a fair trial." 466 U.S., at 689, 104 S.Ct. 2052. Thus, "[t]he benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Id.*, at 686, 104 S.Ct. 2052 (emphasis added). The Court

> acknowledged that "[t]here are countless ways to provide effective assistance in any given case," and that "[e]ven the best criminal defense attorneys would not defend a particular client in the same way." *Id.*, at 689, 104 S.Ct. 2052.
>
> Recognizing the "tempt[ation] for a defendant to second-guess counsel's assistance after conviction or adverse sentence," *ibid.*, the Court established that counsel should be "strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment," *Id.*, at 690, 104 S.Ct. 2052. To overcome that presumption, a defendant must show that counsel failed to act "reasonabl[y] considering all the circumstances." *Id.*, at 688, 104 S.Ct. 2052. The Court cautioned that "[t]he availability of intrusive post-trial inquiry into attorney performance or of detailed guidelines for its evaluation would encourage the proliferation of ineffectiveness challenges." *Id.*, at 690, 104 S.Ct. 2052.
>
> The Court also required that defendants prove prejudice. *Id.*, at 691-692, 104 S.Ct. 2052. "The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.*, at 694, 104 S.Ct. 2052. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* That requires a "substantial," not just "conceivable," likelihood of a different result. *Richter*, 562 U.S., at ----, 131 S.Ct., at 791.

Cullen v. Pinholster, 563 U.S. ___, 131 S.Ct. 1388, 1403 (2011). Strategic decisions by counsel are "virtually unchallengeable." *Strickland v. Washington, supra.* Almost all of counsels' actions challenged in this appeal fall into that category.

THE INDIVIDUAL CLAIMS

I. THE 911 CALL CLAIM

On pages 17-22 of his brief, Victorino says that trial counsel were ineffective for not objecting to the "911 call" made by the person who discovered the victims' bodies. The collateral proceeding trial court denied relief on this claim:

> It is clear that the defense counsel did not object to the playing of the tape which contained this language. However, there is no information in the communication that is inconsistent with the bulk of the evidence that was presented in regard to the State's efforts to prove the details of these murders. The defendant argues that the man who discovered the bodies was emotionally charged. It is hard to imagine how anyone discovering that murder scene could be anything but emotionally charged and concerned and distressed and sympathetic and engaged in a whole range of human emotions that most people never experience.
>
> The standard, however, is the *Strickland* test. In *Reese v. State,* 14 So. 3d 913 (Fla. 2009), the *Strickland* test was restated by the court and indicated that the yardstick by which we measure ineffective assistance of counsel claims is the seminal decision of the Supreme Court in *Strickland.* First, the defendant must establish that counsel's performance was deficient. Second, the defendant must establish that counsel's deficient performance prejudices the defendant. To establish the deficiency prong under *Strickland,* the defendant must prove that counsel's performance was unreasonable under "prevailing professional norms." The *Strickland* standard requires proof that, "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is the probability sufficient to undermine confidence in the outcome." *White v. State,* 964 So. 2d 1278 (Fla. 2007).
>
> In this case there was no testimony to suggest that counsel's conduct in failing to object was deficient.

> The 911 call was clearly an excited utterance when made but when viewed in the context of delivering information to the jury, did not deliver any information that they didn't receive over and over during the course of the trial. Even if there had been deficient performance and the objection should have been sustained, the introduction of the information creates no prejudice to the defendant so neither prong of the *Strickland* test has been established and Claim 1 must fail.

(V6, R763-65). There is no showing that the evidence at issue is objectionable in the first place, nor is there any showing that Victorino was prejudiced in any fashion. The facts of this case are horrendous at best, and no part of the 911 call put anything before the jury that they did not also hear from other sources, in far greater (and more graphic) detail. The trial court properly found that Victorino had failed to establish either deficient performance or prejudice as he must do to carry his burden of proof.

II. THE "MISTRIAL" CLAIM

On pages 22-36 of his brief, Victorino says that trial counsel were ineffective for not moving for a mistrial when co-defendant Cannon (who had previously entered into a plea agreement with the State), "refused" to testify. The substantive "mistrial" claim was raised and rejected on direct appeal:

> Victorino contends that the trial court's denial of his motion for mistrial was erroneous because Victorino's rights under the Sixth Amendment to confrontation and cross-examination were violated when a State witness, Cannon, the fourth perpetrator, refused to be cross-examined. Victorino argues that he

> was prejudiced as a result because Cannon implicated Victorino during his direct testimony. We reviewed and rejected a similar claim in *Hunter*. 8 So. 3d at 1065-66. Here, as in *Hunter*, the Sixth Amendment argument was not presented to the trial court. Victorino is not entitled to relief on this unpreserved argument.

Victorino v. State, 23 So. 3d at 102. In *Hunter*, this Court addressed this claim at length, and denied relief:

> Hunter contends that the trial court erred in denying his motion for mistrial as his rights under the Sixth Amendment to confrontation and cross-examination were violated when the State's witness, Cannon, the fourth perpetrator, refused to be cross-examined. Hunter argues that he was prejudiced as a result because Cannon implicated Hunter during his direct testimony. Upon review of the record, we conclude that Hunter is not entitled to relief.
>
> At trial, the State called Cannon to testify in its case-in-chief. Cannon was a codefendant and had pled guilty to all fourteen counts as charged. Cannon testified that he expected to be sentenced to life imprisonment without parole. However, Cannon testified that he was not guilty and therefore could not answer the State's questions as to what happened. Cannon did testify that Victorino intended to kill everyone in the house and that he and Salas had no choice but to go with the others. Cannon further testified that he and Salas felt they had no choice because Victorino would kill them. Cannon thereafter denied doing anything but did explain that all of the defendants including himself went into the house where the murders occurred and everyone was armed with a baseball bat. Counsel for defendants Salas and Victorino objected to this testimony; counsel for Hunter did not.
>
> Counsel for Victorino attempted to cross-examine Cannon. He would not answer any questions other than to repeat that he was not guilty. Cannon then testified that his lawyers made him plead guilty and that he wanted to withdraw his pleas. After Victorino's defense attorney completed his cross-examination, counsel for Hunter expressly stated that

"Mr. Hunter has no questions." Counsel for Salas also declined to cross-examine Cannon.

The following morning, after the State had presented the testimony of seven witnesses, counsel for Salas renewed his motion for mistrial, adding the new grounds that counsel was concerned the State either knew or had reason to know that Cannon was not going to testify. Victorino and Hunter joined in the motion. **However, the trial court denied the motion for mistrial, observing that, from opening statements, Cannon was expected to be a commentator as to what happened at the crime scene and that it was to the defendants' benefit because the State was not able to elicit much of the information intended from Cannon.** The trial court further found that everyone in the courtroom was surprised by Cannon's testimony, including the State, which then requested that Cannon be declared an adverse witness. Finally, the trial court stated that none of the defendants requested that he strike Cannon's testimony.

We deny Hunter's claim. First, the alleged error was not preserved. Hunter did not seek a mistrial at the time of Cannon's testimony on the basis that Cannon would not answer questions, and Hunter expressly waived his right to cross-examine the witness. *Cf. Norton v. State*, 709 So. 2d 87, 94 (Fla. 1997) (failing to object contemporaneously to a witness's testimony waived right to raise issue on appeal, notwithstanding motion for mistrial at the close of the witness's testimony). Moreover, the basis upon which Salas belatedly sought a mistrial, joined by Hunter, was not the Sixth Amendment, on which Hunter now relies, but a procedural rule. [FN6]

> [FN6] The State may not call a witness to testify that it knows will invoke his or her Fifth Amendment right against self-incrimination. *Richardson v. State*, 246 So. 2d 771, 777 (Fla. 1971). Nor may the defense. *Faver v. State*, 393 So. 2d 49, 50 (Fla. 4th DCA 1981).

Hunter v. State, 8 So. 3d 1052, 1065-1066 (Fla. 2008). (emphasis added).

The collateral proceeding trial court denied relief on the ineffectiveness claim, and made the following findings:

> The defendant has removed from Claim 2 the allegation of "prosecutorial misconduct" in regard to the State calling Mr. Cannon to the stand. The defendant asserts that his attorney was ineffective in not making a motion for mistrial when Mr. Cannon, a co-defendant who had pled guilty to the murders, was reluctant to answer all the questions posed on cross examination. The focused testimony appears at pages 1913 through 1970 of the transcript. In essence Mr. Cannon, in an odd display of behavior, declined to answer some questions by Victorino's counsel. No questions were asked by counsel for Hunter or Salas.
>
> There were numerous objections and apparently three motions for mistrial during the testimony of Mr. Cannon, the motions for mistrial having been made by Mr. Salas' counsel. Those motions were denied and his conviction was affirmed. *Salas v. State,* 972 So. 2d 941 (Fla. 5th DCA 2008), *pet. cert. denied,* 34 So. 3d 2 (Fla. 2010). The defendant now claims his lawyer was ineffective by failing to raise a contemporaneous motion for mistrial at the time he declined to answer several questions during the cross examination. As the State points out in its answer, these issues were extensively briefed and argued on direct appeal in *State v. Victorino,* 23 So. 3d 87 (Fla. 2009) and *State v. Hunter,* 8 So. 3d 1052 (Fla. 2008), *pet. cert. denied* 129 S.Ct. 2005, 173 L.Ed.2d 1101 (2009). No error was found by the Supreme Court which specifically dealt with the issue.
>
> Mr. Nielsen, Mr. Victorino's attorney, was frustrated when Mr. Cannon chose not to answer many, but not all of his questions. The court declared Mr. Cannon to be an adverse party to facilitate a proper examination by all parties.
>
> At the evidentiary hearing Mr. Nielsen and Mr. Dowdy indicated that they thought a contemporaneous motion for mistrial had been made but an examination of the record clearly shows that they did not make such a contemporaneous motion. The record clearly indicates that Mr. Salas' counsel made a motion for mistrial on

three occasions which was denied by the court. Counsel for Mr. Victorino indicated they thought they had and thought they should have made such a motion.

The question is first whether there is a defect in their performance and did it cause Mr. Victorino prejudice. Said another way, **would a motion for mistrial have been granted and was the defendant prejudiced by the information that was received from Mr. Cannon.**

In analyzing this claim, the State urges that the defendant is merely attempting to re-litigate a previously decided substantive claim by couching it as ineffectiveness of counsel hearing. The court agrees with that proposition and concludes that such approach is not permissible and cannot serve to allow a defendant to get a second opportunity to re-litigate the same issue. *Rodriguez v. State/McNeil,* 39 So. 3d 275 (Fla. 2010); *Taylor v. State/McNeil,* 3 So. 3d 986 (Fla. 2009); *Overton v. State/McDonough,* 976 So. 2d 536 (Fla. 2007). **The defendant has not alleged nor proven deficient performance and he has not alleged adequate grounds for the court to conclude that had an objection been made a mistrial would be granted.** [FN1]

The granting of a mistrial is reserved for severe circumstances and should only be granted when premised on an error that is so serious as to vitiate the entire trial. *Miller v. State,* 42 So. 3d 204 (Fla. 2010). The mistrial must be so severe as to essentially deprive the defendant of a fair proceeding. *Wade v. State,* 41 So. 3d 857 (Fla. 2010).

> [FN1] The motion for mistrial was not made by Mr. Victorino's attorneys. The logical predicate to a mistrial would be a request to strike the witness' testimony. No such request was made. Often matters can be corrected by an instruction to the jury which in this case, **where Cannon's testimony, to the extent given, was merely duplicate of other proof on the same factual matters, would have addressed the issue. Cannon's testimony did not deprive the defendant of a fair proceeding and a mistrial was not the appropriate outcome.**

In this case there does not appear to have been a clear showing of the first prong of *Strickland* requiring a demonstration that the performance of counsel fell below that expected. Nonetheless, this court has had the benefit of the presentation of the entire matter involving the claims by the State against these defendants in an extensive and comprehensive trial. As indicated earlier in this decision, it appears to this court that the State negotiated a plea deal with Mr. Cannon in exchange for his agreement to testify at the trial of the other three defendants. **Presumably he was to provide information that would not otherwise be available.**

The information that he had available to him based on his negotiations, was the detail as to exactly who did what to whom and what happened within the interior of the house as the six victims were killed by the four defendants using bats and other devices. Because there were ten people in the house and six are dead, there are only four people that had potential knowledge regarding that matter from the state's perspective. All had entered pleas of not guilty and all had the privilege against self-incrimination so they could not be required to testify. Any trial in that setting would not be able to provide the jurors with a commentator to explain what went on within the house. Obviously the State felt that was information that was needed and Cannon was the person they decided would provide that.

When Mr. Cannon testified he did provide information that the parties were there but refused to answer the questions associated with his role as commentator inside the residence, for the most part. To the extent that the State did not have a live witness to explain that information, the defendants each enjoyed a benefit that it appeared they would not otherwise have. Two of the defendants with similar interests asked no questions, apparently in an effort to take advantage of that benefit.

Mr. Cannon did not present that damaging testimony in that he really provided no new information that wasn't otherwise available through multiple sources based on the comprehensive presentation made by the State. In

essence what he said was corroborated and duplicated by the combination of other witnesses and unchallenged forensic evidence including the DNA.

For example, the trial testimony showed that Mr. Victorino was wearing his Lugz boots at the 7/Eleven shortly before the murders took place. For some uncanny reason, he bent his leg in such a position that the sole of his shoe faced a security camera which captured that event on tape. That shot on the tape was captured and blown up so that Mr. Victorino, a tall striking man, could easily be identified along with his Lugz boots. The sole of the shoe, which was enlarged on an exhibit presented to the jury, identically matched the sole of the shoe that Mr. Victorino owned. That same shoe print was found on the door that had been broken through to enter the residence, presumably by the power of Mr. Victorino, the largest of the defendants. Similar shoe prints were found within the residence.

The unchallenged DNA testimony at the time of trial indicated that Mr. Victorino had wear DNA inside the shoe which was identified and that four of the victims who were killed and bled inside the residence had blood drops on his shoe which by definition places him inside the residence and in that proximity. Mr. Cannon's reluctance caused the State to lose its ability to corroborate that fact and perhaps they were prejudiced by his reluctance but it is very difficult to see any prejudice to Mr. Victorino.

The prejudice prong requires that "there is a reasonable probability that but for counsel's unprofessional errors the result of the proceeding would have been different. Reasonable probability is a probability sufficient to undermine the confidence of the outcome." *White v. State,* 964 So. 2d (Fla. 2007) In claim 2 it appears that the matter has already been litigated which would bar re-litigation of the claim. Even so, the defendant has failed to establish prejudice and either prong of the *Strickland* case and claim 2 must fail.

(V6, R765-68). (emphasis added).

The trial court's finding that this claim was insufficiently pled is, in and of itself, an adequate basis for the denial of relief. *Reynolds v. State/Tucker*, 99 So. 3d 459, 482 (Fla. 2012); *Douglas v. State/Tucker*, 2012 WL 16745, 18 n.14 (Fla. Jan. 5, 2012); *Wyatt v. State/Tucker*, 78 So. 3d 512, 521 n. 6 (Fla. 2011). In any event, Cannon's "refusal" worked to the detriment of the State, not the defense, and did not rise to the level of requiring a mistrial. And, nothing about which Cannon did testify was not otherwise before the jury. Under these facts, it would have been improper to grant a mistrial because Victorino was not deprived of a fair proceeding. Because that is so, counsel were not deficient in their performance in not moving for a mistrial, nor was Victorino prejudiced because the motion, if made, would have been denied. The trial court should be affirmed.

III. THE "UNMADE OBJECTIONS" CLAIM

On pages 36-45 of his brief, Victorino says that trial counsel were ineffective for not making various objections to witness testimony which is described as "speculative" or impermissible lay expert testimony. The collateral proceeding trial court rejected this claim:

> Claim 3 asserts ineffective assistance of counsel for failing to make objections to information concerning the interaction of the defendants and others several days prior to the date of the murders. Brandon Graham, who was not involved in the murders,

evidently participated at the time the decision was made to go forward with the confrontation which ultimately resulted in the murders of six victims. Graham testified that on Sunday, August 2, 2004, four days before the murders, he, Salas and Hunter all had a verbal confrontation with the soon-to-be victims in the front yard or porch of the Telford house. Apparently Mr. Victorino waited behind in the vehicle. It was part of Graham's testimony that Salas was involved in the confrontation and was "apparently trying to impress defendant Victorino." The defendant's complaint is that there was not an objection raised to that testimony. Another individual by the name of Christopher Craddock testified that he and Graham did not do anything when they were made aware of the plan to murder because they did not believe that the other codefendants would actually go through with it. Again, the defendant raises speculation.

In like fashion the defendant asserts that co-defendant Salas testified that he heard Victorino fantasize aloud about beating the victims to death with poles. He expressed some fear of Victorino and suggested that both he and Mr. Cannon did not want Mr. Victorino thinking he was an uncooperative person. The defense takes the position that objections should have been made to those statements, or appropriate motions to strike as being unresponsive at the time they were made.

It is important to note in this case, which may not be obvious in the record, that Mr. Victorino is a towering man. He stands in the neighborhood of 6 feet 4 inches, has a very substantial build and carries himself in such a way to appear to be quite muscular. In contrast the other defendants are quite small in size compared to the stature of Mr. Victorino and just the mere observation of these people together with the information provided concerning their style suggests that he might be someone they should be afraid of.

Again the standard of proof for the evaluation of this set of claims is that the defendant must establish that counsel's performance was deficient. Had there been an objection to the thought process of

> one of the co-defendants or other young men, it is likely it would have been sustained. The next question is whether the defendant has established that counsel's deficient performance prejudices the defendant.
>
> In this case these young men were merely stating the obvious. When four or five people get together and actively format plans to kill six other people, it seems perfectly logical that some would be hesitant to participate and thereafter would be reluctant to announce their withdrawal from the plan in light of the announced violent potential of the people with whom they are dealing. That fact was obvious to the most casual observer of the trial, the trial facts and the stature of Mr. Victorino. In light of that fact, there is no showing that the performance was unreasonable under "prevailing professional norms." **This court specifically finds that fact is so inconsequential that even if that information had not been part of the trial testimony, there is no reasonable probability that the result of the proceeding would have been different.** The *Strickland* test has not been met and Claim 3 fails.

(V6, R769-70) (emphasis added). Whether or not the objections that Victorino says should have been made would have been sustained is, at least to some degree, debatable. Of course, whether or not to object is a matter of trial strategy, and not objecting to unobjectionable or marginally objectionable evidence is not deficient performance on the part of counsel. *Evans v. State/McNeil*, 995 So. 2d 933, 946 (Fla. 2008); *Branch v. State/McDonough*, 952 So. 2d 470, 480 (Fla. 2006); *Hendrix v. State/Crosby*, 908 So. 2d 412, 420 (Fla. 2005). Moreover, as the collateral proceeding trial court expressly found, the evidence at issue here is so inconsequential that there is no reasonable

probability of a different result. The evidence supports that finding, and there is no basis for relief.[8]

VI. THE "CLOSING ARGUMENT" CLAIM[9]

On pages 50-53 of his brief, Victorino says that trial counsel should have objected to certain comments by the State during closing argument. The collateral proceeding trial court denied relief:

> The basis for Claim 6 is an assertion that the prosecutor began the guilt phase closing argument by saying, " On . . . August 5 and 6, when the six people (victims) went to sleep in their house on Telford Lane in Deltona, they could not have imagined in their worst nightmares that two years later, 100 miles away, twelve strangers would get to look at the photographs of their broken, sometimes naked, bodies. And of the 16 people that have looked at them, 12 would ultimately decide who the killers were and perhaps what to do with them."
>
> The defendant asserts that language equals a "Golden Rule" argument which is prohibited under *Pagan v. State,* 837 So. 2d 792 (Fla. 2002) and *Barnes v. State,* 58 so.2d 157 (Fla. 1951).
>
> There was no evidence presented at the evidentiary hearing and this claim turns on an interpretation of the language that was used. The law has been quite insistent over time that "Golden Rule" arguments, both in criminal and in civil cases, are inappropriate on the theory that they ask the jurors to put themselves in the victims' positions rather than to act as objective persons sifting, trying and evaluating the facts of the case.

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[8] To the extent that Victorino cites *Chambers v. Mississippi,* 410 U.S. 284 (1973) on page 44 of his brief, that decision has nothing to do with this issue.

[9] Claims IV and V have been withdrawn. Claim IV is withdrawn in the brief, and Claim V was withdrawn by letter dated ?????.

> In this case that language does not appear to make a "Golden Rule" argument. While over time prosecutors have been constrained as to what they can say in closing argument by a whole series of cases which often flattens their affect, the language in this case does not seem to this court to be, a Golden Rule argument. **There is no suggestion that the jury put themselves in the place of the victims. The language merely suggests that it is indeed an irony of time and geography as to how their lives ended and who would decide the outcome of the case. (The venue was moved to St. Augustine when a jury could not be empanelled in Deland, Volusia County, Florida) The court therefore finds that there was no Golden Rule argument and, therefore, there has been no deviation from the standard. As a result neither prong of the *Strickland* test has been established and Claim 6 fails.**

(V6, R772-73). (emphasis added). As the collateral proceeding trial court found, the complained-of argument is not improper in the first place -- it is no more than a statement of fact. There is no error, and, as Justice Scalia pointed out in another context in *McKoy v. North Carolina*, 494 U.S. 433, 467, 110 S.Ct. 1227, 1246 (1990), the most that can be said for the claim is that nothing can be said against it. The denial of relief was proper.

VII. THE "REMARKS AROUSING FEAR IN THE JURORS"

On pages 53-57 of his brief, Victorino says that the prosecutor's closing-argument example of "vicarious culpability" was improper because it was "intended to arouse fear in the jurors." The collateral proceeding trial court denied relief on this claim:

> The defendant next asserts that the prosecutor's guilt phase argument where the prosecutor used an example of vicarious culpability by saying, ". . . a wife hires a hit man, hit man goes up to New York and kills husband. Wife is not present. Is she responsible? You better believe it. It is a good thing, too. Or life might not be as safe as it is." The defendant asserts that this is an impermissible statement intended to arouse fear in the jurors which the defense counsel did not object to.
>
> The court has reviewed the arguments and statements by the defendant and cannot conclude that an objection would have had any merit because there is no suggestion that the argument was designed to or in fact aroused fear in the jurors. It appears that neither of the *Strickland* prongs have been met. It also appears that, at least for this claim, this is a mere sidebar to the very substantial and meaningful evidence that was presented, considered and evaluated by the jury and in no way, even if had been objected to, could have caused prejudice.

(V6, R773-74). That result is completely correct -- there has been no showing of prejudice (especially in light of the uncontested facts of these murders), nor has there been any showing that any objection would have been sustained. Victorino cannot establish either prong of *Strickland*, and the trial court properly denied relief. The fact that counsel did not object indicates that the statement played, at trial, as being just as insignificant as it now reads in the transcript. *See, Sawyer v.* Butler, 881 F.2d 1273, 1279 (5th Cir. 1989) (*en banc*). The denial of relief was proper.

VIII. THE "FAILURE TO REBUT THE ARMED BURGLARY" CLAIM

On pages 57-60 of his brief, Victorino says that trial counsel were ineffective for not "rebutting" the armed burglary charge. Given that Victorino's defense theory was alibi (*See* pages 5, 13, above), this claim is inconsistent with that theory of defense. Unless Victorino is abandoning his alibi theory or otherwise conceding that it has no basis, this inconsistent and mutually exclusive claim has no place here.

In any event, the collateral proceeding trial court denied relief on this claim:

> The defendant asserts that the prosecutor argued during the guilt-phase closing, in support of the felony murder rule theory, that the defendant and co-defendant entered the Telford house to commit armed burglary. The defendant asserts that trial counsel gave no rebuttal to this claim in their own guilt-phase closing argument.
>
> The claim does not assert any meaningful violation of either prong of the *Strickland* test. The court is unable to understand why the defendant can even postulate a change in outcome because the purpose of Mr. Victorino's trip to the Telford house was different than that argued. If he was going to pick up his stolen property he nonetheless was found guilty of committing the six murders and the court is struck that it would be baseless to try to suggest that such a minor differential in the purpose for his being there would somehow change anyone's thinking on the case. Neither of the prongs of the *Strickland* case has been established and Claim 8 fails. **In addition it is obviously sound trial strategy not to make such trivial arguments in such a serious case.** Specifically, "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." *Occhicone v. State,* 768 So. 2d 1037, 1048 (Fla. 2000). **It is difficult to fathom that**

> **a noble purpose for Mr. Victorino's visit to the Telford property could even be effectively argued without conceding his alibi defense was manufactured.** Claim 8 must fail.

(V??, R774-75). (emphasis added). There is nothing that can be added to the order. This claim fails on the facts, and is not a basis for relief.

IX. THE "STATE DID A WONDERFUL JOB" CLAIM

On pages 60-63 of his brief, Victorino says that trial counsel was ineffective for saying, in closing argument, that the "prosecution has done a wonderful job." Defense counsel explained the basis for this comment at the evidentiary hearing as being part of his routine practice which is intended to avoid an adverse impression of him by the jury. *See* page 12, above. In denying relief on this claim, the trial court said:

> Similar to Claim 5 the only evidence presented came from Jeff Dowdy and Mike Nielsen who were Mr. Victorino's trial counsel. Neither indicated that they were troubled by the fact that a statement was made that "the prosecution has done a wonderful job here" during the guilt phase closing argument. **Both indicated that is a normal practice and it admits nothing other than the obvious and allows them to use that as a platform and then branch out and show what the State has missed or overlooked. There was no contrary testimony on that point.**
>
> Again, in this proceeding the burden of proof calls on the defendant to identify the specific acts or omissions that demonstrate counsel's performance was unreasonable on a prevailing professional norm. *Duest, id.* There is no evidence to demonstrate that Claim 9 constitutes any unreasonable conduct on counsel's part. As a result neither prong of the *Strickland* test has been established and Claim 9 must

> fail. In addition, as stated in Claim 8, "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." *Occhicone v. State,* 768 So. 2d 1037, 1048 (Fla. 2000). Mr. Victorino's attorneys declined to object based on sound trial strategy so that an ineffective claim cannot be made.

(V6, R775). (emphasis added). Victorino failed to carry his burden of proving any deficiency on the part of counsel, and has not shown prejudice as *Strickland* requires. There is no basis for relief.

X. THE "VICTIM IMPACT" INEFFECTIVENESS CLAIM

On pages 63-71 of his brief, Victorino says that trial counsel was ineffective for not objecting to certain "victim impact" evidence. Even though there were six victims in this case, the "victim impact" presentation was limited to 44 pages of the record. (DAR, V45, R4067-70; 4070-78, 4080-81; 4081-83; R4083-89; 4089-92; 4092-94; 4099-4105; 4108-09; 4110-12). Moreover, the jury was properly instructed about the evaluation of that evidence. (DAR, V51, R5017) The trial court denied relief on this claim, finding:

> Claim 10 asserts ineffective assistance of counsel in failing to object to emotional "grief' and "mourning" testimony of the deceased victims' relatives and friends. The State takes the position that failure to make an objection to improper evidence "renders the claim procedurally barred absent fundamental error." *McGirth v. State,* 48 So. 3d 777 (Fla. 2010). The court has reviewed the proposition asserted by the defendant and finds that none of that evidence is of

> the type of evidence that is impermissible under *Payne v. Tennessee,* 501 U.S. 808 (1991). *Wheeler v. State,* 47 So. 3d 599 (Fla. 2009); *Huggins v. State,* 889 So. 2d 743 (Fla. 2004); *Farina v. State,* 801 So. 2d 44 (Fla. 2001). **Since none of the evidence is improper, counsel cannot be faulted for "failing" to object.** Neither of the *Strickland* prongs can be established by this claim.
>
> The introduction of victim impact evidence is allowed both constitutionally and procedurally in capital cases. The evidence does not bear on the actual issues decided by the jury but is nonetheless allowed. In this particular case there were six young people who were victims of these violent murders. The testimony presented and allowed by the court was well constrained consistent with the court's responsibility. Any further objection would have been to no avail and, therefore, the *Strickland* test cannot be met and Claim 10 fails.

(V6, R776). (emphasis added). No further discussion is required -- there was nothing to object to, and therefore there can be no ineffectiveness of counsel.

XI. THE "ALIBI DEFENSE" CLAIM

On pages 71-79 of his brief, Victorino says that his trial counsel were constitutionally ineffective for presenting the alibi defense that he insisted that they present. The trial court made the following findings of fact about this claim:

> Claim 11 asserts that trial counsel were ineffective in failing to establish alibi witnesses and in presenting what it now claims is an unbelievable and damaging alibi defense. Both Mr. Dowdy and Mr. Nielsen testified in regard to the alibi witness. **They both conceded that Mr. Victorino had indicated that he was not guilty of the murders that were charged and that he was not at the scene where the crimes occurred. Mr. Victorino, the client in this case, insisted on the alibi defense. It initially**

looked viable to both trial counsel.

> Both of the attorneys indicated that the alibi witnesses were vetted by their team which included experienced private investigators and the alibi defense seemed to be viable. A concern was raised during the course of the trial preparation when Mr. Victorino's wear DNA was found in his boots which also had victims' blood on the outside of the shoe. **Mr. Victorino's confident response was, "someone else was wearing them at the time" presumably in an interest to frame him for the murders. Mr. Victorino insisted that he was not guilty and was not present even when confronted with the DNA testimony. Mr. Victorino insisted that they present the alibi which they did.**

(V6, R776-77). (emphasis added). Those findings of fact dispose of this claim -- counsel's performance cannot have been deficient in the face of Victorino's insistence on an alibi defense.

The trial court evaluated this claim even further, and rejected it:

> Again, the burden of demonstrating counsel's performance was unreasonable under prevailing norms has not been met. The defendant must show that counsel's errors must be "so serious that counsel was not functioning as the `counsel' guaranteed the defendant by the Sixth Amendment." *Strickland, id.* In this case the lawyers clearly did what they could do test the alibi defense. When confronted with a difficult fact scenario involving the DNA evidence, they confronted Mr. Victorino. **He insisted that he did not commit the murders, was not present and wanted the alibi defense to move forward.** There is no evidence that either prong of *Strickland* has been met and there is no showing as to this claim that there has been a breakdown in the adversary process that renders the result unreliable.

(V6, R778). (emphasis added). This claim has no legal basis,

and was properly rejected. It is not a basis for relief.

XII. THE "GURESOME PHOTOGRAPHS" CLAIM

On pages 79-84 of his brief, Victorino says that trial counsel were ineffective for not objecting to five (5) specific photographs. *Initial Brief*, at 80. The trial court rejected this claim, and, in so doing, made detailed findings about the photographs that were (and more importantly, were not) introduced:

> The ineffective assistance claim involves .an assertion that counsel failed to object to gruesome photographs. This court, having been required to spend half a day in a sealed room with all the exhibits in contemplation of the appropriate decision regarding the death penalty, has examined all of the photographs that were introduced at time of trial in great detail. The court has also examined a large number of very gruesome photographs that did not come into evidence.
>
> In the context of this case, the State did not stipulate as to the cause or manner of death for the six people that were murdered at the Telford house. Mr. Victorino, Mr. Hunter, Mr. Salas and Mr. Cannon entered the Telford house and unmercifully beat the six young victims to death causing them horrifying injuries and ultimately death. The entire house was ravaged with bodies in different states of destruction and there was blood splatter on the floors, walls and ceilings of the home.
>
> There were ten people in the home at the time of these murders. Six of them are dead and cannot speak. Three of the defendants were on trial for the murders. Mr. Cannon had pled to the murders and was called to the witness stand by the State obviously to be the commentator on what happened within the four walls of that house while the murders were taking place. **To the benefit of each of the defendants on trial, Mr. Cannon was reluctant in providing much of**

> **the detail that had been expected from him which left the jury only the forensic evidence and views of the scene to piece together who did what to whom. The State had a right to prove its case with as much detail as is necessary without exposing the defendant to unreasonably gruesome photographs that would have no other reasonable purpose. These were gruesome murders, which is a fact of life.** It would be hard to conclude that any juror was surprised by what they saw.
>
> This court, greatly concerned with this issue, entertained pretrial hearings on motions *in limine* and preliminary matters. The court only allowed a small number of photographs but carefully tried to avoid any unnecessary duplication for exactly the reasons that were raised. The defense attorneys were active participants in that enterprise where in fact they discharged their duty in limiting the photographic evidence the State otherwise wanted to have. If the evidence had been any more limited the State, which also had a right to a fair trial, would not have had an opportunity to adequately prove its case.
>
> There has been absolutely no showing that counsel for the defendant could have raised any objections that would have been sustained in light of the history and details of this case. There is absolutely no showing that counsel's performance as unreasonable under prevailing professional norms. *Duest, id.* Neither prong of the *Strickland* case has been established and Claim 12 has not been established.

(V6, R778-79). (emphasis added). There was, as the trial court found, no possibility that the defense would be able to keep every photograph away from the jury. The facts, which the trial court recognized, were that there were six victims, all of whom had been beaten to death -- the photographs are no doubt unpleasant, but those whose work product includes murdered human beings should not be heard to complain when the jury sees photos

or their handiwork. *Henderson v. State*, 463 So. 2d 196, 200 (Fla. 1985). There was no ineffectiveness of counsel because Victorino has not established either prong of *Strickland.* There is no basis for relief.

XIV. THE "EDWARDS TESTIMONY"[10]

On pages 84-89 of his brief, Victorino says that trial counsel were ineffective because they did not call Dorona Edwards as a mitigation witness. The trial court rejected this claim, and, in so doing, made various credibility findings which are supported by the evidence. In finding that Victorino has satisfied neither prong of *Strickland,* the trial court said:

> This claim as to Mindy L. Pouliot has been abandoned. At the evidentiary hearing the defendant presented testimony from Dorona Edwards who is the defendant's cousin. Apparently she moved to Florida in 1984 and saw Mr. Victorino once or twice a month. She had very young children and testified that she had no hesitation with having her children around Mr. Victorino.
>
> On cross examination she indicated that she never knew anything about his history as a multiple convicted felon other than the fact that he had been to prison. She seemed to have some knowledge that Mr. Victorino had an abusive father at one point in time but indicated that he was a perfect gentleman around she and her children. On that very limited evidence that Mr. Victorino asserts that calling Dorona Edwards would have changed the outcome of the case.
>
> Trial counsel Jeff Dowdy and Mike Nielsen testified that they didn't have a direct memory of Mrs. Edwards. They did indicate that they interviewed a large number of people who they thought might be of

[10] Claim XIII has been withdrawn by Victorino.

assistance as witnesses in mitigation. After screening this large number of witnesses, they made some decisions to call only those that they interviewed and had conversations with. In that screening apparently Mrs. Edwards was not included in the list of witnesses to be used. When confronted with the nature of her testimony, trial counsel's conclusion was that her testimony would merely be cumulative.

"Penalty phase prejudice under the *Strickland* standard is measured by whether the error of trial counsel undermines this Court's confidence in the sentence of death when viewed in the context of the penalty phase evidence and the mitigators and aggravators found by the trial court." *Stewart v. State,* 37 So. 3d 243, 253 (Fla. 2010) (*quoting Hurst v. State,* 18 So. 3d 975; 1013 (Fla.2009)). That standard does not "require a defendant to show 'that counsel's deficient conduct more likely than not altered the outcome' of his penalty proceeding, but rather that he establish 'a probability sufficient to undermine confidence in [that] outcome.'" *Porter v. McCollum,* U.S. , 130 S.Ct. 447, 455-56, 175 L.Ed.2d 398 (2009) (alteration in original) (*quoting Strickland,* 466 U.S. at 693-94, 104 S.Ct. 2052) "To assess that probability, [the Court] consider[s] `the totality of the available mitigation evidence ...' and `reweigh[s] it against the evidence in aggravation.'" *Id.* at 453-54 (*quoting Williams v. Taylor,* 529 U.S. 362, 397-98, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000). This language is quoted from *Hildwin v. State,* --So.3 rd --, WL 2149987 (Fla. 2011).

Again, there has been no showing that in regard to remaining portion of claim 14 that demonstrates counsel's performance was unreasonable under prevailing professional norms. *Duest, id.* Based on the testimony that Dorona Edwards gave at the time of the hearing, she was certainly something less than persuasive. The idea that this woman would leave her young children with Mr. Victorino who had been convicted of multiple felonies and had been to prison is hard to imagine. The fact that this defendant was a gentleman to her children seems like such a petty suggestion to be used in an effort to mitigate the

> destruction and murder of six human beings. Neither the unreasonable performance prong nor the prejudice prong is met by the testimony of Dorona Edwards and, therefore, Claim No. 14 is without merit.

(V6, R780-81). There was no deficient performance, nor was there prejudice, as the trial court found. Those findings are correct, are supported by competent, substantial evidence, and should not be disturbed.

XV. THE "CUMULATIVE ERROR" CLAIM

On pages 89-91 of his brief, Victorino says he is entitled to relief based on the "cumulative effect" of all of the claimed instances of ineffective assistance of counsel. The collateral proceeding trial court denied relief on this claim, finding that "[b]ecause each of the claims of error fail individually, however, he is entitled to no relief for cumulative error. *Shoenwetter v. State,* 46 So. 3d 545 (Fla. 2010)." That result is correct and should not be disturbed.

XVI. THE "PRE-SCREENIMG OF CASES" CLAIM

On pages 91-94 of his brief, Victorino says that trial counsel were ineffective for not objecting to a guilt-stage closing argument comment by the State that "we're very careful about what we do" in charging cases. The collateral proceeding trial court denied relief:

> Apparently an objection was made by the attorney for the co-defendant Salas but no objection by the others. Again the information in this statement by the prosecutor does not strike the court as anything that would have required an objection to be sustained and that the argument made within the context of the

> massive amount of information and details in the case seems to be perfectly within the range of acceptable comment. In any case, even if improper, the argument would never reach the threshold of prejudice to the defendant. As a result neither prong of the *Strickland* test has been met as to Claim 16.

(V6, R782). That result is correct, and should not be disturbed.

There was nothing improper about the complained-of statement, and, even if there were, there is no reasonable probability of a different result had the jury been instructed to disregard that statement. There was no deficiency, nor was there prejudice -- *Strickland* requires both, and Victorino has established neither one.

XVII. THE RING V. ARIZONA CLAIM

On pages 94-97 of his brief, Victorino says that he is entitled to relief based on *Ring v. Arizona.* This claim is raised as a substantive claim, just as it was on direct appeal, where this Court decided the claim against Victorino. The collateral proceeding trial court denied relief because the *Ring* claim has previously been litigated:

> In *Victorino v. State,* 23 So. 3d 87 (Fla. 2009), the Supreme Court dealt with the claim that the death sentences are illegal under *Ring v. Arizona*. Likewise in *Hunter v. State,* 8 So. 3d 1052 (Fla. 2008), the Supreme Court ruled on the *Ring v. Arizona* claims. The Supreme Court indicated that Ring does not apply to cases that include the prior violent felony aggravator, the prior capital felony aggravator or the under-sentence-imprisonment aggravator, and Mr. Victorino's case includes all three. The court

> concluded in both Mr. Victorino's case and Mr. Hunter's case that they are not entitled to relief based on a *Ring* challenge and in this case the defendant is merely trying to re-litigate issues previously raised and resolved. Claim 17 fails.

(V6, R782). That result is correct under settled Florida law.

In his brief, Victorino cites to the decision of the Federal District Court for the Southern District of Florida in *Evans v. McNeil*, Case No. 08-14402 for the proposition that Florida's capital sentencing scheme violates *Ring v. Arizona*. That finding by the District Court was reversed by the Eleventh Circuit Court of Appeals. *Evans v. Secretary, Florida Dept. of Corrections*, 2012 WL 5200326, 1 (11th Cir. Oct. 23, 2012).[11] The collateral proceeding trial court properly denied relief on this claim.

CONCLUSION

WHEREFORE, based on the foregoing, the State submits that the denial of relief should be affirmed in all respects.

Respectfully submitted,

PAMELA JO BONDI
ATTORNEY GENERAL

KENNETH S. NUNNELLEY
SENIOR ASSISTANT ATTORNEY GENERAL
Florida Bar #0998818
444 Seabreeze Blvd. 5th FL
Daytona Beach, FL 32118

[11] In fairness to Victorino's counsel, that decision was released after the *Initial Brief* was filed.

(386) 238-4990
Fax # (386) 226-0457

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above has been furnished by e-mail to: **Christopher J. Anderson, Esq., christopheranderson@clearwire.net** on this 11th day of December, 2012.

KENNETH S. NUNNELLEY
SENIOR ASSISTANT ATTORNEY GENERAL

CERTIFICATE OF COMPLIANCE

This brief is typed in Courier New 12 point.

KENNETH S. NUNNELLEY
SENIOR ASSISTANT ATTORNEY GENERAL