ORIGINAL

IN THE SUPREME COURT OF FLORIDA

CASE NO.: SC12-482
Lower Tribunal No.: 2004-01378 CFAWS

TROY VICTORINO

Appellant,

v.

STATE OF FLORIDA

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE FOURTH JUDICIAL CIRCUIT,
IN AND FOR DUVAL COUNTY, STATE OF FLORIDA

INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

This is an appeal of a trial Court order denying Appellant's Rule 3.851, Fla. R. Crim. P. Amended, Initial Motion for Post-Conviction Relief in a death-penalty case. Such motion appears at Volume 4, pages 391-515 of the Record on Appeal for *this* appeal. However, for ease of reading, that denied motion is referred to simply as the "subject motion." This appeal contains references to the record on appeal created for the subject post-conviction motion proceedings. They are designated by the letter "PCR" followed by the applicable record volume number, followed by the applicable record page numbers which are stamped at the bottom of each page of the record on appeal.

The appeal also contains references to the prior record of the original jury trial proceedings. They are designated by the letter "R" followed by the applicable record volume number, followed by the clerk's record-on-appeal page numbers (bottom of page).

The Defendant Troy Victorino is referred to primarily as "Defendant, " but sometimes also as "Appellant" or "Victorino."

The trial Court conducted an evidentiary hearing on the subject motion. PCR2, p. 84-235. For brevity, it is referred to simply as the "evidentiary hearing" in this brief. The trial Court order denying the subject motion (PCR 6, p. 759-

784) –the Order being appealed here– is formally titled Amended Final Order Denying Amended Motion for Post Conviction Relief. It referred to as simply the subject "denial order." (PCR6, p. 803-827).

STATEMENT OF THE CASE AND FACTS

This is a death-penalty case. Defendant Troy Victorino was convicted of murdering six individuals in a house located on Telford Lane in Deltona, Florida. R9, p. 1531-1555 & R9, p. 1558-1559. All six murders occurred in a single episode the evening of August 6, 2004. *See* Victorino v. State, 23 So.3d 87, 91 (Fla. 2009). The Defendant remains incarcerated under sentences of death for four of the murders and sentences of life without the possibility of parole for the remaining two murders. R1, p. 29-34 & R9, p. 1531-1555. Victorino v. State, 23 So.3d 87 (Fla. 2009).

This Florida Supreme Court provided a narrative summary of the evidence presented in Defendant's jury trial in its direct-appeal Opinion in Victorino v. State, 23 So.3d 87 (Fla. 2009) as follows:

> 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.

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 Page 92 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 Page 93 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 sheriffs 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 night-club 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, Page 94 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.

Victorino v. State, 23 So.3d 87 (Fla. 2009),
at Pages 91-95

As further stated by this Florida Supreme Court in its same Victorino v. State, 23 So.3d 87, 94 (Fla. 2009) Opinion:

> 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).
>
> * * *
>
> On September 21, 2006, the trial court followed the jury's recommendations by imposing four death sentences.

Special facts especially relevant to the question of "prejudice":

Under Fla. Stand. Jury Instr. (Crim) 7.11 the jury is required to deliver a "life" sentence recommendation whenever six or more jurors vote for life. In this vein, it is significant that none of Defendant's jury sentencing recommendations were unanimous: not the jury "life" sentence recommendations and not the jury "death" sentence recommendations. As indicated in this Florida Supreme Court's decision in Victorino v. State, 23 So.3d 87, 94 (Fla. 2009) the Defendant got jury "life" sentence recommendations for the murders of Michelle Nathan and Anthony Vega. Defendant missed getting jury "life" sentence recommendations for the murders of Erin Berlanger and Francisco Ayo-Roman by just four juror votes; He missed getting a jury "life" sentence recommendation

for the murder of Robert Gonzales by just three juror votes; He missed getting a jury "life" sentence recommendation for the murder of Jonathan Gleason by just one juror vote.

Without a doubt, the murders were very brutal. At first glance, it may be difficult to imagine how the Defendant even managed to get even two jury "life" recommendations. However, review of record reveals significant weaknesses in the State's case as well as some very strong mitigation in Defendant Victorino's favor. The biggest glitch in the State's case was the abridged testimony of crime-participant-turned-State-witness Robert Anthony Cannon. He testified that he himself was not guilty (R30, p. 1941) and that he and his other codefendants all complied with Victorino's plan to kill the occupants of the Telford house and all thereafter entered the Telford house armed with baseball bats because they were afraid of Victorino. R30, p. 1941, 1953. After saying all of these very damaging things, Cannon "shut down" and refused to answer cross-examination questions. R30, 1946, 1954-1960, 1969. Victorino's trial counsel failed to timely move for mistrial.

A significant event which preceded the subject, Telford Lane murders by seven days was the theft of Defendant's belongings from another house located on Providence Boulevard. R31, p. 2136-2139. Defendant asked the police to

help him recover his property (R3, p. 2136-2140). Deputy John McDonald of the Volusia County Sheriff's Office testified that after he instructed Troy Victorino to check his property and compile a list of his missing items, Troy Victorino replied that he had worked hard for his stuff and would take care of the problem himself. R31, p. 2140-2142; R39, p. 3220.

Codefendant Michael Salas testified that he and codefendant Jerone Hunter went to the Telford Lane house on August 1 (five days before the subject murders). Some young women who accompanied them yelled to the house occupants, "Where's Troy's stuff?" The young women "stormed" into the house and exited it awhile later with Troy Victorino's CD case. A male individual with the street name of "Abi G" and his twin brother were seen in the screened-in patio of the Telford Lane (murder scene) house with a baseball bat. (R40, p. 3454-3456).

Two days before the subject murders, codefendants Michael Salas complained about getting "jumped" by some rivals. R31, p. 2167. Codefendant Salas testified that on August 5, the day before the subject incident, both he and Cannon were beaten by some rivals R40, p. 3466-3470. Cannon had to take a day off of work to see a doctor for his injuries. R40, p. 3487. Michael Salas wanted a " rematch" with these assailants who are identified solely by their street names of

"Abi G." and "Abi M." and "Ryan." R40, p. 3463-3465, 3473-3475. Codefendant Jerome Hunter advised picking up Victorino. R40, p. 3475-3476.

As noted by this Florida Supreme Court in Victorino v. State, 23 So.3d 87, 94 (Fla. 2009), "A few days later . . . 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."

It is also important to note at this point that Defendant Victorino admitted in his own jury trial that he did not like Abi G because Abi G had attempted to rape one of his friends. R39, p. 3259.

Although Victorino and his cohorts failed to find these rivals at the park, and although none of these things justify or excuse the subject murders, the entire situation provided Victorino's jurors with a strong basis for finding that Victorino was laboring under considerable provocation at the time of the subject murders. Such provocation, together with the other significant mitigation evidence presented at Victorino's trial (summarized in this Florida Supreme Court's direct-appeal Opinion in Victorino v. State, 23 So.3d 87, 94-96 (Fla. 2009)) create a reasonable probability that, but for the errors of Court and counsel which are identified in this brief, Defendant Victorino would have escaped conviction

altogether or, at a minimum, would have received jury "life" sentence recommendations for *all* of the murders.

Defendant Victorino, Codefendant Jerone Hunter and Codefendant Michael Salas all testified for themselves at the subject, single Jury trial. The testimony of Hunter and Salas gave the jurors good reason to wonder who really did what in the subject crimes and to doubt their characterizations of Victorino as the ringleader controlling everyone else with fear. Hunter testified that Victorino had been inside the Telford Lane house hitting victims with a baseball bat ® 40, p. 3375-3379). However, by his own admission, Hunter was the first person to enter the front door of the Telford Lane house to commit the murders. R40, p. 3375.

Michael Salas testified that Cannon owned a sports-utility vehicle and served as driver. R41, p. 3530. Michael Salas also testified that immediately after the subject killings, Hunter exited the Telford Lane house in a state of "feral joy," bragging about how he killed a female victim who had been begging for her life. R41, p. 3531.

These facts are all crucial to an understanding of why the errors, oversights and mishaps that are complained of in this brief all rendered the subject jury trial unreliable as to Defendant Troy Victorino.

Subject postconviction motion:

Following this Florida Supreme Court's direct-appeal decision in Victorino v. State, 23 So.3d 87 (Fla. 2009), the Defendant filed his subject motion for post-conviction relief. PCR5, p. 559-631. It contains seventeen enumerated claims. However, Defendant withdrew Claims 4 and 13 and proceeded to adjudication only on Claims 1, 2, 3, 5, 6, 7, 8, 9, 10, 11, 12, 14, 15, 16 and 17.

Claims 1, 2, 3, 5, 6, 7, 8, 9, 10, 11, 12, 14, 15, 16 are "ineffective assistance of trial counsel" claims. PCR 5, p. 572-624. Claim 17 challenges the constitutionality of Florida's death-sentencing scheme pursuant to a recent Ring v. Arizona, 536 U.S. 584 (2002) progeny case entitled Paul H. Evans vs. Walter A. McNeil, Case No. 08-14402-CIV-MARTINEZ (S.D. Fla. 6-20-2011) PCR 5, p 624-627.

On February 20, 2012, the trial court entered its amended order denying all of the claims in Defendant's subject postconviction motion. PCR6, p. 803-911. This is an appeal of that amended denial order

No claim that Defendant's trial counsel lacked sufficient experience:

With respect to the aforementioned "ineffective assistance of counsel" claims, Defendant has never claimed –and does not claim now– that his trial counsel lacked sufficient experience. Indeed, Defendant's "first chair" defense attorney, Mr. Jeff Dowdy, testified at the evidentiary hearing that he has

practiced law in the State of Florida for over 20 years and has worked on 48 death-penalty cases and completed approximately 150 jury trials. PCR2, p. 117-117. Defendant does not dispute this.

Similarly, Defendant's "second chair" defense attorney, Mr. Michael Nielsen, testified at the evidentiary hearing that he had over 20 years of experience and completed 80 prior felony trials, 19 of which were first-degree murder trials. PCR2, p. 162-168. Defendant does not dispute any of this either. Instead, in his subject "ineffective assistance of counsel" claims, Defendant alleges that these same, experienced criminal defense attorneys made certain specific, enumerated mistakes, each of which constitute ineffective assistance of counsel.

The Defendant now argues, on a claim-by-claim basis, that the trial court erred in denying each and every one of the claims raised in Defendant's subject postconviction motion.

SUMMARY OF ARGUMENT

This Florida Supreme Court affirmed Defendant's Judgment and Sentences of death in Victorino v. State, 23 So.3d 87 (Fla. 2009). Thereafter, Defendant Troy Victorino filed his subject motion for postconviction relief. (PCR 5, p. 559-628. In it, Defendant Victorino alleged that he suffered ineffective

assistance of trial counsel in fourteen different, enumerated ways. PCR5, p. 572-624, 630-631. The Defendant abandoned "ineffective assistance of counsel" Claims 4 and 13 prior to the evidentiary hearing and proceeded to adjudication only on the following, enumerated "ineffective assistance of counsel claims: (1) ineffectiveness in failing to object to an emotional and inflammatory 911 emergency phone call made by the person who first discovered he murders (2) ineffectiveness in failing to correctly object and move for mistrial after Robert Anthony Cannon, a participant in the murders turned who became a prosecution witness, testified against Defendant Victorino and then refused to allow himself to be cross-examined, (3) ineffectiveness in failing to raise "calls for speculation" and "calls for opinion of a lay witness" objections when the prosecutor got one crime participant to give testimony about what a different crime participant had been thinking, (5) ineffectiveness in failing to object to a statement in the State DNA Expert's computerized image-presentation program that "DNA has been used and Exonerates Persons Wrongly Convicted on Death Row," (6) ineffectiveness in failing to object to prosecutor statements which effectively asked the jurors to imagine what the victims felt, (7) ineffectiveness in failing to object to prosecutor remarks that aroused fear in the jurors, (8) ineffectiveness in failing to rebut the State's Argument that the Defendants entered the Telford Lane

House to Commit the Crime of Armed Burglary, (9) ineffectiveness in admitting to Defendant's jurors that the "prosecution has done a wonderful job here" during guilt-phase closing argument, (10) ineffectiveness in failing to object to improper victim-impact evidence, (11) ineffectiveness in failing to evaluate alibi witnesses and presenting an unbelievable and damaging alibi defense, (12) ineffectiveness in failing to object to gruesome photographs, (14) ineffectiveness in failing to present the mitigation testimony of Dorona Edwards, (15) ineffectiveness as a result of the cumulative effect of all of the individual errors of defense counsel, (16) ineffectiveness in failing to object to State argument indicating that the State pre-screens cases and only prosecutes people who are truly guilty, PCR5, p. 572-624, 629-631.

The Defendant's subject postconviction motion also contained a Claim 17, which is a claim that the Florida death-sentencing law under which Defendant received his Judgment and Sentences of Death has been held unconstitutional in the recent Federal District Court case of v. McNeil, Case No. 08-14402-CIV-MARTINEZ, S.D. Fla. 6-20-2011. PCR 5, p. 624-627.

On February 17, 2012, the trial court entered its Amended Order denying every claim in Defendant's subject motion for postconviction relief. R6, p. 803-827.

The Defendant contends that all of the unabandoned claims in his subject postconviction motion were meritorious and that the trial erred in not finding such in its subject, amended denial Order.

ARGUMENT WITH REGARD TO EACH ISSUE, INCLUDING APPLICABLE APPELLATE STANDARDS OF REVIEW

Issue 1: The Trial Court Erred in Not Finding Ineffective Assistance of Counsel for Not Objecting to the Emotional and Inflammatory 911 Emergency Phone-Call Recording

Allegations in subject motion:

This "ineffectiveness" claim was raised in Defendant's subject motion. PCR5, p. 572-575. In his subject motion, Defendant alleged that he suffered from ineffective assistance of counsel as a result of his trial counsel not objecting to a recording of an emotional and inflammatory 911 emergency phone call by the Mr. Christopher Carroll, the first uninvolved person to happen upon the murder scene. PCR5, p. 572-573.

The recorded 911 call recording played to Defendant's jurors went as follows:

> CALLER: I think it's a murder. I went to pick up my guys today and I go over here, the door's kicked in, and everybody else is supposed to be at work, and my girlfriend works at Burger King and I come in and the door's kicked in and I see blood. That's all I see.
>
> * * *

No, it's in the bedroom. I walked in –

* * *

There's four or five people in there and they're just all laying on he floor, and I yelled and yelled and yelled and no one answered, and I walked in and just looked in the bedroom and I see blood on the bed and I stopped and backed up.

(R29, p. 1800-1802, referenced at PCR5, p. 572-573 of subject motion)

Evidence presented at evidentiary hearing:

Defendant's "first chair" defense attorney Jeff Dowdy initially testified that there was no strategic reason for his not objecting to this recording. PCR2, p. 105. On cross-examination, Mr. Dowdy testified that the subject 911 call was a "typical 911 call" and ". . . it wasn't like he was screaming or yelling . . ." PCR2, p. 118-119.

With regard to the question of whether or not to object in general, Mr. Dowdy testified "Sometimes we feel it might be better not to object if we don't feel it's really going to get us anywhere." PCR2, p. 119.

Defendant's "second chair" defense attorney Michael Nielsen similarly could not recall any strategic or tactical reason for not objecting to the 911 call recording. PCR2, p. 133. On cross-examination by the State, he indicated that, at present, he did not see any basis for objecting to the 911 recording. PCR2, p.

162.

Trial Court's denial order:

The trial court declined to find ineffective assistance of counsel on this ground. Applying the Strickland v. Washington 466 U.S. 668 (1984) test of ineffectiveness, the trial court held that there was no showing of deficient performance of counsel and no showing of prejudice to the Defendant. PCR5, p. 808-809.

Standard of review:

For "ineffective assistance of counsel" claims like this one, the appellate courts engage in a *de novo* review because the claim is a mixed question of law and fact. Stephens v. State, 748 So.2d 1028, 1032 (Fla. 1999). The appellate Courts give deference to trial court factual findings that are based on competent, substantial evidence while applying the *de novo* standard of review to both the "deficient performance" and "prejudice" prongs of test of ineffective assistance set forth in Strickland v. Washington, 466 U.S. 668 (1984). Julien v. State, 917 So.2d 213 (Fla. 4th DCA 2005).

Legal argument including relevant case law:

Audio-recorded witness statements are subjected to a Fla. Stat. §90.403 probative-value-versus-unfair-prejudice-risk analysis. Smith v. State, 880 So.2d

730 (Fla.App. 2 Dist. 2004). In Shorter v. State, 532 So.2d 1110 (Fla. 3d DCA 1988) the Florida Third District Court of Appeal held that the trial court erred in admitting a police audiotape of the anguished sounds of a stabbing victim in his last moment of life. Statements which evoke a particularly emotional response from the listener or which suggest to the jury an improper basis for its decision are unlawful. Wuornos v. State, 644 So.2d 1000 (Fla. 1994). Even if such evidence is relevant, it is nonetheless inadmissible under Fla. Stat. §90.403 if "its probative value is substantially outweighed by the danger of unfair prejudice, confusion of issues, misleading the jury, or needless presentation of cumulative evidence." Id.

A Florida court's failure to adhere to its own state's procedural and evidentiary rules violates the accused's due process rights secured by the 14th Amendment to the United States Constitution. Chambers v. Mississippi, 410 U.S. 284 (1973). In the present case, even if it is assumed –for purposes of argument only– that the tape recording of witness Carroll's 911 call was somehow relevant to prove such things as the time of the murders or the existence of a broken front door, the danger of unfair prejudice in the form of jurors' emotional response to witness Carroll's shock and horror far outweighed any probative value of the 911-call recording. In the present case, the State possessed and presented ample other

evidence of the *time* of the subject murders. R41, p. 3507-3528 (co-defendant Sala's account of murders); R40, p. 3371-3383 (co-defendant Hunter's account of murders); R29, p. 1807-1817 (VCSO Investigator Anthony Crane's testimony regarding his presence and observations at the murder scene the morning of the murders). The State also possessed ample other evidence of the kicked-in door. R33, p. 2366 (VCSO Investigator Grave's testimony); R33, p. 2476 (VCSO Dewees' testimony); R35, p. 2705 (VCSO Crime Lab Analyst Jennifer Ahern's testimony); R41, p. 3560 (co-defendant Salas' testimony).

By not objecting to the presentation of the 911 call, Defendant's trial lawyers provided ineffective assistance of counsel in violation of Strickland v. Washington, 466 U.S. 668 (1984). The trial court erred in not finding ineffectiveness on this basis.

Constitutional violations:

The above-described errors and omissions of counsel violated the Defendant's right to effective assistance of counsel, secured by the Fifth, Sixth and Fourteenth Amendments to the U.S. Constitution and by Article 1, Section 16 of the Florida Constitution. The above-described errors and omissions also deprived the Defendant of his right to a fair jury trial, secured by the Sixth and Fourteenth Amendments to the U.S. Constitution and Article 1, Sections 16 and

22 of the Florida Constitution.

Issue 2: The Trial Court Erred in Not Finding Ineffective Assistance of Counsel for Failing to Timely and Correctly Object and Move for Mistrial When Cannon Testified Against this Defendant and Then Refused to Answer Cross-Examination Questions

Allegations in subject motion:

Defendant included this "ineffectiveness" claim and the facts supporting it in his subject postconviction motion. PCR5, p. 562-564, 575-579.

Codefendant Robert Anthony Cannon ended the State's case against himself with by entering into a negotiated plea agreement prior to Defendant's trial. Cannon was called as a State witness in Defendant's subject trial. Cannon admitted that he plead guilty because he was " . . . indicted along with these other three men (co-defendants)". R30, p. 1936-7. He admitted he pled guilty to conspiracy to commit aggravated battery, murder and armed burglary of a dwelling." He pled guilty to murdering and abusing the dead bodies of all six victims. He pled guilty to cruelty to animals: beating the victims' pet dog to death. R30, p. 1936-1939. Cannon pled guilty to first-degree murder of several of the victims and pled guilty to armed burglary with a baseball bat and some other offense in exchange for a sentence of life without parole. He admitted he was a longtime friend of co-defendant Michael Salas. R30, p. 1931-1941. He testified

that he was a longtime friend of Co-Defendant Salas. He had been living with Co-Defendant Salas and withdrawing participant Graham for a few weeks before the subject murders. R30, p. 1940. He met Co Defendant's Hunter and Victorino just "days" before the subject murders. R30, p. 1940. Thereafter, Cannon "shut down" and refused to answer any questions. R 30, p. 1941-1947. The trial judge declared Cannon to be a hostile witness whom both sides could examine with leading questions. R 30, p. 1947.

In response to such leading questions, Cannon did answer a few, select questions that were very damaging to Victorino. The prosecutor asked Cannon if he knew, at the time he drove Victorino to the Telford house, that the intention was to kill everyone in the house. R30, p. 1951-1952. Cannon answered, that yes, he had intentions to do that, but " . . . me and Salas were in fear for our life. We had no choice. We had to go with them . . . Because he would have killed me and Salas, sir." R30, p. 1952. In response to another question, Cannon testified that three men entered the Telford house on the night of the murder, Victorino, Hunter and Salas. Each one was armed with a baseball bat. R30, p. 1954. Cannon *did* respond that he was now 20 years old. R30, p. 1954. Cannon also responded that he was "made to plead and implicate others by his lawyers." R30, p. 1963. However, Cannon *refused* to answer the following questions among the

many that he refused to answer:

- What he, Cannon, saw when he entered the Telford house. R30, p. 1952-1953.
- What happened when he, Cannon, entered the Telford house. R30, p. 1953.
- What Cannon himself did inside the Telford house. R30, p. 1953.
- How he, Cannon, got to the Telford house and what happened when he arrived there. R30, p. 1953.
- That he admit that he and Salas were involved in a street fight, got jumped by a group of people, prior to the subject murders. R30, p. 1956-1957
- That he admit that, after being attached, he and Salas came up wit a plan to avenge themselves for such attack. R30, p. 1957
- How long he has known Michael Salas. R30, p. 1958
- That he admit that he regards Michael Salas as a brother. R30, p. 1958.
- That he admit that he hardly knows Defendant Victorino. R30, p. 1959.
- That he admit that he, Cannon, and his Co-Defendant and friend, Salas, were the driving force that sought revenge against two individuals named "Abi G" and "Abi M, " whom Cannon and Salas believed were at the Telford house. R30, p. 1959.
- That he admit that he owned the gun that the other witnesses had spoken of. R30, p. 1960.
- That he admit that he and Salas routinely traveled armed with guns

and bats. R30, p. 1960.

- How he, a "kid 18 years old" got the money to purchase a brand-new, 2004 Ford Expedition SUV." R30, p. 1961-1962.

- Whether he, Thomas Aichinger and Co-Defendant Salas got together and drafted some letters to fabricate a story blaming everything on Victorino, combined with a plan to escape from jail R30, p. 1965-1966.

- Whether it was his own writing on a letter identified as Defendant's Exhibit A. (apparently a communication regarding the same Aichinger and same scheme). as well as on an April 27, 2005 letter to Ms. Naomi Kogut. R30, p. 1966-1967.

- Who Ms. Naomi Kogut is and whether he wrote her a letter directing her to tell everyone she knew to blame Victorino for the crimes. R30, p. 1969.

Worse still, Cannon continued to volunteer, throughout his examination by counsel, that he was not guilty and yet he knew he stood no chance if he went to trial. R30, p. 1963.

Defendant's trial attorney *did* raise what can best be described as an "unfair surprise" objection to Cannon's testimony. R30, p. 1946. However, he did not follow through with a timely mistrial motion based on such surprise. Also, as is apparent at R1, p. 1946 of the record in the subject case, and at pages 1055-1066 and footnote 6 of co-defendant Hunter's direct appeal opinion in Hunter v. State, 8 So.3d 1052, 1065–66 (Fla. 2008), Co-defendant Hunter's trial

counsel made what amounted to a Richardson v. State, 246 So.2d 777 (Fla. 1971) objection that a prosecutor cannot call a witness he knows will invoke his Fifth Amendment right against self-incrimination. However, neither Defendant Victorino's trial counsel nor any other trial attorney made any timely objection or mistrial motion based on Cannon's refusal to be cross-examined being a violation of Victorino's right to confront and cross-examine adverse witnesses. Such rights are guaranteed by the 6th Amendment to the U.S. Constitution and by Article 1, Section 16 of the Florida Constitution. No one made a mistrial motion promptly after Cannon's testimony. R30, p. 1970.

Salas' trial counsel and Victorino's trial counsel did eventually move for mistrial on grounds of Cannon's refusal to be cross examined, (R32, p. 2331-2334) but such mistrial motions were made belatedly, after six other witnesses had testified. Furthermore, as the trial court judge observed on the record, none of the lawyers asked the trial court judge to order Cannon to answer questions or to hold Cannon in contempt of court or to strike Cannon's testimony while Cannon was still on the stand. R32, p. 2241-42. Consequently, no timely or effective mistrial motion was ever made. Defendant was unfairly tried, convicted and sentenced to death without the benefit of effective cross-examination of Cannon.

Evidence presented at evidentiary hearing:

The Defense announced at Victorino's subject evidentiary hearing that Victorino was abandoning the "prosecutorial misconduct" aspect of this claim and proceeding only on the "ineffective assistance of counsel" aspect of it. PCR2, p. 91.

Defendant's "first chair" defense attorney, Mr. Jeff Dowdy, testified at the evidentiary hearing. In response to a question asking if there was some "strategic reason" for him not moving for mistrial when Cannon refused to allow himself to be cross-examined, Mr. Dowdy testified that he thought that the defense *had* timely moved for mistrial. PCR2, p. 105-106. Mr. Dowdy explained that was "pretty chaotic" in the courtroom and he believed a timely motion for mistrial *had* been made, even though the record did reflect such. PCR 2, p. 105-106, 120. He added that he "renewed" the mistrial motion the next morning. PCR2, p. 105-106.

At the end of the evidentiary hearing, the judge said, " Now, whether or not they objected, the record is the record, and the record speaks for itself as it stands." PCR2, p. 192. This statement of the judge came just a few minutes after the same judge said that Defendant's jury trial record contains no evidence of a timely mistrial motion. PCR2, p. 188,

Returning to the evidentiary-hearing testimony of Defendant's "first chair" trial attorney Mr. Jeff Dowdy, it is significant that Mr. Dowdy further testified at the evidentiary hearing that he also represented Mr. Victorino on his direct appeal and had raised this issue in such direct appeal. PCR2, p. 119. Mr. Dowdy explained that he did everything he could to protect Defendant Troy Victorino with respect to what had happened with Cannon. PCR2, p. 119-120.

Mr. Michael Nielsen, Defendant's second-chair defense attorney testified at the evidentiary hearing. He testified that Cannon's refusal to allow himself to be cross-examined was "a major curve ball" which he himself raised "very strong objections" to. PCR2, p. 133. Mr. Nielsen added, "And I did ask the judge, I believe, to order him (Cannon) to do it (answer cross-examination questions) and I think the judge tried to have Mr. Cannon do it." PCR2, p. 124.

Like Mr. Dowdy, Mr. Nielsen believed a timely mistrial motion *had* been made in response to Cannon's shut-down, even though the jury trial record did not reflect such. PCR 2, p. 134. Mr. Nielsen admitted that a timely mistrial motion should have been made and that failing to so would be a mistake. PCR2, p. 133-134.

Mr. Michael Nielsen spoke of the difficulties caused by the trial court's decision to try all three defendants together. "We moved to sever the defendants

for fear of this potential scenario. There was a ruling by the Court that the defendants were going to be tried together. We objected." PCR2, p. 137-139.

Even the trial judge commented on the chaos of trial that went on during Cannon's jury-trial testimony as follows:

> THE COURT: My memory is tat (Cannon's jury trial testimony) happened between 10:00 and 11:00.
> MR. NUNNELLEY (FOR THE STATE): I think it was –
> THE COURT: That was the busiest 45 minutes of my life.
> MR NUNNELLEY: There was – there was –
> THE COURT: I mean you look at the record, I ruled more times in 45 minutes than I've ever ruled in a trial.
>
> (Evidentiary hearing, PCR2, p. 191).

With regard to failing to move for a mistrial in connection with Cannon's refusal to answer cross-examination questions, Mr. Nielsen testified:

> Now, the issue of the mistrial, certainly I would suggest that would be a mistake, in my opinion, not to move for mistrial, and if I didn't do it, then I did make that mistake. My recollection is that I did, and I know, based on the appeal and the review of the record, there is no such motion apparently in the transcripts, but, I mean, I think a first-year lawyer would know, under that situation, to try to make that motion, and if I didn't do it, then I did make that mistake. I believe it would have been well-founded, and I furthermore thought that I did do it, and I don't have any proof of it. But that's my recollection, and I would agree under that scenario that motion should be made. I don't know if it would have been granted, but it should be made.
>
> (PCR2, p. 134)

On cross-examination by the State, Mr. Nielsen testified that it was he, not his co-counsel Mr. Dowdy, that was responsible for cross-examining Cannon. PCR2, p. 166. He (Mr. Nielsen) asked Judge Parsons to make Cannon answer cross-examination questions. PCR2, p. 166. Mr. Nielsen believes that he *did* moved for mistrial when Cannon refused to answer cross-examination questions even though the record des not reflect such. PCR2, p. 134, 166. Mr. Nielsen testified that, under the circumstances, he did the best with what he had. PCR2, p. 166.

Following the presentation of witness testimony at the evidentiary hearing, both sides gave their closing arguments in the form of a question-and-answer session with the trial Court. PCR2, p. 99-196 . With regard to the significance of Cannon's testimony, the State agreed that Cannon was present and able testify regarding who did what inside the Telford Lane house during the murders. PCR2, p. 193-194. Nevertheless, the State argued that the defense benefitted and the prosecution suffered from the lack of any cross-examination testimony from Cannon. PCR2, p. 193-194. The State also argued that any damage that Cannon's refusal to answer might have done to Victorino's defense was not serious enough to constitute "prejudicial" or "fundamental" error. PCR2, p. 195-

196.

Trial court's denial order:

In its subject denial order, the trial court initially stated:

> 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' (codefendant's) counsel. Those motions were denied and his conviction was affirmed. Salas v. State, 972 So.2d 941 (Fla. 5th DCA 2008), Cert. Den. 34 So.2d 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 97 (Fla. 2009) and Hunter v. State, 8 So.3d 1052 (Fla. 2008) Cert. Den. 129 S.Ct. 2005 (2009). No error was found by the Supreme Court which specifically dealt with the issue.
>
> * * *
>
> . . .the State urges that the defendant is merely attempting to relitigate 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 relitigate the same issue. (citations)
>
> (PCR 6 p. 809-810)

Actually, in State v. Victorino, 23 So.3d 97 (Fla. 2009) this Florida Supreme Court specifically *declined* to consider this issue because Defendant's trial counsel failed to preserve it for appeal as follows:

> 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.

Moreover, this Florida Supreme Court's direct-appeal determination that trial counsel failed to preserve the issue of Cannon's shut-down for appeal is "law of the case." The trial court erred in not accepting such determination by this Florida Supreme Court as final. *See* Greene v. Massey, 384 So.2d 24, 28 (Fla. 1980).

Standard of Review:

Defendant argues in this appeal that trial counsel's failure to timely object and move for mistrial when Cannon refused to answer cross-examination questions was both "presumptive" ineffective assistance of counsel under United States v. Chronic, 466 U.S. 648 (1984) and "proven" ineffective assistance of counsel under Strickland v. Washington, 466 U.S. 668 (1984).

Under the Chronic, standard, the reviewing court examines the record and the circumstances of trial to determine whether the appellant has been "denied the

right of effective cross-examination" which "`would be constitutional error of the first magnitude and no amount of showing of want of prejudice would cure it." Id., at p. 645, citing Davis v. Alaska, 415 U.S. 308 (1974). If the record shows that the Defendant has experienced such a denial of effective cross-examination that there has been a "breakdown in the adversarial system," the conviction must be reversed.

Under the Strickland test of proven "ineffective assistance of counsel, the appellate courts engage in a *de novo* review because the claim is a mixed question of law and fact. Stephens v. State, 748 So.2d 1028, 1032 (Fla. 1999). The appellate Courts give deference to trial court factual findings that are based on competent, substantial evidence while applying the *de novo* standard of review to both the "deficient performance" and "prejudice" prongs of test of ineffective assistance set forth in Strickland v. Washington, 466 U.S. 668 (1984). Julien v. State, 917 So.2d 213 (Fla. 4th DCA 2005).

Legal argument including case law:

Defendant Victorino received presumptive ineffective assistance of counsel under the United States v. Chronic, 466 U.S. 648 (1984) standard. Cannon's testimony against Victorino, followed by Cannon's refusal to answer the cross-examination questions of Victorino's defense counsel, left Victorino without any

means of protecting himself from Cannon's accusations and claims. This left Victorino defenseless to his codefendants' efforts to falsely depict Victorino as the evil mastermind who bullied everyone else into participating in his murder scheme.

Victorino's chances of getting a fair trial ended the moment Cannon got off the witness stand without having to answer Victorino's lawyer's cross-examination questions. Victorino's trial counsel was ineffective in failing to immediately object and to timely move for mistrial. Although it is doubtful that a curative instruction (directing the jurors to disregard Cannon's testimony) would helped, it is surprising that Victorino's trial counsel did not ask for one. As indicated above, this was a very big, three-defendant murder trial. Conditions in the courtroom were hectic. The situation was rife for errors. As noted by the United States Supreme Court in Powell v. Alabama, 287 U.S. 45 (1932), circumstances of a Defendant's trial can result in denial of a defendant's right to effective counsel and cross-examination notwithstanding the good intentions of the judge and lawyers.

With regard to the Strickland v. Washington 466 U.S. 668 (1984) "proven" test of ineffective assistance of counsel, it is noteworthy that Mr. Nielsen, Defendant's "second chair" defense attorney, admitted at the evidentiary hearing

that failing to promptly move for mistrial following Cannon's shut-down would be a mistake that not even a first-year law student would make. (PCR2, p. 134). Given the hectic circumstances of Defendant Victorino's trial, it may be impossible to blame any one person for the problems caused by Cannon Nevertheless, the fact remains that Defendant Victorino received no effective cross-examination of Cannon. The record does not reflect any timely motion for mistrial.

Victorino did not receive any meaningful cross-examination of adverse witness and murder participant Cannon. Cannon unfairly depicted Victorino as ringleader and main killer. Victorino's Sixth Amendment, U.S. Constitution right to confront adverse witnesses was violated.

Constitutional violations:

By failing to timely and correctly object and move for mistrial in connection with Cannon's refusal to allow himself to be cross-examined, Defendant's trial lawyers provided ineffective assistance of counsel. This violated Victorino's rights to confront and cross-examine adverse witnesses, as secured by Sixth Amendment of the United States Constitution and by Article 1, Section 16 of the Florida Constitution. It also violated Victorino's right to a fair jury trial as secured by the Sixth and Fourteenth Amendments to the U.S.

Constitution and Article 1, Section 16 of the Florida Constitution. It also violated Victorino's right to due process of law secured by the Fifth and Fourteenth Amendments of the U.S. Constitution and Article 1, Section 9 of the Florida Constitution. It also denied Victorino the right to effective assistance of counsel secured by the Sixth and Fourteenth Amendments to the U.S. Constitution and Article 1, Section 16 of the Florida Constitution.

Issue 3: The Trial Court Erred in Not Finding Ineffective Assistance of Counsel For Not Raising " Calls for Speculation" and "Calls for Opinion of a Lay Witness" Objections to Questions Eliciting Testimony About What Codefendants Were Thinking

This issue was raised in the subject motion. PCR5, p. 579-584.

At various times during Defendant's trial, witnesses were asked questions which improperly called for speculation by inquiring about what other co-defendants had been thinking. Such questions improperly asked witnesses to speculate about what the various co-defendants thought at various times. There was no objection by defense counsel. Such questions produced answers which very unfairly and damagingly suggested that all of Victorino's co-defendants were intimidated by Victorino and acting in accordance to his will.

During the guilt phase of Defendant Victorino's trial, the state called Brandon Graham to testify against the defendants. R30. P. 1770. Brandon

Graham might best be described as a withdrawing co-conspirator to the subject homicides. He testified that he, co-defendant Salas, co-defendant Hunter and Defendant Victorino were all together at Victorino's Fort Smith Boulevard house. R30, p. 1985-86. He testified that Victorino believed that the subject victims had stolen his belongings. R30, p. 1974, 1978. He testified that Victorino fantasized aloud about wanting to beat the subject victims to death with lead pipes. R30, p. 1985-86. Graham further testified that, upon hearing this, Salas, Hunter and Graham all expressed their willingness to join Victorino in such beating. R30, p. 1985-6.

Graham testified that on Sunday August 2, 1004, four days before the subject 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. According to Graham, Defendant Victorino waited in the SUV while SUV passengers Graham, Salas, Hunter and some of their female allies exited the SUV, walked forward to the Telford house, and engaged in a verbal confrontation with the residents. R30, p. 1974-1977, 2003-2007. Graham testified that "the girls" were first to exit the SUV and approach and yell at the residents of The Telford house. Graham further testified that co-defendant Salas was next, apparently trying to impress Defendant Victorino. R30, p. 2005. This was pure speculation. Graham could

not read Salas' mind. There was never any verbal evidence that Salas acted as he did to impress Victorino. Nobody raised a "calls for speculation" objection.

The State also called a friend of Graham's named Christopher Craddock to testify during the guilt phase. Christopher Craddock testified that he was with Graham but apart from the other co-defendants when he overheard Cannon telling Graham what all of the co-defendants intended to do (obviously referring to the proposed killing of the Telford house residents). R31, p. 2176. Christopher Craddock testified that he and Graham did not do anything in response because they did not believe that the other co-defendants would actually go through with it. R31, p. 2176. Note that by so testifying, Christopher Craddock was telling the jurors what was going on inside of Graham's mind, namely, disbelief that the co-defendants really intended to go through with the killings. No one raised a "speculation" objection. R31, p. 2179.

Co-Defendant Salas testified in his own defense. R40, p. 3442. According to Salas, when Victorino fantasized aloud about beating the victims to death with poles, Salas expressed his willingness to join in out of intimidation because Victorino is a "big dude." R41, p. 3495. He also testified about what was going on inside of Cannon's mind. He testified that, like himself, Cannon did not want Victorino thinking that he was an uncooperative person who might

turn Victorino over to the police. R41, p. 3503. He further testified about what was going on inside of Cannon's mind when he said that when he and all of his co-defendants walked up to the Telford house the night of the murders, he and Cannon both "figured that we couldn't get out of it." R41, p. 3514.

Evidence Presented at Evidentiary Hearing:

Defendant's "first chair" defense attorney Jeff Dowdy was asked if there was some strategic or tactical reason for not raising "calls for speculation" or "calls for opinion of a lay witness" types of objections to these witness questions. PCR2, p. 106-107. Mr. Dowdy responded, "None that I can recall." PCR2, p. 106-107.

With regard to the question of whether or not to object in general, Mr. Dowdy testified "Sometimes we feel it might be better not to object if we don't feel it's really going to get us anywhere." PCR2, p. 119.

On cross-examination by the State, Mr. Dowdy testified that there was no basis for him to object to the complained-of prosecutor questions to witnesses Brandon Graham, Kristopher Craddock, and Michael Salas. PCR2, p. 120-212.

Defendant's second-chair defense attorney Michael Neilsen testified that, as a general rule, his decision not to object to an objectionable question to a witness is strategic or tactical. PCR2, p. 135.

With regard to Graham testifying that co-defendant Salas entered the victims' house first, "apparently trying to impress Defendant Victorino," Mr. Neilsen testified that he himself did not object to this testimony, either because Graham was the responsibility of his partner, Mr. Dowdy, or because objecting did not seem like a good move strategically, or because Mr. Neilsen simply "missed it." PCR2, p. 136-137.

Mr. Neilsen was asked about Kristopher Craddock testifying that he and Graham did nothing when Cannon told Graham about the proposed killing at the Telford house because *they* –meaning Craddock and Graham– did not believe that the other codefendants would actually go through with it. It was pointed out to Mr. Neilsen at the evidentiary hearing that in so testifying, Craddock was improperly speculating about what Graham was thinking. PCR2, p. 137-138. By the time of this evidentiary hearing, the only thing Mr. Neilsen could recall about Kristopher Craddock was his name. PCR2, p. 138.

It was pointed out to Mr. Neilsen at the evidentiary hearing that was also Brandon Salas testified (a) that Cannon did not want Victorino to think Cannon was an uncooperative person who might turn Victorino over th the police and (b) like himself, Cannon did not feel he could get out of committing the subject crimes. PCR2, p. 138. Mr. Neilsen was asked why there was no objection Salas

testifying about what was going on in Cannon's mind. PCR2, p. 138. Mr. Neilsen testified that this was the very sort of problem that he and his co-counsel Mr. Dowdy sought to avoid in their unsuccessful motion to sever the trials of these multiple defendants. PCR2, p. 139. Mr. Neilsen further testified that, if this was objectionable testimony and the defense failed to object to it, it was either because of oversight or a strategic purpose. Mr. Neilsen had no further recollection of this matter. PCR2, p. 139.

Trial court's denial order:

In its subject denial order the trial court explained:

> 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.
>
> (PCR6, p. 769-770).

The trial court went on to state that, in making their complained-of comments about what others thought, the witnesses were "merely stating the obvious." PCR 6, P. 770. The trial court declined to find any effectiveness on this basis. PCR 6, p. 770.

Standard of Review:

For "ineffective assistance of counsel" claims like this one, the appellate courts engage in a *de novo* review because the claim is a mixed question of law and fact. Stephens v. State, 748 So.2d 1028, 1032 (Fla. 1999). The appellate Courts give deference to trial court factual findings that are based on competent, substantial evidence while applying the *de novo* standard of review to both the "deficient performance" and "prejudice" prongs of test of ineffective assistance set forth in Strickland v. Washington, 466 U.S. 668 (1984). Julien v. State, 917 So.2d 213 (Fla. 4th DCA 2005).

Legal argument including case law:

The complained-of "speculative" and "opinion" witness testimony about what Defendant Victorino and other crime participants had been thinking was very damaging to Victorino's defense. Such testimony misleadingly depicted Victorino as the domineering ringleader who scared others into accompanying him to the Telford Lane house to carry out his plan to kill. It greatly reduced the chances of the jurors considering whether the trip made to the Telford Lane house was to recover Victorinos' stolen property or to scare Abi G into leaving Victorino and his friends alone.

As noted above, the trial court judge stated in his subject denial order 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." (PCR6, p. 769-770). Actually, Victorino's commanding physical appearance made him *more* vulnerable to the efforts of the other Defendants, including Cannon, to make Victorino look like the ringleader. Victorino's large size made the complained-of, improper witness questions and Cannon's shut-down all the more prejudicial to Mr. Victorino. Hence, Victorino's dauntingly large size supports *granting* Victorino's subject motion, not denying it.

Florida courts recognize that witness questions that call for speculation are objectionable. Jones v. State, 908 So.2d 615 (Fla.App. 4 Dist. 2005). However, a contemporaneous objection accompanied with a statement of the grounds for the objection must be made. Lacey v. State, 831 So. 2d 1267, 1268 (Fla. 4th DCA 2002). Testimony based on speculation should be excluded as inadmissible. Sec. Mgmt. Corp. v. Markham, 516 So. 2d 959, 963 (Fla. 4th DCA 1987). As expressed by the court in LeMaster v. Glock, Inc., 610 So. 2d 1336,

1338-39 (Fla. 1st DCA 1992), quoting Drackett Prods. Co. v. Blue, 152 So. 2d 463, 465 (Fla. 1963):

> Conjecture has no place in proceedings of this sort. . . . The law seems well established that testimony consisting of guesses, conjecture or speculation — suppositions without a premise of fact — are clearly inadmissible in the trial of causes in the courts of this country. A statement by a witness as to what action he would have taken if something had occurred which did not occur . . . or what course of action a person would have pursued under certain circumstances which the witness says did not exist will ordinarily be rejected as inadmissible and as proving nothing.

Evidence which is speculative is inadmissible in the State of Florida for another reason. Under Florida Statutes Section 90.701.1 lay witnesses are only allowed to testify about what "what he or she perceived." Florida courts have emphasized that in criminal cases, testifying about what someone else was thinking is inadmissible, lay opinion testimony. Lee v. State 729 So.2d 975 (Fla. 1st DCA 1999), Branch v. State, 118 So.13 (Fla. 1928).

A Florida court's failure to adhere to its own state's procedural and evidentiary rules violates an accused's due process rights. Such rights are secured by the 14th Amendment to the United States Constitution. Chambers v. Mississippi, 410 U.S. 284 (1973).

The trial court erred in not finding that Defendant Victorino received ineffective assistance of counsel as a result of his trial counsel's failure to object to improper witness questions.

Constitutional Violations:

The above-described errors and omissions of counsel violated the Defendant's right to effective assistance of counsel, secured by the Fifth, Sixth and Fourteenth Amendments to the U.S. Constitution and by Article 1, Section 16 of the Florida Constitution. The above-described errors and omissions also deprived the Defendant of his right to a fair jury trial, secured by the Sixth and Fourteenth Amendments to the U.S. Constitution and Article 1, Sections 16 and 22 of the Florida Constitution. They also violated Defendant's rights to due process secured by the Fifth and Fourteenth Amendments to the U.S. Constitution and by Article 1, Section 9 of the Florida Constitution.

Issue 4: Withdrawn

Issue 5: The Trial Court Erred in Not Finding Ineffective Assistance of Counsel in the Failure to Object to an Improper DNA-Expert Statement About DNA Exonerating Persons Wrongly Convicted on Death Row

This "ineffectiveness" claim was raised in Defendant's subject motion. PCR 5, p. 590-592.

FDLE Crime Lab Analyst Emily Varan was called by the State to present

the State's DNA evidence against the Defendants. R36, p. 2743-4. She used a computer image-presentation program to explain DNA and DNA testing to the jury. R36. P. 2747-58. It was admitted into evidence as State's exhibit DDD. R36, p. 2747. Included on one of the project images was a statement that "DNA has been used and exonerates persons wrongly convicted on death row." R36, p. 2863-64. This amounted to improper, State "bolstering" of the State's DNA witness and evidence. It was also prejudiced Defendant by indicating to the jurors that there existed a DNA "fail safe" to correct unsound jury verdicts and death recommendations and free wrongfully convicted Death Row inmates. It created an inference that defendants like Victorino who do not have any DNA evidence in their favor must be guilty. There was no objection by Defendant's trial counsel.

Evidence presented at evidentiary hearing:

· Defendant's "first chair" trial attorney, Mr. Jeff Dowdy, testified that he had no recollection whatsoever about this subject, other than that Defendant's "second chair" trial attorney, Mr. Michael Nielsen was in charge of DNA and that this matter would have been Mr. Michael Nielsen's responsibility at trial. PCR2, p. 107, 130.

With regard to the question of whether or not to object in general, Mr.

Dowdy testified "Sometimes we feel it might be better not to object if we don't feel it's really going to get us anywhere." PCR2, p. 119.

On cross-examination by the State, Mr. Dowdy added that, even though co-defense counsel Michael Neilsen was handling the DNA portions of the case, he himself paid attention to the DNA evidence and would have alerted Mr. Neilsen if he himself observed any objectionable DNA-related evidence or testimony. PCR2, p. 131.

Defendant's "second chair" trial attorney, Mr. Michael Neilsen testified essentially that he would never object to the statement "DNA has been used and exonerates persons wrongfully convicted on death row" because he regards such statement as a truism that is beneficial to criminal defendants. He said this is so because DNA evidence "cuts both ways" and is sometimes is used to exonerate defendants. PCR2, p. 139-143. However, Mr. Neilsen also admitted that, in the present case, the DNA evidence was adverse to Defendant Troy Victorino. PCR2, p. 142-143.

On cross-examination by the State, Mr. Nielsen admitted that the DNA evidence in Defendant Troy Victorino's case was unfavorable to his defense. PCR 2, p. 169. However, Mr. Nielsen agreed with Mr. Dowdy that the statement "DNA has been used and exonerates persons wrongfully convicted on death row"

is generally beneficial to the defense. PCR2, p. 169.

Trial Court Denial Order:

The trial court explained why it denied this claim of ineffectiveness:

> . . . Mr. Dowdy and Mr. Nielsen indicated that they did not object to the presentation by the State's expert which included language to the effect that "DNA has been used to exonerate persons wrongfully convicted on death row." Their general testimony indicated that they both thought it was helpful information to the extent that it allowed the jury to recognize that people on death row had been wrongfully convicted. Both (defense attorneys) thought the information was helpful.
>
> (PCR 6, p. 771)

Standard of Review:

For "ineffective assistance of counsel" claims like this one, the appellate courts engage in a *de novo* review because the claim is a mixed question of law and fact. Stephens v. State, 748 So.2d 1028, 1032 (Fla. 1999). The appellate Courts give deference to trial court factual findings that are based on competent, substantial evidence while applying the *de novo* standard of review to both the "deficient performance" and "prejudice" prongs of test of ineffective assistance set forth in Strickland v. Washington, 466 U.S. 668 (1984). Julien v. State, 917 So.2d 213 (Fla. 4th DCA 2005)

Legal argument including case law:

The trial judge stated in his subject denial order that "Their general testimony (Defendant's trial counsels' evidentiary hearing testimony) indicated that they both thought it was helpful information to the extent that it allowed the jury to recognize that people on death row had been wrongfully convicted." (PCR 6, p. 771). However, this is not what Defendant's trial counsel said. (PCR 2, p. 107-169).

In Williamson v. State, 994 So.2d 1000 (Fla. 2008), the Florida Supreme Court, quoting Hutchinson v. State, 882 So.2d 943, 954 (Fla. 2004) held:

> "This Court has long recognized that "[i]t is improper to bolster a witness' testimony by vouching for his or her credibility." Gorby v. State, 630 So.2d 544, 547 (Fla. 1993). As this Court later explained, "Improper bolstering occurs. when the State places the prestige of the government behind the witness *or indicates that information not presented to the jury* supports the witness's testimony." Hutchinson, 882 So.2d at 953.
>
> (emphasis Defendant's)

In Caldwell v. Mississippi, 472 U.S. 320 (1985) the United States Supreme Court forbade any prosecutorial comments that tend to diminish jurors' sense of responsibility. The Caldwell court, specifically prohibited a prosecutor's comment which indicated to the jurors that there was an appeal process available to correct any errors or injustice which might occur. Jurors need to believe that

their verdict and sentence recommendations are *final* and no fail-safe legal or scientific procedure exists to protect the Defendant from a wrong verdict. The trial court erred in failing to find ineffectiveness on this ground.

Constitutional violations:

By not objecting to the projected statement about DNA exonerating wrongly convicted Death Row inmates, Defendant's trial attorneys rendered ineffective assistance of counsel in violation of Defendants right to effective assistance of counsel secured by the Sixth and Fourteenth Amendments to the U.S. Constitution and Article 1, Section 16 of the Florida Constitution. It also violated Defendant's due process rights secured by the Fifth and Fourteenth Amendments to the U.S. Constitution and by Article 1, Section 9 of the Florida Constitution. It also violated Defendant's right to a fair jury trial secured by the Sixth and Fourteenth Amendments to the U.S. Constitution and by Article 1, Section 16 of the Florida Constitution

Issue 6: The Trial Court Erred in Not Finding Ineffective Assistance of Counsel for Not Objecting to Prosecutor Statements Which Effectively Asked the Jurors to Imagine What the Victims Felt

This claim was raised in the subject motion. PCR 5, p. 592-594. The prosecutor began his guilt-phase closing argument by saying, "On ...August the fifth and sixth, when these six young people (victims) went to sleep in their

house on Telford in Deltona, they could not have imagined in their worst nightmares that two years later, 100 miles away, 12 strangers would get in to look at the photographs of their broken, sometimes naked bodies. And of the sixteen people that looked at them, twelve wold ultimately decide who the killers were and perhaps what to do with them." R41, p. 3483. There was no objection by Defendant's trial counsel.

Evidence presented at evidentiary hearing:

Defendant's "second chair" trial attorney, Mr. Jeff Dowdy, testified that he understood these statements as meaning that the victims could not imagine that their worst nightmare would have happened. PCR2, p. 108. He testified that there was not any tactical or strategic reason for not objecting. PCR2, p. 109.

With regard to the question of whether or not to object in general, Mr. Dowdy testified "Sometimes we feel it might be better not to object if we don't feel it's really going to get us anywhere." PCR2, p. 119.

On cross-examination by the State, Mr. Dowdy testified that he did not believe that the complained-of prosecutorial comments amounted to an improper "golden rule" argument. PCR2, p. 122.

Defendant's "first chair" trial attorney, Mr. Michael Nielsen, had no recollection of this matter. PCR2, p. 144.

On cross-examination by the State, Mr. Nielsen testified that he did not feel that the State made anything close to the sort of "golden rule" argument which would him intruding into this, Mr. Dowdy's part of the case. PCR2, p. 170.

Trial court's denial order:

The trial court declined to find ineffectiveness and ruled that the complained-of prosecutorial comments did not amount to a prohibited "golden rule" argument. PCR6, p. 817.

Standard of review:

For "ineffective assistance of counsel" claims like this one, the appellate courts engage in a *de novo* review because the claim is a mixed question of law and fact. Stephens v. State, 748 So.2d 1028, 1032 (Fla. 1999). The appellate Courts give deference to trial court factual findings that are based on competent, substantial evidence while applying the *de novo* standard of review to both the "deficient performance" and "prejudice" prongs of test of ineffective assistance set forth in Strickland v. Washington, 466 U.S. 668 (1984). Julien v. State, 917 So.2d 213 (Fla. 4th DCA 2005).

Legal argument including case law:

Statements which ask jurors to put themselves in a victim's place and imagine what a victim felt are just species of prohibited, "golden rule" arguments.

Pagan v. State, 830 So.2d 792, 812-13 (Fla.2002). Such arguments are prohibited because it is an attempt to "unduly create, arouse and inflame sympathy, prejudice and passions of [the] jury to the detriment of the accused." Barnes v. State, 58 So.2d 157, 158 (Fla. 1951). The trial court erred in not finding ineffectiveness on this ground.

Constitutional violations:

By not objecting to the above-identified, improper, prosecutorial remarks, Defendant's trial attorneys rendered ineffective assistance of counsel in violation of Defendants right to effective assistance of counsel secured by the Sixth and Fourteenth Amendments to the U.S. Constitution and Article 1, Section 16 of the Florida Constitution. It also violated Defendant's due process rights secured by the Fifth and Fourteenth Amendments to the U.S. Constitution and by Article 1, Section 9 of the Florida Constitution. It also violated Defendant's right to a fair jury trial secured by the Sixth and Fourteenth Amendments to the U.S. Constitution and by Article 1, Section 16 of the Florida Constitution.

Issue 7: The Trial Court Erred in Not Finding Ineffective Assistance of Counsel in Not Objecting to Prosecutorial Remarks That Aroused Fear in the Jurors

This issue was raised in the subject motion. PCR 5, p. 594-596.

In his guilt-phase closing argument, the prosecutor gave the Defendant's jurors the following illustration of vicarious culpability, ". . . a wife hires a hit

man. Hit man goes up to New York, kills husband. Wife's not present. Is she responsible? You better believe it. *It's a good thing, too, or life might not be a safe as it is.*" R41, p. 3846. This was an impermissible statement intended to arouse fear in the jurors. There was no objection by defense counsel. Defendant's "second chair" trial attorney, Mr. Jeff Dowdy, could not recall any tactical or strategic reason for not objecting to these prosecutorial remarks. PCR2, p. 109.

Evidence presented at evidentiary hearing:

With regard to the question of whether or not to object in general, Mr. Dowdy testified "Sometimes we feel it might be better not to object if we don't feel it's really going to get us anywhere." PCR2, p. 119.

On cross-examination by the State, Mr. Dowdy testified that the complained-of prosecutorial remarks were "just the nature of the crime," and "the facts were the facts; there's not much we could change on that, so I didn't see it as a violation." PCR2, p. 123.

Defendant's "first chair" trial attorney, Mr. Michael Nielsen, had no recollection of this matter. PCR2, p. 144-145, 170-171. Mr. Nielsen did testify on cross-examination that, he and Mr. Dowdy were presenting a alibi defense –a defense that Mr. Victorino was not even present when the crimes occurred– therefore prosecutor's characterizations of the crimes and perpetrators were of no

concern and needlessly objecting to any such characterizations would cost them credibility with the jurors. PCR2, p. 171-172.

Trial court's denial order:

The trial court declined to find ineffectiveness on this ground, finding instead that "there is no suggestion that the argument was designed to or in fact aroused fear in the jurors." PCR6, p. 818.

Standard of review:

For "ineffective assistance of counsel" claims like this one, the appellate courts engage in a *de novo* review because the claim is a mixed question of law and fact. Stephens v. State, 748 So.2d 1028, 1032 (Fla. 1999). The appellate Courts give deference to trial court factual findings that are based on competent, substantial evidence while applying the *de novo* standard of review to both the "deficient performance" and "prejudice" prongs of test of ineffective assistance set forth in Strickland v. Washington, 466 U.S. 668 (1984). Julien v. State, 917 So.2d 213 (Fla. 4th DCA 2005).

Legal argument including case law:

Appeals to jury sympathy or emotions or fear are impermissible. Taylor v. State, 583 So.2d 323 (Fla. 1991), Rhodes v. State, 547 So.2d 1201 (Fla. 1989), King v. State, 623 So.2d 486 (Fla. 1993). A combination of unopposed and opposed appeals to jurors emotions can have the cumulative effect of depriving

the Defendant of a fair penalty phase. Brooks v. State, 762 So.2d 879 (Fla. 2000). Similarly, arguments which cause jurors to fear for their own welfare are improper. Norman v. Gloria Farms, Inc., 668 So.2d 1016 (Fla. 4th DCA 1996), U.S. v. Gainey, 111 F. 3d 834 (3rd Cir. 1997).

In the present case, the prosecutor argued that is a good thing that, under our laws, someone who hires a hit man is nonetheless responsible for the resulting, remote killing. The obvious intent was to depict Victorino as an organized-crime hit man and to instill fear in the jurors that acquitting Victorino or sentencing him to life instead of death might put themselves in jeopardy. The trial court judge's finding that this prosecutorial argument was not designed arouse fear and did not in fact aroused fear is not supported by competent, substantial evidence. The trial court judge erred in not finding ineffectiveness on this ground.

Constitutional violations:

By not objecting to the above-identified, improper, prosecutorial remarks, Defendant's trial attorneys rendered ineffective assistance of counsel in violation of Defendants right to effective assistance of counsel secured by the Sixth and Fourteenth Amendments to the U.S. Constitution and Article 1, Section 16 of the Florida Constitution. It also violated Defendant's due process rights secured by the Fifth and Fourteenth Amendments to the U.S. Constitution and by Article 1,

Section 9 of the Florida Constitution. It also violated Defendant's right to a fair jury trial secured by the Sixth and Fourteenth Amendments to the U.S. Constitution and by Article 1, Section 16 of the Florida Constitution.

Issue 8: The Trial Court Erred in Not Finding Ineffective Assistance of Counsel in Failing to Rebut the State's Argument That the Defendants Entered the Telford Lane House to Commit the Crime of Armed Burglary

This issue was raised in the subject postconviction motion. PCR5, p. 596-598. In its guilt-phase closing argument, the prosecutor argued, in support of its "felony murder rule" theory, that the Defendant and co-defendants entered the Telford house to commit armed burglary. R41, p. 3348. Defendant's trial counsel gave no rebuttal to this claim in their own, guilt-phase closing argument (R41, p. 3871-3908). As indicated in the Statement of the Case and Facts above, there was actually ample record evidence that Victorino went to the Telford house to recover property that Defendant rightfully owned and not to break in or steal. Defendant's trial counsel were ineffective in failing to make such argument in rebuttal.

Evidence presented at evidentiary hearing:

Defendant's "second chair" trial attorney, Mr. Jeff Dowdy, testified that there was no strategic or tactical reason for not opposing such arguments by the State. PCR2, p. 109.

Defendant's "first chair" trial attorney Mr. Nielsen testified that the

division of labor between himself and Mr. Dowdy was such that this portion of the trial was Mr. Dowdy's responsibility (PCR2, p. 147), not his.

Trial Court's denial order:

In declining to find ineffectiveness on this ground, the trial Court stated:

> 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 truck that it would be baseless 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 have been established and Claim 8 fails. . . it is obviously sound trial strategy not to make such trivial arguments in such a serious case . . .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 alii defense was manufactured.
>
> (PCR6, p. 818-819).

Standard of review:

For "ineffective assistance of counsel" claims like this one, the appellate courts engage in a *de novo* review because the claim is a mixed question of law and fact. Stephens v. State, 748 So.2d 1028, 1032 (Fla. 1999). The appellate Courts give deference to trial court factual findings that are based on competent, substantial evidence while applying the *de novo* standard of review to both the "deficient performance" and "prejudice" prongs of test of ineffective assistance set forth in Strickland v. Washington, 466 U.S. 668 (1984). Julien v. State, 917

So.2d 213 (Fla. 4th DCA 2005).

Legal argument and relevant case law:

This is an "ineffective of counsel" claim governed by the Strickland and Cronic cases cited elsewhere in this brief. There was ample evidence that the Defendant had a motive to someday return to the Telford house legally, to recover his own property. By failing to dispute the State's argument that the Defendant went to the Telford Lane house specifically to commit armed burglary, Defendant's lawyers effectively admitted such by silence. Defendant's counsel effectively conceded by silence the "felony" element of the felony murder rule. This was ineffective assistance of counsel.

Conceding guilt is a form of "ineffective assistance of counsel." Francis v. Spraggins, 720 F.2d 1190 (11th Cir. 1983). Indeed, conceding key, disputed factual issues is *per se* ineffective assistance of counsel. U.S. v. Swanson, 943 F.2d 1070 (9th Cir. 1991). *Accord*, Mills v. State, 714 So.2d 1198 (Fla. 4th DCA 1998), Nixon v. Singletary, 758 So.2d 618 (Fla. 2000). The trial court erred in not finding ineffectiveness on this ground.

Constitutional violations:

By not disputing the prosecutor's claim that Defendant went to the Telford house to commit the crime of armed burglary, defendant's trial counsel failed to provide effective assistance of counsel as secured by the Sixth and Fourteenth

Amendments to the United States Constitution and by Article 1, Section 16 of the Florida Constitution. This also improperly deprived Defendant of his right to a fair jury trial as secured by the Sixth and Fourteenth Amendments to the United States Constitution and Article 1, Section 16 of the Florida Constitution.

Issue 9: The Trial Court Erred in Not Finding Ineffective Assistance of Counsel for Admitting During Closing Argument That The "Prosecution Has Done a Wonderful Job Here"

This issue is raised in Defendant's subject motion. R5, p. 598-601

At the beginning of Defendant's lawyer's guilt-phase closing argument, Defendant's lawyer said, "Good afternoon, ladies and gentlemen. Once again, my name is Jeff Dowdy, my partner, Mr. Nielsen. As you know, we represent Mr. Victorino. You've already heard thanks enough. Thank you from our team. *The prosecution has done a wonderful job here. They've had aid from the additional prosecutors in the case.*" R41, p. 3871. There was no follow-up or explanation. There was nothing to indicate that this comment was made facetiously or sarcastically. Rather, this statement, made alone as it was in Defendant's case, communicated nothing more that a compliment to the prosecutors for a job well done.

Evidence Presented at Evidentiary Hearing:

Defendant's "second chair" trial attorney, Mr. Jeff Dowdy, explained that,

in making this comment to the jurors, he was pointing out that although the State did a wonderful job, the State still failed to prove Defendant Troy Victorino's guilt. PCR2, p. 109-110.

On cross-examination by the State, Mr. Dowdy added that complimenting the judge and prosecutors is something he and first-chair Michael Nielsen do in virtually every trial in order to make the jurors comfortable, and not dislike the defense. PCR2, p. 124.

Defendant's "first chair" defense attorney, Mr. Michael Nielsen, testified that there is nothing wrong with paying respects to other lawyers and that doing so is not the same as saying one's client is guilty. PCR2, p. 148. On cross-examination by the State, Mr. Nielsen added that acknowledging the hard work that everyone put into a case, including one's legal opponents, is an effective way to "win points" with jurors. PCR2, p. 172. Mr. Neilsen alluded to the two, jury "life" sentence recommendations that Defendant Troy Victorino received as evidence of the success of this approach. PCR2, p. 173.

Trial court's denial order:

The trial court declined to find ineffectiveness on this ground, explaining that this comment " . . . admits nothing other than the obvious and allows them (defendant's trial counsel) to use that (comment) as a platform and then branch

out and show what the State has missed or overlooked." PCR6, p. 819.

Standard of Review:

For "ineffective assistance of counsel" claims like this one, the appellate courts engage in a *de novo* review because the claim is a mixed question of law and fact. Stephens v. State, 748 So.2d 1028, 1032 (Fla. 1999). The appellate Courts give deference to trial court factual findings that are based on competent, substantial evidence while applying the *de novo* standard of review to both the "deficient performance" and "prejudice" prongs of test of ineffective assistance set forth in Strickland v. Washington, 466 U.S. 668 (1984). Julien v. State, 917 So.2d 213 (Fla. 4th DCA 2005).

Legal argument including case law:

By so complimenting the State, Defendant's lawyer effectively conceded that Defendant's prosecutors did a good job in making its case against all of the defendants, including Defendant Victorino. As a result, the adversarial process broke down. Defendant's lawyers failed to function as advocates, testing and challenging the State's case. United States v. Chronic, 466 U.S. 648 (1984), Strickland v. Washington, 466 U.S. 668 (1984). The trial court erred in failing to find ineffectiveness on this ground.

Constitutional violations:

By not objecting to the above-identified, improper, prosecutorial remarks, Defendant's trial attorneys rendered ineffective assistance of counsel in violation of Defendants right to effective assistance of counsel secured by the Sixth and Fourteenth Amendments to the U.S. Constitution and Article 1, Section 16 of the Florida Constitution. It also violated Defendant's due process rights secured by the Fifth and Fourteenth Amendments to the U.S. Constitution and by Article 1, Section 9 of the Florida Constitution. It also violated Defendant's right to a fair jury trial secured by the Sixth and Fourteenth Amendments to the U.S. Constitution and by Article 1, Section 16 of the Florida Constitution.

Issue 10: The Trial Court Erred in Not Finding Ineffective Assistance of Counsel in Connection With Improper "Victim-Impact" Testimony

This issue is raised in Defendant's subject postconviction motion. PCR 6, p. 819-820. Defendant's trial counsel rendered ineffective assistance fo counsel by not objecting to emotional, "grief" and "mourning" testimony of the deceased victims' relatives and friends. Such testimony exceeded the permissible bounds of victim-impact evidence, inflaming the jury.

Ms. Lucy Santiago Bonilla, sister-in-law of victim Francisco Ayo-Roman talked about her grief and shock upon learning of victim Ayo-Roman's death. She spoke of how her own husband has "not been the same man" since the death.

R45, p. 4088-89 ,

Mr. Stephen Nathan, father of victim Michelle Nathan talked about how victim Michelle Nathan's brother Adam was unable to think about anything but Michelle Nathan's murder for months. R45, p. 4090-91.

Ms. Tina Gonzales, mother of victim Roberto "Tito" Gonzalez testified:

> "We, as a family have lost track of time. We function to the best of our ability, each trying to support the other, grieving in silence, solace and together. Work has become an escape from our reality for a couple of hours for some, many hours for others. But the daily reminders are many, and his loss so evident in everything we do and say. Although he was far from home, we spoke to Tito almost every day and kept him up to speed with the family's happenings and sought his input or just shared and looked forward to seeing him and getting together for the holidays. That moment never came. And neither has the meaning of the holidays for us. We know he is gone, and yet, by some miracle, we expect that this is all a nightmare and he will call or show up.
>
> We remember the funeral. We remember the preparation, the service, and yet, we never got to say goodbye. My last kiss was placed on a cold casket as I held onto every ounce of strength to lay him to rest.
>
> * * *
>
> We continue to teach values and morals and teach her (victim Roberto "Tito" Gonzalez's daughter) not to hate. The hardest is trying to explain why this happened to her dad, brother, our son. Has it only been a year, or is it just a vicious nightmare that never ends and has no time limit? I have written this letter (victim-impact statement) at least 1,000 times. I apologize to my family for having to justify our pain, and I am ashamed to be part of a system that must justify a person's existence and family's pain to achieve justice.

> Robert Manuel Gonzalez was a beautiful human being, along with the others who did not deserve to be brutally murdered. May God help us all. Has it been a year? Oh, yes. I remember the different types of griefs and flowers, mass cards, letters and well wishes. We receive them on every anniversary of his murder. Six months later to the day, it all happens again on my mother's passing." There was no objection nor mistrial motion by the defense.
>
> (R45, p. 4101-05.)

The Court apparently recognized that the victim-impact testimony was getting out of hand and gave the following instruction to the jury:

> "I just want to let you know that the role of that type of (victim-impact) testimony has a limited purpose and let me tell you what that is. Such evidence shall be designed to demonstrate the victim's uniqueness as an individual human being and the resultant loss to the community's members by the victim's death. The goal of this information is to address those issues. And that's lots of other things that obviously could be said, but I think it needs to be confined to those issues only."
>
> (R45, p. 4017.)

Mr. Bill Belanger, Victim Erin Belanger's father, also gave his own, victim-impact testimony as follows: "Erin's brutal murder was the worst horror that I or any member of my family could have imagined. My entire family suffers daily under the agony of this senseless tragedy. It has been said that no parent should ever have to bury a child. The pain of Erin's burial was made more intense by the horrible manner of her death. Due to the vicious and cowardly

attach and her resulting dismemberment and disfigurement, we were not even given the opportunity– R45, p. 4110-4111. Co-defendant Salas' attorney Dees made an "outside the scope" objection. The trial court judge instructed the jury to disregard the reference to "cowardly." R45, p. 4111-4112.

Victim Erin Belanger's father continued: "From the time that I received the terrible news, I could not function at my job. The sorrow was unbearable and the anger overwhelming. I needed and sought professional counseling and, with the help of continued psychiatric support, was finally able to return to work. The lost time at work is nothing, but the loss of my only child will burn with me forever. A light in my life has been extinguished. Not an hour goes by but my thoughts to Erin, asking what words I could have said, what actions I could have taken, what could have been, what should have been." R45, p. 4111-4112.

The trial court judge then stated, "with regard to victim-impact evidence . . . (we) . . . need to be careful here because it's not about the loss to the parent. It's about the person and the loss to the community of the person's value, not – I mean, I know it's hard to tell a parent your loss doesn't count. The statute is very limited, and so I'd like to make sure you're all aware of that and I will interrupt them if I think they're over the line, because the defense is almost handicapped to interrupt without causing damage to their case." R45, p. 4116.

The trial court judge further admonished counsel, "We deal with objections. But it's very limited, and I think we're fine. But I think I want to caution everybody, that's an area that has dynamite for purposes of appeal." R45, p. 4117.

All defense counsel joined together in asking the Court instruct the jury that victim-impact evidence is not to be considered an aggravating circumstance. R45, p. 4117.

Evidence presented at evidentiary hearing:

Defendant's "second chair" trial attorney, Mr. Jeff Dowdy, testified that there was no "strategic" reason for allowing these witnesses to give such grief and mourning testimony. PCR2, p. 112. He recalled the defense joining in and objecting when the trial judge's admonished victim-impact witness Mr. Berlanger not to testify about cowardice. PCR2, p. 112, 126.

With regard to the question of whether or not to object in general, Mr. Dowdy testified "Sometimes we feel it might be better not to object if we don't feel it's really going to get us anywhere." PCR2, p. 119.

On cross-examination by the State, Mr. Dowdy agreed with the State that Payne v. Tennessee, 501 U.S. 808 (1991), which is followed in Florida, "basically allows just about anything except the witness's opinions about the crime, the

defendant and the appropriate punishment for that Defendant. PCR2, p. 125-126. Mr. Dowdy also testified that he had been provided with written statements of what the victim-impact witnesses intended to say before trial, so there were no surprises. PCR2, p. 127.

The testimony of Defendant's first-chair defense attorney, Mr. Michael Nielsen, on this point was essentially the same as Mr. Dowdy's. PCR2, p. 149-150. Mr. Dowdy added that the defense had moved the trial court, unsuccessfully, to keep *all* victim-impact evidence from the jury's ears. PCR2, p. 150. Mr. Dowdy also testified essentially that it is wise to allow victim-impact witnesses some leeway and to refrain from interrupting them in this, their effort to get some peace and closure, in order to avoid alienating the jurors and perhaps losing some juror "life" votes. PCR2, p. 151-152.

On cross-examination, Mr. Nielsen testified that, to the best of his recollection, the defense did move to limit victim-impact evidence prior to trial (PCR2, p. 173) and reviewed the proposed victim-impact witness testimony before trial. All victim-impact witness testimony went as expected (PCR2, p. 74) with the exception of Mr. Berlanger whose transgression was promptly corrected by the trial judge. PCR 2, p. 174.

Trial court's denial order:

The trial court declined to find ineffectiveness on this ground, holding 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), Huggines v. State, 889 So.2d 743 (Fla. 2004), Forina v. State, 801 So.2d 44 (Fla. 2001)."

Standard of Review:

For "ineffective assistance of counsel" claims like this one, the appellate courts engage in a *de novo* review because the claim is a mixed question of law and fact. Stephens v. State, 748 So.2d 1028, 1032 (Fla. 1999). The appellate Courts give deference to trial court factual findings that are based on competent, substantial evidence while applying the *de novo* standard of review to both the "deficient performance" and "prejudice" prongs of test of ineffective assistance set forth in Strickland v. Washington, 466 U.S. 668 (1984). Julien v. State, 917 So.2d 213 (Fla. 4th DCA 2005).

Legal argument including case law:

Under the Payne case, victim-impact evidence is allowed *provided* it is presented to show the victim's uniqueness as an individual, and *provided* that such victim-impact evidence is no so unduly prejudicial as to render the trial fundamentally unfair and hence violate the Defendant's right to due process of

law secured by the 14th Amendment to the U.S. Constitution. Payne v. Tennessee, 501 U.S. 808 (1991).

Florida Statutes Section 921.141 codifies the Payne rule as follows:

> (7) VICTIM IMPACT EVIDENCE. — Once the prosecution has provided evidence of the existence of one or more aggravating circumstances as described in subsection (5), the prosecution may introduce, and subsequently argue,
> victim impact evidence to the jury. Such evidence shall be designed to demonstrate the victim's uniqueness as an individual human being and the resultant loss to the community's members by the victim's death. Characterizations and opinions about the crime, the defendant, and the appropriate sentence shall not be permitted as a part of victim impact evidence.

Clearly, the victim-impact evidence presented in Defendant Victorino's trial went far beyond demonstrating the various victims' uniqueness and the resultant loss to the community. It included a great deal of irrelevant impermissible "grief" and "mourning" evidence not allowed by either Payne or Florida Statutes Section 921.141. By not objecting to it, Defendant's trial counsel rendered ineffective assistance of counsel. The trial court erred in not finding ineffectiveness on this ground.

Constitutional violations:

By not objecting to the above-identified, improper, victim-impact witness statements, Defendant's trial attorneys rendered ineffective assistance of counsel

in violation of Defendants right to effective assistance of counsel secured by the Sixth and Fourteenth Amendments to the U.S. Constitution and Article 1, Section 16 of the Florida Constitution. It also violated Defendant's due process rights secured by the Fifth and Fourteenth Amendments to the U.S. Constitution and by Article 1, Section 9 of the Florida Constitution. It also violated Defendant's right to a fair jury trial secured by the Sixth and Fourteenth Amendments to the U.S. Constitution and by Article 1, Section 16 of the Florida Constitution.

Issue 11: Ineffective Assistance of Counsel in Failing to Evaluate Alibi Witnesses and in Presenting an Unbelievable and Damaging Alibi Defense

Defendant included this issue in his subject motion. PCR5, p. 606-611. During the guilt phase of Defendant's trial, Defendant's trial counsel called some of the Defendant's friends and the Defendant himself to give "alibi" testimony that the Defendant was elsewhere on the night of the subject, Telford Lane house murders. Such "alibi" witnesses and testimony were unbelievable to the point of being ridiculous. There was no chance of such evidence persuading the jurors of Defendant's alibi. Worse still, such "alibi" testimony actually supported the State's arguments that the Defendant controlled others.

Defendant's trial lawyer called Ms. Yvonne Pizarro to testify regarding Defendant's alibi. She had known the Defendant for 15 years. She described

seeing defendant at her house between 10:30 and 11:00 p.m. on the night of the murders. R38, p. 3127-3130. In response to further questioning, she admitted that Defendant may have left her house anytime between a little before 11:00 p.m. and a little before midnight. R38, p. 3132-33.

Defendant's lawyers called Arthur Otterson. He had known the Defendant for 10 years. He initially testified that Defendant was present at his house at "right around 9:00 p.m. on the night of the subject murders. The State impeached him with his earlier deposition testimony in which he said that the Defendant was at his house between 9:30 and 11:30 p.m. After initially insisting that the Defendant had been at this witness' house around 9:00 p.m., this witness conceded on cross-examination that he really did not have any idea when the Defendant stopped by this witness' home. R38, p. 3134-3137.

Defendant's lawyers called Defendant's employer, Philip Montosa. R38, p. 3140. In response to an initial question by Defendant's own defense lawyer, Mr. Montosa admitted he was wearing handcuffs in court because he was currently jailed for non-payment of child support. R38, p 3140. He initially testified that the Defendant had been working for him from 9:00 a.m to 3:00 p.m on Wednesday, August 5, 2004, the morning and afternoon before the subject murders. R38, p. 3140. Upon cross-examination by the State, he admitted that he

had earlier testified in his deposition that the Defendant had *returned* at 12:00 noon that day, but he added that what he meant was that the Defendant had *returned* sometime between 12:00 noon and 3:00 p.m. that day. Id. He initially denied testifying earlier, in his deposition, that his sister Eunice Vega has not seen or spoken with the Defendant since the murders. When confronted with his prior, inconsistent deposition testimony on this point, he admitted that his sister had not seen or spoken with the Defendant since the murders. The net effect was that Mr. Montosa appeared to be lying, unsuccessfully, for the defendant. Id.

Lilian Olmo was an acquaintance of the Defendant's. She testified that, on the night of the subject murders, she observed Defendant at a night club called Papa John's. R39, p. 3144-3147. She admitted drinking between five and six vodka-cranberry cocktails and being "tipsy" that night. R39, p. 3163. She testified that the Defendant remained in Papa John's night club until shortly before closing time on the night of the subject murders. R39, p. 3154-3156. When confronted with a convenience store security video that showed Defendant in the store at 11:10 p.m. on the night of the murders, Ms. Olmo changed her earlier testimony and claimed that the Defendant was present at Papa John's night club from after 11:00 p.m. until "close to closing time." R39, p. 3164. She had earlier testified in her deposition that Defendant Victorino left Papa John's

night club with her. Now, in Defendant's trial, when she was confronted with evidence that Defendant departed in co-defendant Cannon's white SUV, she said, "But we went out the door (of Papa John's) at the same time." R39, p 3165. Upon further questioning by the State, she vacillated between claiming that Ms. Eunice Vega drove her home from Papa John's and not remembering who drove her home. She eventually admitted she could not remember who drove her home. R39, p. 3165-3166. The net effect was that Ms. Olmo came across as someone who did a bad job lying for the Defendant.

Ms. Eunice Vega testified that she was "close friends" with Defendant Victorino, "like my brother." R39, p. 3167. She denied being "in love" with Defendant Victorino. R39, p. 3182-6. She denied engaging in erotic jail telephone calls with Defendant Victorino. She gave a detailed account of how Defendant Victorino was present at a number of different locales, not the subject Telford house, between 10:30 and 11:00 p.m and 2:00 or 2:30 a.m. during the night of the subject murders. R39, p. 3176-3178. If believed, this testimony would have made it unlikely that Defendant Victorino was present at the Telford house at the time of the murders.

Out of the presence of the jury, the State played Ms. Vega a recorded jail telephone conversation that Ms. Vega had with Defendant Victorino. It was

obvious "phone sex." The jury was called back in and, on further questioning, she admitted that she loved and had a romantic interest in Defendant Victorino and had a sexual fantasy and phone sex with him and had talked of having his children. R39 p. 3186-3206. The net effect was that Ms. Vega came across as a bad liar for the Defendant.

Defendant Troy Victorino's trial lawyer called him to testify himself regarding his alibi defense. R39, p. 3214-3321. Defendant Victorino gave a cohesive and detailed account of the many places he visited on the night of the subject murders. He also admitted that he had *eight* prior felony convictions. As such, he never stood a chance of having the jury believing a single word he said.

Evidence presented at evidentiary hearing:

Defendant's "second chair" trial attorney, Mr. Jeff Dowdy, testified that Defendant Troy Victorino was adamant that he was at Papa John's restaurant and not at the killing scene at the time of the subject murders. PCR2, p. 113. Mr. Dowdy explained that Defendant Troy Victorino was adamant that his trial counsel go forward with such alibi defense. PCR2, p. 113.

Mr. Dowdy essentially confirmed that the defense plan was to admit that Defendant Troy Victorino's shoes were at the murder scene, but somebody else's

feet were in them. PCR2, p. 113-114. Mr. Dowdy added that " . . .the other person was a DNA minor contributor to the shoes, so that's where that came up at. But we never had a discussion that this was an unbelievable defense." PCR2, p. 113-114.

On cross-examination by the State, Mr. Dowdy testified that Defendant Troy Victorino insisted that his trial counsel present the alibi defense. PCR2, p. 127.

Defendant's "first chair" defense attorney, Mr. Michael Nielsen, testified that Defendant Troy Victorino maintained his innocence throughout all proceedings and insisted that he "wasn't there and had an airtight alibi." PCR2, p. 153-154. Mr. Michael Nielsen added that Defendant Troy Victorino came across as a believable person. PCR2, p. 155.

On cross-examination by the State, Mr. Nielsen testified that he *did* inform Defendant Victorino prior to trial that the DNA evidence revealed the presence of the victims' blood on Mr. Victorino's boots. Mr. Nielsen and Mr. Dowdy then asked Mr. Victorino if there was anything he wanted to tell them. PCR 2, p. 175-176. Defendant Victorino's responses were, "they're full of baloney. Someone else but the stuff (victims' DNA) there (on Defendant Victorino's boots)" (PCR2, p. 175) and " . . .they're wrong, and that's not right, and I wasn't there, and you

guys know what I've told you before for months . . ." PCR2, p. 176.

Trial court's denial order:

The trial court declined to find ineffectiveness on this ground, explaining "Both of the attorney's (Victorino's defense attorneys) indicated that the alibi witnesses were vetted by their team which included experienced private investigators and the alibi defense seemed to be viable . . . .It was only at the trial that the State was able to destroy the alibi witnesses and any remnant of the alibi defense associated with Mr. Victorino wearing the boots." PCR6, p. 820-821.

Standard of review:

For "ineffective assistance of counsel" claims like this one, the appellate courts engage in a *de novo* review because the claim is a mixed question of law and fact. Stephens v. State, 748 So.2d 1028, 1032 (Fla. 1999). The appellate Courts give deference to trial court factual findings that are based on competent, substantial evidence while applying the *de novo* standard of review to both the "deficient performance" and "prejudice" prongs of test of ineffective assistance set forth in Strickland v. Washington, 466 U.S. 668 (1984). Julien v. State, 917 So.2d 213 (Fla. 4th DCA 2005).

Legal argument including case law:

Admittedly, there are instances in which a criminal Defendant chooses to

testify in his own defense, against his lawyer's advice. Admittedly, there are times when the decision as to whether or not a Defendant should testify in his own case is a very difficult one. However, counsel has a duty to make reasonable investigations. Strickland v. Washington, 466 U.S. 668 (1984). Trial counsel's choices regarding which witnesses should be called and which should not are subject to the Strickland double-pronged, effectiveness-of-counsel test. Williams v. State, 601 so.2d 596 (Fla. 1st DCA 1992), Gill v. State, 632 So.2d 660 (Fla. 2d DCA 1994), State v. Oisorio, 657 So.2d 4 (Fla. 3d DCA 1995).

In the present case, the Defendant Victorino suffered from ineffective assistance of counsel when his trial counsel presented the aforementioned "alibi" witnesses, not only were they unconvincing, they actually *supported* the State's theory that Victorino was a mastermind who got other people to do wrong for him. As indicated in the Statement of the Case and Facts above, there was evidence going the other way which suggested that the Defendant was *not* a willing participant in the subject, Telford house crimes. Defendant's jurors had cause to doubt the co-defendant's testimony about Victorino's involvement in the Telford house crimes. If Defendant's trial counsel had investigated and evaluated all of the Defendant's alibi witnesses –including the Defendant himself– the better choice of *not* presenting *any* alibi witnesses and simply

holding the State to its burden of proof instead would have been obvious. The trial court erred in failing to find ineffectiveness on this ground.

Constitutional violations:

By failing to investigate and evaluate alibi witnesses, including the Defendant himself, the Defendant's trial attorneys rendered ineffective assistance of counsel in violation of Defendants right to effective assistance of counsel secured by the Sixth and Fourteenth Amendments to the U.S. Constitution and Article 1, Section 16 of the Florida Constitution. This also violated Defendant's due process rights secured by the Fifth and Fourteenth Amendments to the U.S. Constitution and by Article 1, Section 9 of the Florida Constitution. This also violated Defendant's right to a fair jury trial secured by the Sixth and Fourteenth Amendments to the U.S. Constitution and by Article 1, Section 16 of the Florida Constitution.

Issue 12: The Trial Court Erred in Not Finding Ineffective Assistance of Counsel for Not Objecting to Gruesome Photographs

This issue was raised in Defendant's subject postconviction motion. PCR 5, p. 611-614. There was no need for the State to present all of the gruesome, emotion-evoking photographs of the dead victims' bodies. VCSO Investigator Anthony Crane testified that he inspected the site of subject, the Telford house

crimes and diagramed where all the bodies were found. R29, p. 1805-16. FDLE Crime Lab Analyst Stacy Colton confirmed the accuracy of the diagram of the location of the dead bodies. R29, p. 1845. Defendant's trial counsel objected to some, but not all, of the gruesome photographs that the prosecution presented at trial. Defendant's trial counsel was ineffective in not objecting to such inflammatory and emotion-provoking photographs.

The State admitted the following unnecessary, gruesome photographs into evidence, without any objection by Defendant's trial counsel, photographs of the following:

- State's Exhibit 97: Photograph of the victims' bodies. R29, p. 1845.
- State's Exhibit 10: Photographs of victim's Jonathan Gleason and Anthony Vega, showing their wounds. R29, p. 1864.
- State's Exhibit 18: Photograph of Victim Michelle Nathan, with trail of blood. R29, p. 1889-1990.
- State's Exhibit W: Photographs of the dead dachshund dog, "George." R29, p. 1895.
- Photograph of bloody baseball bat found in one of the bedrooms of the Telford house. R30, p. 1929.

Evidence presented at evidentiary hearing:

Defendant's "second chair" trial attorney, Mr. Jeff Dowdy, testified that gruesome photos were a the subject of a pre-trial motion and that the trial judge

"selected a few of the photographs that were going to be admitted." Mr. Dowdy could not remember if the Defense "objected" or "renewed our objections" to gruesome photos during trial. PCR2, p. 114.

With regard to the question of whether or not to object in general, Mr. Dowdy testified "Sometimes we feel it might be better not to object if we don't feel it's really going to get us anywhere." PCR2, p. 119.

On cross-examination by the State, Mr. Dowdy testified that the photographs did accurately portray the brutal nature of the subject crimes. PCR2, p. 128.

Defendant's second-chair defense attorney, Mr. Michael Nielsen, testified that he and Mr. Dowdy did file some pre-trial motions to exclude photos and some photos were so excluded. He testified that the defense renewed its objections to the brutal photos when the State brought them into the jury courtroom mounted on big boards. PCR2, p. 157-158, 176. On cross-examination by the State, Mr. Nielsen testified that the photographs were indeed bad for the defense, but the subject crimes involved six victims murdered in a small house and there was no way for the defense to avoid the adverse impact of such photographs. PCR2, p. 176-177.

Trial court's denial order:

The trial court declined to find ineffectiveness on this ground, explaining that the jurors would be aware of the gruesomeness of the murders regardless of photographs. PCR6, p. 823. The trial court also stated, "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." PCR6, p. 823. The trial court also stated that it *had* limited the number of photographs that it allowed the State to present at trial. PCR6, p. 823.

Standard of review:

For "ineffective assistance of counsel" claims like this one, the appellate courts engage in a *de novo* review because the claim is a mixed question of law and fact. Stephens v. State, 748 So.2d 1028, 1032 (Fla. 1999). The appellate Courts give deference to trial court factual findings that are based on competent, substantial evidence while applying the *de novo* standard of review to both the "deficient performance" and "prejudice" prongs of test of ineffective assistance set forth in Strickland v. Washington, 466 U.S. 668 (1984). Julien v. State, 917 So.2d 213 (Fla. 4th DCA 2005).

Legal argument including case law:

In Czubak v. State, 570 So.2d 925 (Fla. 1990), the Florida Supreme Court held that photographs of victim's bodies can be admissible if they are relevant

and not so shocking as to defeat the value of their relevance. The Florida Supreme Court illustrated this principle in the subsequent case of Looney v. State, 803 So.2d 656 (Fla. 2001). In Looney, the Florida Supreme Court held that it was error to admit post-autopsy photographs of the victim's charred bodies, both because of the gruesomeness of the photographs and because such photographs were not relevant to any issue to be proven in the case.

In the present case, the was no dispute over what caused the victims' deaths: They were bludgeoned to death with baseball bats and then knifed. The locations of the bodies were relevant because there was varying testimony as to which suspect battered which victim in which room. However, the above-described, non-gory diagrams sufficed for such purposes. The gruesome photographs inflamed the passions of Defendant's jurors. They short-circuited the cool, objective deliberation process that is so essential to a fair jury trial. By failing to object to such photographs, Defendant's lawyers rendered ineffective assistance of counsel. The trial court not erred in not finding such ineffectiveness.

Constitutional violations:

By not objecting to the above-identified, gruesome and unnecessary photographs Defendant's trial attorneys rendered ineffective assistance of

counsel in violation of Defendants right to effective assistance of counsel secured by the Sixth and Fourteenth Amendments to the U.S. Constitution and Article 1, Section 16 of the Florida Constitution. It also violated Defendant's due process rights secured by the Fifth and Fourteenth Amendments to the U.S. Constitution and by Article 1, Section 9 of the Florida Constitution. It also violated Defendant's right to a fair jury trial secured by the Sixth and Fourteenth Amendments to the U.S. Constitution and by Article 1, Section 16 of the Florida Constitution.

Issue 13: Withdrawn

Issue 14: The Trial Court Erred in Not Finding Ineffective Assistance of Counsel in the Failure to Present the Mitigation Testimony of Ms. Dorona Edwards

This "ineffectiveness" claim was raised in Defendant's subject postconviction motion. R5, p. 618–620. Defendant suffered ineffective assistance of trial counsel when his attorneys failed to present the mitigation testimony of Ms. Dorona Edwards. Dorona Edwards would have testified that the Defendant was a good, supportive friend, both in good times and bad. She would have testified that Defendant helped her and others who were "down on their luck." She would have explained how the Defendant helped people in need by providing transportation, fixing their cars, and giving encouragement and

providing moral support to people going through hard times.

The testimony of Defendant's penalty-phase witnesses spans from R46, p. 4146 to R47, p. 4432. Ms. Dorona Edwards as not among the mitigation witnesses called.

Evidence presented at evidentiary hearing:

Ms. Dorona Edwards testified that she is Defendant Troy Victorino's cousin. PCR2, p. 97. She "grew up" with him. PCR2, p. 98. She even visited him during the times when he was incarcerated in jail. PCR2, p. 100. She was aware that he had even served time in prison. PCR2, p. 102. The two would see each other once or twice a month. PCR2, p. 98. She testified that Defendant Troy Victorino was "very fatherly," a "father figure" to her two young children. PCR2, p. 98. She never observed Defendant Troy Victorino doing anything illegal. PCR2, p. 99.

Ms. Dorona Edwards witnessed Defendant Troy Victorino's father being abusive toward him. PCR2, p. 99.

Ms. Dorona Edwards never saw Defendant Troy Victorino lose his temper. PCR2, p. 99.

Defendant's "second chair" trial attorney, Mr. Jeff Dowdy, testified that he did not recall why the Defense did not call Ms. Dorona Edwards as a mitigation

witness. He vaguely recalled her name. He testified that the defense investigators interviewed "every possible witness we could bring." Still, he had no explanation as to why Ms. Dorona Edwards was not called to testify. PCR 2, p. 115, 129.

On cross-examination by the State, Mr. Dowdy testified that, insofar as the Defense wanted to call as many mitigation witnesses as possible, there must have been some reason why the defense did not call Ms. Dorona Edwards to testify. Mr. Dowdy testified that, with regard to Ms. Dorona Edwards, he could no longer recall what that reason was. PCR2, p. 129.

Defendant's "first chair" trial attorney, Mr. Michael Nielsen, testified that the Defendant provided Mr. Nielsen and Mr. Dowdy with a large list of potential mitigation witnesses. PCR2, p. 157. Mr. Nielsen and Mr. Dowdy used private investigators to assist in interviewing the various potential mitigation witnesses and narrowing the list down to the ones that were actually called to testify at trial. PCR2, p. 157-158.

On cross-examination by the State, Mr. Nielsen testified that the process of identifying, investigating, interviewing and ultimately selecting mitigation witnesses is a collaborative one involving the Defendant, defense counsel and defense investigators. PCR2, p. 178. Mr. Nielsen testified that Defendant Troy

Victorino was "very involved" in the process. PCR2, p. 180. Mr. Nielsen recalled the name "Dorona Edwards," but could no longer recall why a decision had been made not to call her as a mitigation witness a trial. PCR2, p.178-179.

Trial court denial order:

In its subject denial order the trial court summarized Ms. Dorona Edwards' evidentiary-hearing testimony and concluded that it was repetitive of what other mitigation witnesses said ("cumulative") and would not have affected the outcome of Defendant's case. PCR6, p. 824. The trial court concluded that the Defendant failed to meet the Strickland test of ineffective assistance of counsel in connection with not presenting the mitigation testimony of Ms. Dorona Edwards at Defendant's jury trial. PCR6, p. 824-825.

Standard of review:

For "ineffective assistance of counsel" claims like this one, the appellate courts engage in a *de novo* review because the claim is a mixed question of law and fact. Stephens v. State, 748 So.2d 1028, 1032 (Fla. 1999). The appellate Courts give deference to trial court factual findings that are based on competent, substantial evidence while applying the *de novo* standard of review to both the "deficient performance" and "prejudice" prongs of test of ineffective assistance set forth in Strickland v. Washington, 466 U.S. 668 (1984). Julien v. State, 917

So.2d 213 (Fla. 4th DCA 2005).

Legal argument including case law:

The duty to provide effective assistance of counsel extends to the penalty phase of a capital case and includes a duty to investigate and present mitigation witnesses and evidence. In Wiggins v. Smith, 539 U.S. 510 (2003), the United States Supreme Court held that defense counsel has an affirmative duty to conduct a meaningful investigation into mitigation witnesses and evidence and to make reasonable decisions about which mitigation evidence to present. The Florida Supreme Court has embraced the same concept and, indeed, quoted the Wiggins decision in Kilgore v. State, SC09-257 (Fla. 11-18-2010). By failing to investigate and present the mitigation testimony of Ms. Dorona Edwards, Defendant's trial counsel provided ineffective assistance of counsel in violation of Strickland, supra.

Constitutional violations:

By failing to include Ms. Dorona Edwards as a mitigation witness, defendant's trial lawyers provided ineffective assistance of counsel and denied Defendant a fair trial as guaranteed by the Sixth and Fourteenth Amendments to the U.S. Constitution and Article 1, Sections 16 and 22 of the Florida

Constitution.

Issue 15: The Trial Court Erred in Not Finding Ineffective Assistance of Counsel Due to the Cumulative Effect of All of the Combined Errors of Counsel

Defendant included this issue in his subject postoconviction motion. PCR5, p. 620-622. Defendant alleged that, even if the trial Court were to deem one or two of the ineffectiveness issues raised in Defendant's subject motion to be insufficient to establish the "prejudice" prong of the Strickland, test of ineffective assistance of counsel, then the cumulative effect of *all* of the deficiencies complained of in this motion certainly had the net effect of denying this Defendant a fair trial and hence rendered the results of his trial unreliable. PCR5, p. 620-621.

Evidence presented at evidentiary hearing:

Insofar as this issue is really just legal argument, no witnesses were questioned about "cumulative errors" at the evidentiary hearing.

Trial court's denial order:

The trial court declined to find ineffectiveness on this ground, explaining, "Because 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).

Standard of Review:

For "ineffective assistance of counsel" claims like this one, the appellate courts engage in a *de novo* review because the claim is a mixed question of law and fact. Stephens v. State, 748 So.2d 1028, 1032 (Fla. 1999). The appellate Courts give deference to trial court factual findings that are based on competent, substantial evidence while applying the *de novo* standard of review to both the "deficient performance" and "prejudice" prongs of test of ineffective assistance set forth in Strickland v. Washington, 466 U.S. 668 (1984). Julien v. State, 917 So.2d 213 (Fla. 4th DCA 2005).

Legal argument including case law:

The principle that the trial court must consider the cumulative effects of *all* of the improprieties and errors of counsel in deciding whether a Defendant suffered "prejudice" sufficient to require a new trial was established in Strickland, supra, and in State v. Gunsby, 670 So.2d 920 (Fla. 1996).

Constitutional violations:

The errors and improprieties in all of the above claims, considered together, deprived the Defendant with ineffective assistance of counsel in violation of Defendants right to effective assistance of counsel secured by the Sixth and Fourteenth Amendments to the U.S. Constitution and Article 1, Section 16 of the Florida Constitution. They also violated Defendant's due process

rights secured by the Fifth and Fourteenth Amendments to the U.S. Constitution and by Article 1, Section 9 of the Florida Constitution. They also violated Defendant's right to a fair jury trial secured by the Sixth and Fourteenth Amendments to the U.S. Constitution and by Article 1, Section 16 of the Florida Constitution.

Issue 16: The Trial Court Erred in Not Finding Ineffective Assistance of Counsel for Failing to Object to State Argument Indicating That the State Pre-Screens Cases and Only Prosecutes People Who Are Truly Guilty

The Defendant raised this issue in his subject postconviction motion. PCR 5, p. 622-624. During its guilt-phase closing argument, the prosecutor told Defendant's jurors, " . . .I guess some people say we really threw the book at these guys and did everything we could to charge them with everything we could, and let me say this: That's the decisions that we make, but we're very careful what we do." R41, p 3852.

Later on in its same argument the same prosecutor argued, with regard to victim Michelle Nathan, "As to Michelle Ann Nathan, we said by baseball bat or blunt object and/or a knife or sharp instrument. It turns out that was true when you heard the rest of the story. So we're very careful about what we charge. We also didn't charge – (objection by co-defendant Salas' defense attorney; no objection by Defendant Victorino's defense counsel). R41, p. 3852-3.

Evidence presented at evidentiary hearing:

Defendant's "second chair" trial attorney, Mr. Jeff Dowdy, could not recall any strategic reason for not objecting to this argument. PCR2, p. 116.

With regard to the question of whether or not to object in general, Mr. Dowdy testified "Sometimes we feel it might be better not to object if we don't feel it's really going to get us anywhere." PCR2, p. 119.

On cross-examination by the State, Mr. Dowdy testified that he did not recall any basis for objecting to this comment by the State. PCR2, p. 129-130. He also testified that, if he had a viable objection, he would have made it. PCR2, p. 130.

Defendant's "first-chair" defense attorney, Mr. Jeff Nielsen, testified that this prosecutorial remark is indeed an "inappropriate statement" PCR2, p. 158 but that objecting during this portion of the trial was the responsibility "second chair" defense attorney Jeff Dowdy. PCR2, p. 158-159, 179. Mr. Nielsen added that, " . . . hypothetically, or in a hypertechnical analysis, that probably could draw an objection, but I'm sure it was a strategical move; just let it go. PCR2, p. 160.

Trial court's denial order:

In denying Defendant's subject motion on this ground, the trial court found

the prosecutor comments to be "perfectly within the range of acceptable comment." PCR6, p. 826. The trial court added, "In any case, even if improper, the argument would never reach the threshold of prejudice to the defendant."

Standard of review:

For "ineffective assistance of counsel" claims like this one, the appellate courts engage in a *de novo* review because the claim is a mixed question of law and fact. Stephens v. State, 748 So.2d 1028, 1032 (Fla. 1999). The appellate Courts give deference to trial court factual findings that are based on competent, substantial evidence while applying the *de novo* standard of review to both the "deficient performance" and "prejudice" prongs of test of ineffective assistance set forth in Strickland v. Washington, 466 U.S. 668 (1984). Julien v. State, 917 So.2d 213 (Fla. 4th DCA 2005).

Legal argument including case law:

Prosecutor comments which indicate that the State has put a case through its own evaluation process and determined it to be appropriate for pursuit of the death penalty are contrary to the sentence-recommendation function of the jury and are impermissible. Hall v. United States, 419 F.2d 582 (5th Cir. 1969), Pait v. State, 112 So.2d 380 (Fla. 1959). This Florida Supreme Court found a similar comments by a prosecutor from the same State Attorney's Office to be among the

prejudicial factors requiring a new sentencing-phase trial in Brooks v. State, 762 So.2d 879 (Fla. 2000). Accordingly, the trial court erred in failing to find ineffectiveness on this ground.

Constitutional violations:

By not objecting to the above-identified, improper, prosecutorial remarks, Defendant's trial attorneys rendered ineffective assistance of counsel in violation of Defendants right to effective assistance of counsel secured by the Sixth and Fourteenth Amendments to the U.S. Constitution and Article 1, Section 16 of the Florida Constitution. It also violated Defendant's due process rights secured by the Fifth and Fourteenth Amendments to the U.S. Constitution and by Article 1, Section 9 of the Florida Constitution. It also violated Defendant's right to a fair jury trial secured by the Sixth and Fourteenth Amendments to the U.S. Constitution and by Article 1, Section 16 of the Florida Constitution.

Issue 17: The Trial Court Erred in Failing to Find That Defendant's Death Sentences are Illegal Under *Ring v. Arizona*

Defendant raised this claim in his subject postconviction motion. PCR5, p. 624-626. As noted by this Florida Supreme Court in its direct-appeal Opinion in this case, entitled Victorino v. State, 23 So.3d 87 (Fla. 2009) , "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).

Under Ring v. Arizona, 536 U.S. 584 (2002), this is an insufficient and illegal basis for imposing the death penalty. The jury's sentencing recommendations as to Defendant Victorino appear at R51, p. 5051-5053.

Evidence presented at evidentiary hearing:

This claim is legal argument based on a recent federal court case finding that Florida's death-sentencing scheme violates Ring v. Arizona, 536 U.S. 584 (2002). Accordingly, this is strictly a "legal" issue for which no "evidence" was presented at the evidentiary hearing.

Trial court denial order:

The trial court denied this *Ring* claim as having been previously raised and adjudicated adversely to Defendant in Victorino v. State, 23 So.3d 87 (Fla. 2009). The trial court noted that this Florida Supreme Court adjudicated this same issue with the same result in the direct appeal of Defendant Victorino's codefendant Hunter. Hunter v. State, 8. So.3d 1052 (Fla. 2008). PCR6, p. 826.

Standard of review:

The constitutionality of a statute is a question of law subject to de novo

review. Crist v. Ervin, 56 So. 3d 745, 747 (Fla. 2011).

Legal argument including case law:

On June 20, 2011, the United States District Court for the Southern District of Florida, ruled in Paul H. Evans v. Walter A. McNeil, Case Number 08-14402-CIV-Martinez, that Florida's capital sentencing Statute violates Ring v. Arizona, 536 U.S. 584 (2002). The Evans court explained that Florida's capital sentencing statute, Fla. Stat. 921.141 violates Ring, and violated Defendant Paul H. Evan's own rights under the Sixth and Fourteenth Amendments of the U.S. Constitution because (1) it does not require any specific, jury "findings" reflecting the juror vote as each individual aggravating circumstance, and (2) it leaves open the possibility that the jury death recommendation is based on a simple majority jury "death" recommendation rather than a unanimous jury "death" recommendation, and (3) for a death sentence to be legal, there must be, at a minimum, a record finding by a majority of the jurors that at least one aggravating circumstance exists.

Constitutional violations:

The trial court's action of following the jury's recommendations and sentencing the Defendant to death for the above-described murders violated the Defendant's rights to a fair jury trial and due process of law secured by the 6th

and 14th Amendments to the United States Constitution and by Article 1, Sections 9 , 16 and 20 of the Florida Constitution and also violated the Defendant's right not to be subjected to cruel and unusual punishment as guaranteed by the 8th Amendment to the United States Constitution and by Article 1, Section 17 of the Florida Constitution.

CONCLUSION

The Defendant received ineffective assistance of trial counsel and was sentenced to death pursuant to Florida's death-sentencing law which violates Ring v. Arizona, 536 U.S. 584 (2002). The trial court erred in denying Defendant's subject motion for postconviction relief. This Florida Supreme should reverse such denial and vacate Defendant's Judgment and Sentence of death and remand this case back to the lower Court with instructions to conduct a new penalty phase of Defendant's trial.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of this brief has been served to the Attorney General's Office to AAG Kenneth Nunnelley, Esquire, by email at

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and a copy of this brief has been served by U.S. Mail addressed to:

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief is in Times New Roman 14-point font and thus complies with the font requirement of Rule 9.210, Fla. R. App. P.

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