

TGEGKXGF."33B; 4235"37-35-56."lqj p"C0Vqo culpq."Ergtm"Uwr tgo g"Eqwtv

IN THE SUPREME COURT OF FLORIDA

TODD ZOMMER,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

CASE NO. SC13-717
L.T. No. 2005-CF-1200
DEATH PENALTY CASE

ON APPEAL FROM THE CIRCUIT COURT
OF THE NINTH JUDICIAL CIRCUIT,
IN AND FOR OSCEOLA COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

PAMELA JO BONDI
ATTORNEY GENERAL

KATHERINE MARIA DIAMANDIS
ASSISTANT ATTORNEY GENERAL
Florida Bar No. 069116
Concourse Center 4
3507 East Frontage Road, Suite 200
Tampa, Florida 33607-7013
Telephone: (813) 287-7910
Facsimile: (813) 281-5501
capapp@myfloridalegal.com [and]
katherine.diamandis@myfloridalegal.com

COUNSEL FOR APPELLEE

TABLE OF CONTENTS

TABLE OF CONTENTS..... i

TABLE OF AUTHORITIES..... ii

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

SUMMARY OF THE ARGUMENT..... 20

ARGUMENT..... 21

 ISSUE I..... 21

 WHETHER TRIAL COUNSEL WAS INEFFECTIVE FOR
 FAILING TO MAKE A MOTION TO INSTRUCT THE
 JURY THAT ZOMMER WAS BEING ADMINISTERED
 PSYCHOTROPIC MEDICATION. (Restated by
 Appellee)

 ISSUE II..... 38

 WHETHER TRIAL COUNSEL WAS INEFFECTIVE DURING
 THE PENALTY PHASE REDIRECT EXAMINATION OF
 DEFENSE EXPERT DR. JEFFERY DANZIGER.
 (Restated by Appellee)

CONCLUSION..... 49

CERTIFICATE OF SERVICE..... 49

CERTIFICATE OF FONT COMPLIANCE..... 49

TABLE OF AUTHORITIES

Federal Cases

<u>Basile v. McNeil,</u> 2008 WL 4456816 (M.D. Fla. 2008)	32
<u>Chandler v. United States,</u> 218 F.3d 1305 (11th Cir. 2000)	30
<u>Hill v. McNeil,</u> 2012 WL 1059158 (N.D. Fla. 2012)	32
<u>Morton v. Sec’y, Fla. Dept. of Corrections,</u> 684 F. 3d 1157 (11th Cir. 2012)	47
<u>Strickland v. Washington,</u> 466 U.S. 668 (1984)	passim
<u>Waters v. Thomas,</u> 46 F.3d 1506 (11th Cir. 1995)	47
<u>Zommer v. Florida,</u> ___ U.S. ___, 131 S. Ct. 192 (2010)	10

State Cases

<u>Alston v. State,</u> 723 So. 2d 148 (Fla. 1998)	31, 33
<u>Asay v. State,</u> 769 So. 2d 974 (Fla. 2000)	46
<u>Breedlove v. Singletary,</u> 595 So. 2d 8 (Fla. 1992)	31
<u>Bruno v. State,</u> 807 So. 2d 55 (Fla. 2001)	25, 39
<u>Cherry v. State,</u> 659 So. 2d 1069 (Fla. 1995)	24, 38, 48
<u>Dufour v. State,</u> 905 So. 2d 42 (Fla. 2005)	46

<u>Johnson v. State,</u> 769 So. 2d 990 (Fla. 2001)	29, 45
<u>Johnston v. State,</u> 63 So. 3d 730 (Fla. 2011)	31
<u>Jones v. State,</u> 732 So. 2d 313 (Fla. 1999)	47
<u>Kokal v. Dugger,</u> 718 So. 2d 138 (Fla. 1998)	31
<u>Maxwell v. Wainwright,</u> 490 So. 2d 927 (Fla. 1986)	23
<u>Monday v. State,</u> 792 So. 2d 1278 (Fla. 1st DCA 2001)	45
<u>Occhicone v. State,</u> 768 So. 2d 1037 (Fla. 2000)	passim
<u>Peavy v. State,</u> 766 So. 2d 1120 (Fla. 2d DCA 2000)	31
<u>Rivera v. Dugger,</u> 629 So. 2d 105 (Fla. 1993)	25, 38
<u>Rosales v. State,</u> 547 So. 2d 221 (Fla. 3d DCA 1989)	32, 33
<u>Rutherford v. State,</u> 727 So. 2d 216 (Fla. 1998)	24, 38
<u>Standard Jury Instructions in Criminal Cases (93-1),</u> 636 So. 2d 502 (Fla. 1994)	33
<u>Stano v. State,</u> 520 So. 2d 278 (Fla. 1988)	25, 38
<u>The Florida Bar, In re Rules of Criminal Procedure,</u> 389 So. 2d 610 (Fla. 1980)	30
<u>Wiggins v. Smith,</u> 539 U.S. 510 (2003)	45
<u>Zommer v. State,</u> 31 So. 3d 733 (Fla. 2010)	passim

Other Authorities

Charles W. Ehrhardt, *Ehrhardt's Florida Evidence* §611.2
(2013 ed.) 45

Fla. R. Crim. P. 3.215(c)(2) 21, 30, 32

Florida Standard Jury Instructions in Criminal Cases,
Instruction 3.6(c) Insanity-Psychotropic Medication,
The Florida Bar (1994) 22, 33

Statement Concerning Brief in Support of and in Explanation
of Proposed Amendments and Revisions to the Florida Rules
of Criminal Procedure, FSC Case No. 58988,
(filed April 1, 1980) 31

Suggested Statute on Incompetence to Stand Trial on Criminal
Charges, MENTAL DISABILITY LAW REPORTER, Vol. 2, No. 5,
March-April (1978) 31

STATEMENT OF THE CASE AND FACTS

On May 17, 2005, a grand jury in and for Osceola County, Florida returned an indictment charging Defendant, Todd Zommer, with the first degree murder of Lois Corrine Robinson. (V1:19-20).¹ At trial, Zommer was represented by Patricia Cashman and Kelly Sims. Zommer's case proceeded to a jury trial on December 3-10, 2007. (DAR V19:31).² The jury found Zommer guilty of first degree murder. (DAR V31:1439-45). After hearing the evidence at the penalty phase proceeding, the jury returned an advisory recommendation of death by a vote of 10 to 2. (DAR V12:1795; V36:1939, 1943, 1944).

The trial court followed the jury's recommendation and sentenced Zommer to death. In sentencing Zommer to death, the

¹ The State will cite to the postconviction record by referring to the volume number, and appropriate page number (PCR V_:__); the State will cite to the direct appeal record by referring to the volume number, and the appropriate page number (DAR V_:__).

² After the jury was selected, Zommer entered a plea of guilty to charges pending in other cases consolidated for trial: Case Number 05CR-1078: grand theft of a motor vehicle, fleeing and attempting to elude a law enforcement officer, resisting an officer without violence, possession of drug paraphernalia; Case Number 05CR-1094: attempted felony murder, robbery, and aggravated battery with a deadly weapon; Case Number 05CR-2184: two counts of grand theft of a motor vehicle; Case Number 04CR-2982: uttering a forgery and grand theft; Case Number 05CR-2121: grand theft of a boat; and Case Number 05TC-1855: leaving the scene of an accident involving property damage. (DAR V26:875-906).

court found four aggravating circumstances: Zommer was previously convicted of a prior violent felony (given significant weight), the murder was committed to avoid arrest (given great weight), the murder was cold, calculated and premeditated (CCP) (given great weight), and the murder was especially heinous, atrocious, or cruel (HAC) (given great weight). (DAR V13:1863-68). Both statutory mental mitigators were rejected. (DAR V13:1868-70). Numerous nonstatutory mitigators were found and given little to moderate weight. (DAR V13:1871-76). In sum, the trial court found that the four aggravating circumstances far outweighed the mitigating circumstances. (DAR V13:1876). The court noted that the HAC aggravator, standing alone, was sufficient to "far outweigh" the mitigating circumstances. (DAR V13:1876).

Zommer appealed his conviction and sentence to this Court raising five issues:

Point I: In violation of the Eighth and Fourteenth [Amendments] to the United States Constitution and Article I, Section 17 of the Florida Constitution, the trial court imposed the death penalty upon an erroneous finding that the murder was committed in a cold, calculated and premeditated manner.

Point II: In violation of the Eighth and Fourteenth [Amendments] to the United States Constitution and Article I, Section 17 of the Florida Constitution, the trial court imposed the death penalty upon an erroneous finding that the murder was committed in a heinous, atrocious and cruel manner.

Point III: In violation of the Eighth and Fourteenth Amendments of the United States Constitution and Article I, Section 17 of the Florida Constitution, the trial court impermissibly sentenced Appellant to death by misinterpreting the valid mitigating evidence and misapplying the law with regard to the mitigation.

Point IV: In violation of the Eighth and Fourteenth Amendments of the United States Constitution and Article I, Section 17 of the Florida Constitution, the imposition of the death penalty is proportionately unwarranted in this case.

Point V: Zommer's death sentence is invalid under the state and federal constitutions because the facts that must be found to impose it were not alleged in the charging document nor were they unanimously found to exist beyond a reasonable doubt by a 12-person jury.

Initial Brief of Appellant, Florida Supreme Court Case No. SC08-494.

This Court affirmed Zommer's conviction and sentence.

Zommer v. State, 31 So. 3d 733 (Fla. 2010).

The facts, as found by this Court, are:

On May 17, 2005, Todd Zommer was indicted on one count of first-degree murder for the premeditated killing of Lois Corrine Robinson, a 77-year-old woman. Zommer was also charged with attempted first-degree murder, robbery, aggravated battery with a deadly weapon, grand theft of a motor vehicle (three counts), grand theft (two counts), uttering a forgery, fleeing and eluding at high speed or with wanton disregard, resisting an officer without violence, possession of drug paraphernalia, and leaving the scene of an accident with property damage. Immediately prior to the commencement of trial, Zommer pled guilty to all counts except the murder charge with regard to Robinson.

With regard to the murder, on April 12, 2005, the body of Robinson was discovered in her Kissimmee home after an officer from the Osceola County Sheriff's Office (OCSO) conducted a wellness check at the request of a neighbor. Robinson's vehicle was missing, and the level of decomposition indicated that she had been dead for several days. The same day, Kissimmee police officers spotted Robinson's vehicle and, having been advised that the vehicle was sought in reference to a homicide, attempted to initiate a traffic stop. The driver of the vehicle accelerated with officers in pursuit until the vehicle crashed. After a brief foot chase of the occupant, Todd Zommer was arrested and taken into custody.

In the days following the murder, Zommer admitted to numerous people that he killed Robinson. The four admissions were to: (1) Joanne and James Vella, a mother and son with whom Zommer consumed drugs for a five-day period surrounding the time of the murder; (2) Matthew Druckenmiller, another acquaintance with whom Zommer consumed drugs; (3) a reporter for an Orlando television station; and (4) OCSO detectives. A large portion of Zommer's statement to OCSO was suppressed by the trial court because the detectives had failed to correct an inaccurate assumption by Zommer that if he invoked his right to counsel he would be required to wait eight months for counsel to be appointed.

The details of the murder were thoroughly developed through Zommer's statements, testimony from witnesses, and Zommer's trial testimony. From time to time, Zommer would live with a neighbor of Lois Corrine Robinson (the same neighbor who requested that OCSO conduct a wellness check for Robinson). On Saturday, April 9, 2005, the neighbor told Zommer during a telephone conversation that Robinson had agreed to loan Zommer twenty dollars for gas. Zommer walked to Robinson's house to obtain the money and, when she opened the door, Zommer believed that Robinson recognized him as the individual who had stolen a boat from a neighbor's yard. Zommer accepted the twenty dollars from Robinson, left the premises,

but then later returned. During his interview with the television reporter, Zommer described the event:

ZOMMER: I killed the lady, Corrine, you know, because she wouldn't mind her business, for one.... In the life that I live, she should've minded her business. That's what she shoulda did.

....

... I didn't realize how old she was or-you know, that's not a factor and, you know, the fact that she was a female didn't matter. It's just the fact that she had saw me do something, and she should have minded her business and she didn't. You know, it's just like anything else in the world.

REPORTER: What did she see you do?

ZOMMER: She seen me robbing-stealing something.

....

... [W]hen I went over there that day to meet her, I finally meet her, the recognition was there.

....

REPORTER: So is that why you killed her?

ZOMMER: Basically, yeah, to shut her up. Tell her mind her business. You know, when I was beating her, that's what I was telling her, too. "Now, you wanna talk, you wanna yell? Yell now. You wanna tell on somebody? Tell now."

When Zommer returned to the Robinson home, she began showing Zommer items that she collected. As Robinson was exhibiting her items, Zommer picked up a wooden instrument referred to as a ukelin and struck her over the head. According to Zommer, "she bounced back a little bit. And was like, 'Oh, my God. What was that?' And I said, 'It was your ceiling.' And when she

looked up, I hit her again." Zommer struck Robinson repeatedly with the ukelin until it shattered. Zommer then hit Robinson with a hurricane lamp. He next obtained the cord from a computer mouse and placed it around Robinson's neck as he attempted to strangle her. During the attack, Robinson scratched and resisted. The mouse cord ripped several times, and Zommer later told Matthew Druckenmiller that "it was hard to choke somebody when their fingers were in the way." When the cord ripped, Zommer stopped the attack for a urination break. After the bathroom break Zommer again attacked Robinson, stepping on her head in the process. Then:

I think I kicked her in the face. I don't think I punched her at all; I just think I kicked her. And then she was kind of like flopping around. I hate to say that, but she was-every time I kicked her, she'd moved to one spot and I'd kick her and I'd get in the other-I think I kicked her twice.

Zommer then stopped the attack and walked into the kitchen for a cool drink from the refrigerator. While in the kitchen, Zommer noticed a block of knives on the counter. Zommer fully described (during the television interview) the attack when he stated:

I went in the kitchen, got a knife and came back and lifted her throat up, stood behind her.... I straddled her, and lifted her head back and just sliced it, chu, chu, chu, chu.

And then I dropped her head and she gurgled and I kicked her again. And I sat and I watched her and I made sure she wasn't breathing.

Zommer admitted to one of the Vellas that he first attempted to cut Robinson's throat with his left hand to make it appear that a left-handed person had committed the murder. When the left-hand attempt did not work, Zommer confirmed that he had to use his right hand. He cut so deep into her throat that he could hear the knife hitting the bones. Zommer informed the reporter that after the murder:

I went home, took everything off, put it in a bag, ate, went back over there, got her car and drove her car down the street, walked back home, went back over there and made it look like a robbery. And within that time frame, I threw the shoes and stuff away.

When asked by the reporter if he was under the influence of drugs at the time of the murder, Zommer replied that he was "sober as f* *k."

Subsequent to his arrest (and his confession to OCSO detectives) Zommer led the police to a dumpster where a plastic bag was recovered which contained bloody sneakers, socks, and a towel. A DNA analyst for the Florida Department of Law Enforcement (FDLE) testified that the blood on the sneakers and socks matched the known DNA profile of Robinson. A swab from the inside of one of the socks revealed DNA that matched the known DNA profile of Zommer at all thirteen relevant locations on the DNA strand. The analyst testified that the likelihood of randomly selecting a DNA profile of a Caucasian male who matched the DNA sample taken from the sock was one in 25 quadrillion. Further, an FDLE footprint analyst testified that the sneakers recovered from the dumpster exhibited design characteristics similar to a footprint impression that appeared on the back of the shirt that Robinson was wearing at the time of her death.

An associate medical examiner concluded that the cause of death was a large incised wound to Robinson's neck with massive hemorrhaging. The examiner determined that there were at least two incised wounds to the neck. One of the wounds was deep enough that it extended to Robinson's backbone, and the examiner explained it would have required a significant amount of force to cut through the blood vessels and tissues of the neck to reach bone. The wound was consistent with someone pulling the victim's head back and making the incision with a sharp object, such as a blood-stained knife that was recovered from Robinson's kitchen. The examiner noted that there were defensive wounds on the victim's hands. Further, Robinson had

contusions and abrasions on the front and back of her body as well as her head, and the examiner concluded that the number of injuries was consistent with someone struggling against an attacker for a period of several minutes. The examiner opined that the head injuries were inflicted before the fatal neck wound because circulation to the head would have continued to develop the contusions found. The examiner testified that all of Robinson's injuries (other than the neck wound) could not have been caused by a single blow and a fall. Moreover, these blows would not have rendered her immediately unconscious, but may have left her stunned and disoriented.

Todd Zommer testified in his own defense. Although he described the murder in great detail, his testimony during trial differed from his prior statements in three main respects. First, Zommer testified at trial that he smoked crack cocaine before returning to Robinson's house; therefore, he was high at the time of the murder. Second, Zommer asserted during trial that he did not kill Robinson because she had witnessed him stealing a boat. Instead, he asserted that the only reason he returned to Robinson's home was because he was high and wanted to talk to someone. On cross-examination, he stated that he falsely admitted to stealing the boat to protect one of his friends. He also claimed that he fabricated the boat-theft motive because the inmates at the jail wanted to "kick my ass" and he had to "come up with a reason that's plausible for inmates to accept the fact that I killed a 77-old-woman [sic]." When asked why he commenced and continued the attack on Robinson, Zommer professed that he did not know, and could not provide a reason for his actions. Zommer also testified that the night before the murder, he had unsuccessfully attempted to contact a childhood acquaintance because he felt that his life was coming unraveled and he was experiencing homicidal thoughts. Third, Zommer contended during trial testimony that Robinson appeared to be unconscious after he struck her with the lamp, that she never fought him during the attack, and that she never used her hands in an attempt to block the mouse cord from strangling her.

During cross-examination, Zommer was impeached with the following statements:

I woke up that morning and I said, you know, what? I'm just gonna-I'm going all out. F* *k it. Can't stand her. I don't even know her, dude. The ... hate, you know, it builds up.... I'm sorry that she's seventy-seven years old. It has nothing to do with it. It's not an age.... It could have been a nineteen-year-old.... I don't think it would have mattered at that straight time. And the sad thing about it, it felt so good. You know, what I'm saying?

....

I knew right as soon as I saw [the ukelin], that's what I was going to use.... I said "Why don't you get up and walk me around your house." What I really was doing is checking out who could see through what.... I said, "Why don't you show me your dolls, dah, dah, dah." And I'm walking around, the whole time I've already planned it in just the right spot.

....

She started rolling around and grabbing my leg and s* *t. And I'm like, "Get the f* *k off me, you snitching bitch." And this has motivated me to keep doing it.

....

I went berserk, dude. But then I remember going in the kitchen looking for a knife.... And I always told myself, it would be f* *king so cool to f* *king slice the bitch's head off....

So I went in the f* *king kitchen. I got me this long ass f* *king knife, and I stood over her like a f* *king cowboy riding her like this, and I was f* *king yanking her, yanking her. And not thinking of nothing but getting my s* *t.... It wasn't the fact she's a woman or older, anything

like that. It was the fact the bitch seen me doing something I got caught doing.

Zommer, 31 So. 3d at 737-740.

After this Court affirmed the conviction and sentence, Zommer filed a petition for Writ of Certiorari to the United States Supreme Court on June 9, 2010. Zommer's petition was denied on October 4, 2010. Zommer v. Florida, ___ U.S. ___, 131 S. Ct. 192 (2010).

POSTCONVICTION PROCEEDINGS

On or about September 19, 2011, Zommer timely filed³ an unverified postconviction motion in the trial court raising eight issues, and simultaneously filed a motion for competency determination. (PCR V2:168-211, 212-231). The issues raised were:

Claim I: Mr. Zommer was denied the effective assistance of counsel in the guilt and penalty phases of his trial in violation of the Sixth, Eighth, and Fourteenth Amendments. Trial counsel was ineffective by failing to move for a competency evaluation during the trial, or in the alternative, for failing to make a motion to instruct the jury that Mr. Zommer was under the influence of psychotropic drugs during the trial.

³ Zommer's counsel originally mailed the postconviction motion and the motion for competency determination to the Orange County Clerk's Office in error, where they were received on September 20, 2011 and mailed to the Osceola Clerk's Office. The motion for competency determination was received by the Osceola Clerk's Office and filed on October 13, 2011 and the postconviction motion received and filed on October 19, 2011.

Claim II: Mr. Zommer was denied the effective assistance of counsel in the guilt and penalty phase of his trial in violation of the Sixth, Eighth, and Fourteenth Amendments. Trial counsel was ineffective by presenting evidence or mental health issues to the exclusion of Mr. Zommer's extensive drug usage before and during the offense. Mr. Zommer was prejudiced because the jury was not presented with sufficient and convincing evidence of Mr. Zommer's drug addiction.

Claim III: Mr. Zommer was denied the effective assistance of counsel at the sentencing phase of his capital trial, in violation of the Sixth, Eighth, and Fourteenth Amendments to the Constitution of the United States and the corresponding provisions of the Florida Constitution. Trial counsel failed to adequately rehabilitate his witness on redirect examination. Trial counsel's performance was deficient, and as a result the death sentence is unreliable.

Claim IV: Mr. Zommer's trial was fraught with procedural and substantive errors which cannot be harmless when viewed as a whole, since the combination of errors deprived him of the fundamentally fair trial guaranteed under the 6th, 8th and 14th Amendments.

CLAIM V: Florida Statute 921.141 is facially vague and overbroad in violation of the 8th and 14th Amendments, and the unconstitutionality was not cured because the jury did not receive adequate guidance in violation of the 8th and 14th Amendments. The trial court's instructions to the jury unconstitutionally diluted its sense of responsibility in determining the proper sentence. Mr. Zommer's death sentence is premised on fundamental error which must be corrected. To the extent trial counsel failed to litigate these issues, trial counsel was ineffective.

Claim VI: Mr. Zommer's 8th Amendment right against cruel and unusual punishment will be violated as he may be incompetent at the time of execution.

Claim VII: The Florida death sentencing statute as applied is unconstitutional under the 6th, 8th and 14th Amendments of the United States Constitution.

Claim VIII: Florida's capital sentencing statute is unconstitutional on its face and as applied for failing to prevent the arbitrary and capricious imposition of the death penalty and for violating the guarantee against cruel and unusual punishment in violation of the 5th, 6th, and 14th Amendments to the United States Constitution. To the extent this issue was not properly litigated at trial or on appeal, Mr. Zommer received prejudicially ineffective assistance of counsel.

The State filed a response to Zommer's postconviction motion on November 10, 2011, addressing Zommer's legal claims but deferred answering factual claims pending a determination of competency. (PCR V2:239-70). A competency hearing was conducted on June 15, 2012. At the hearing testimony was received from court-appointed psychologists, Drs. Harry McClaren, Daniel Tressler and Greg Prichard. Collateral counsel presented the testimony of Dr. Michael Maher. Additionally, the Court received testimony from Zommer. (PCR V2:294-96; PCR V16:1387-1519). All the doctors, except Dr. Maher, found Zommer competent to proceed. (PCR V2:306-11, 319-25; V3:345-50; V5:689-94). On July 27, 2012, the trial court issued an order finding Zommer competent to proceed with postconviction proceedings. (PCR V3:423-27).

On November 8, 2012, a verified postconviction motion was filed. (PCR V4:491-533).⁴ The State filed an amended response addressing all claims on November 19, 2012. (V4:544-588). A case management conference was held November 16, 2012 (PCR V16:1520-1553) after which the trial court granted an evidentiary hearing on Claims I, II and III and the hearing took place on January 30, 2013. (PCR V4:594-95; V18; V19). Claim I alleged trial counsel was ineffective for failing to move for a competency evaluation and ineffective for failing to request a jury instruction explaining that Zommer's attendance at trial was aided by medication for a mental condition. Claim II alleged trial counsel was ineffective for failing to present evidence of Zommer's drug use and addiction at both the guilt and penalty phases of Defendant's trial. Claim III alleged that trial counsel was ineffective during his redirect examination of Dr. Danziger where Danziger testified on cross-examination he diagnosed Zommer with antisocial personality disorder.

At the evidentiary hearing, collateral counsel presented forensic psychiatrist, Dr. Michael Maher. The State presented trial counsel, Patricia Cashman and Kelly Sims, licensed private

⁴ The verified motion was identical to the previously filed unverified motion.

investigator, Toni Maloney, and forensic psychiatrist, Dr. Jeffrey Danziger.

Patricia Cashman and Kelly Sims are experienced capital litigators. (PCR V4:651 n. 3). Cashman worked as an assistant public defender from 1984-2000. (PCR V19:1660). She spent thirteen of her years as a public defender exclusively trying death penalty cases. (PCR V19:1660-61). Cashman has represented over 100 defendants in first-degree murder cases. (PCR V19:1661). More than 40 of the cases were death penalty cases. (PCR V19:1661). Her entire legal career has been devoted to criminal defense. (PCR V19:1661). In addition to her trial experience, Cashman frequently lectures other criminal defense attorneys regarding death penalty litigation, and is an adjunct professor at the University of Central Florida teaching Evidence, Criminal Law, and Law and Legal Systems. (PCR V19:1660-63). She served on the Death Penalty Steering Committee for 12 years as a supervisor or trainer. (PCR V19:1660). Lastly, Cashman authored a criminal law college textbook which was published by West, and authored a chapter in the Capital Manual. (PCR V19:1660, 1663).

Kelly Sims has practiced criminal law in Central Florida since 1984. (PCR V19:1713). He has been Board-certified in criminal law since 1998. (PCR V19:1714). He has been trying

capital cases since 1988, and estimated he has been involved in 100 death penalty litigations. (PCR V19:1714). In addition to his extensive trial experience, Sims has lectured other attorneys regarding death penalty law, "everything from mitigation to the ABCs of death cases to witness prep, probably a dozen times." (PCR V19:1714-15). Cashman and Sims had tried many cases together and handled at least 20 death penalty cases together, taking 5-8 to trial. (PCR V19:1716). Cashman was appointed and reached out to Sims to act as her co-counsel. (PCR V19:1715-16).

Regarding why she did not request the explanatory psychotropic medication jury instruction, Cashman explained:

We were concerned how the jury would take that and that they would hold it against him, be scared of him, think he was crazy. I mean, Todd's behavior, was um . . . sort of (indicating) -- he was a little bit on edge, as it was, while medicated. And if the jury saw that, they could be fearful that, if he's that way on meds, what if he gets off 'em? You know, what if this happens again? And, you know, as a defense attorney you worry about jurors who are scared of the mentally ill, because there's no cure for it, all you can do is control it and . . .

(PCR V19:1687).⁵

Cashman indicated the decision regarding the instruction was based on her extensive history in death penalty cases. (PCR

⁵ Cashman indicated that this decision was reached together with co-counsel Sims after discussion. (PCR V19:1687).

V19:1688). Cashman noted she specifically had experience in having to analyze and decide this issue in prior cases. (PCR V19:1688). It was her opinion that a juror is likely to vote for death where they are afraid of the client, afraid he may murder again, "might be crazy." (PCR V19:1688). Cashman indicated this was a strategic decision, and that she sought input from mental health experts on this topic. (PCR V19:1688-89).

Regarding the jury instruction, Sims testified he and Cashman made a strategic decision not to seek the instruction. (PCR V19:1725-26). Sims explained his strategy:

Mine was simple, in that -- and I told Trish, and I believed it -- that Todd barely looked under control, and if we were to tell somebody that he's under control based on psychotropic medications, there might be great worry in the jury if Todd would ever get out or if Todd would ever get into -- um, get into a more free setting within the jails you know, that would come with a life sentence as opposed to death.

(PCR V19:1734).

Sims added that Zommer always seemed to be "straining at the leash" and he did not want the jury to think he was a "wild animal" that we had drugged up during the guilt phase. (PCR V19:1734-35). He explained the effect the instruction would have during the penalty phase:

At penalty phase, it's like there's nothing that can control him. So we can't put him out into a normal

prison society 'cause he could hurt another prisoner -
- which I don't think would be that big of a concern -
- but he could hurt a prison worker and that would
have been a concern. So we didn't request that
instruction.

(PCR V19:1735).

Sims testified he was concerned if the jury knew he was
medicated it would affect the jury's sentencing recommendation.
(PCR V19:1736). He explained: "[T]hey'd say we can't ever be
sure that this guy's gonna take his medication and he's gonna be
all right." (PCR V19:1736). Moreover, Sims testified that
Zommer had outbursts during trial and their thought was that
they did not want the jury to question "if he's dangerous
underneath that amount of drugs, what's he gonna be like if he
gets off his drugs. . . ." (PCR V19:1736, 1797-98).

At the evidentiary hearing Dr. Danziger reiterated his
diagnoses of Zommer. Danziger's opinion was and **remains** that
Zommer suffers from bipolar disorder, poly-substance dependence
(in remission), and antisocial personality disorder. (PCR
V19:1744, 1750-51, 1771, 1773, 1777-80, 1785). Danziger
testified it is proper to diagnose someone with Axis I bipolar
disorder and Axis II antisocial personality disorder. (PCR
V19:1744-45). The two are not mutually exclusive. (PCR
V19:1745). Danziger's opinion was based upon his review of the
DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS, FOURTH

EDITION, TEXT REVISION (DSM-IV-TR), his 30 years of experience, and training. (PCR V19:1745).⁶ During questioning by collateral counsel, Danziger did not disavow his diagnoses. (PCR V19:1752-87).

According to Sims, Danziger's testimony was important from a strategic standpoint in presenting mitigation. (PCR V19:1789-90). Danziger had found Zommer suffered from bipolar disorder and as Sims explained, bipolar disorder has been found to be a mitigator under the proper circumstances. (PCR V19:1789, 1790). Moreover, Danziger's "perfect storm" testimony tied into the defense's trial strategy in presenting mitigating evidence that the Defendant's ability to conform his conduct to the law was impaired. (PCR V19:1790; 1811-12).

Both trial attorneys discussed Zommer's diagnosis of antisocial personality with Dr. Danziger, and each other. (PCR V19:1790-92235-37).⁷ And as Sims explained they made a strategic decision to call him as "the good we could get from him was worth the risk of the bad, especially when you had another doctor that said he wasn't diagnosed with that disorder -- or

⁶ Dr. Maher testified he disagreed with Dr. Danziger's diagnosis of antisocial personality disorder. (PCR V18:1600-02).

⁷ During her preparation of Zommer's penalty phase case, Cashman testified she was aware of the diagnostic criteria for antisocial personality disorder and utilized them in her preparation. (PCR V19:1682-84); State's Exhibit 8.

did not diagnose with that disorder." (PCR V19:1793; 1809).

Regarding why he did not question Danziger on redirect regarding the criteria for antisocial personality disorder, Sims explained:

While with Dr. Toomer I was able to go back and talk to him about that, and he was able to explain -- 'cause he didn't have that diagnosis, he was able to explain why this didn't work. To do the same thing with Dr. Danziger would just have him explain why that diagnosis was correct to me. He wasn't going to come off that diagnosis; some worse factual issues had a chance of coming out.

And the bottom line was, I didn't want get in front of the jury and say, this is a great expert, he's perfect, he's told you exactly how this crime occurred and why Todd should not get the ultimate penalty with regards to A, B and C, but as far as D goes, oh, don't listen to that, because that he doesn't know anything about. That's not a consistent approach to a witness and I wasn't going to fight with my own witness over that.

(PCR V19:1793-94). Sims further testified arguing with Danziger would have been "devastating." (PCR V19:1813-14).

On March 28, 2013 the trial court issued a detailed order denying Zommer's postconviction claims. (PCR V4:642-67).

Zommer now appeals to this Court.

SUMMARY OF THE ARGUMENT

The postconviction court properly denied Zommer's claim that his trial counsel was ineffective for failing to request a jury instruction regarding psychotropic medication. Trial counsel explained this was a strategic decision made after consultation with experts and each other. The decision was reasonable, and in any event Zommer has failed to establish any resulting prejudice. This Court should affirm the court's denial of this claim.

The postconviction court properly denied Zommer's claim regarding the redirect examination of Dr. Jeffrey Danziger. Dr. Danziger diagnosed Zommer with antisocial personality disorder and trial counsel's testimony revealed he made a sound strategic decision not to argue with Danziger on redirect examination over his diagnosis. The decision was reasonable, and in any event Zommer has failed to establish any resulting prejudice. This Court should affirm the court's denial of this claim.

ARGUMENT

ISSUE I

WHETHER TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO MAKE A MOTION TO INSTRUCT THE JURY THAT ZOMMER WAS BEING ADMINISTERED PSYCHOTROPIC MEDICATION. (Restated by Appellee).

Zommer asserted below that trial counsel was ineffective for failing to request a jury instruction that his attendance at trial was aided by medication for a mental condition. Specifically, Defendant alleged trial counsel was ineffective for failing to request the explanatory jury instruction pursuant to Florida Rule of Criminal Procedure 3.215 (EFFECT OF ADJUDICATION OF INCOMPETENCY TO PROCEED: PSYCHOTROPIC MEDICATION). Fla. R. Crim. P. 3.215(c)(2) provides:

(c) Psychotropic Medication. A defendant who, because of psychotropic medication, is able to understand the proceedings and to assist in the defense shall not automatically be deemed incompetent to proceed simply because the defendant's satisfactory mental condition is dependent on such medication, nor shall the defendant be prohibited from proceeding solely because the defendant is being administered medication under medical supervision for a mental or emotional condition.

...

(2) If the defendant proceeds to trial with the aid of medication for a mental or emotional condition, on the motion of defense counsel, the jury shall, at the beginning of the trial and in the charge to the jury, be given explanatory instructions regarding such medication.

The postconviction court granted an evidentiary hearing on this claim, and subsequently denied it based on a finding that trial counsel made a strategic decision not to request the jury instruction. (PCR V4:653-55).⁸ The State submits that the postconviction court properly concluded that Zommer was not entitled to relief on his claim.

In order for a defendant to prevail on a claim of ineffective assistance of counsel pursuant to the United States Supreme Court's decision in Strickland v. Washington, 466 U.S. 668 (1984) a defendant must establish two general components.

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

⁸ The jury instruction reads, in pertinent part:

(Defendant) currently is being administered psychotropic medication under medical supervision for a mental or emotional condition.

Psychotropic medication is any drug or compound affecting the mind or behavior, intellectual functions, perception, mood, or emotion and includes anti-psychotic, anti-depressant, anti-manic, and anti-anxiety drugs.

Florida Standard Jury Instructions in Criminal Cases, Instruction 3.6(c) Insanity-Psychotropic Medication, The Florida Bar (1994).

Maxwell v. Wainwright, 490 So. 2d 927, 932 (Fla. 1986).

To the extent Zommer is challenging counsel's performance at the penalty phase, it should be noted in order to obtain a reversal of a death sentence on the ground of ineffective assistance of counsel at the penalty phase, the defendant must show "both (1) that the identified acts or omissions of counsel were deficient, or outside the wide range of professionally competent assistance, and (2) that the deficient performance prejudiced the defense such that, without the errors, there is a reasonable probability that the balance of aggravating and mitigating circumstances would have been different." Occhicone v. State, 768 So. 2d 1037, 1049 (Fla. 2000) (citations omitted); Strickland, 466 U.S. at 694 (for prejudice finding, sentencer would have weighed the aggravating and mitigating factors and found that the circumstances did not warrant the death penalty).

Furthermore, as the Strickland Court noted, there is a strong presumption that counsel's performance was not ineffective. Strickland, 466 U.S. at 690. A fair assessment of an attorney's performance requires that every effort be made to eliminate the distorting effects of hindsight and to evaluate the conduct from counsel's perspective at the time. Id. at 689. The defendant carries the burden to "overcome the presumption that, under the circumstances, the challenged action 'might be

considered sound trial strategy.'" Id.

Defendant's argument and the testimony from the postconviction hearing establish only that collateral counsel disagrees with trial counsel's strategic decision. This is not the standard to be considered. Rutherford v. State, 727 So. 2d 216, 223 (Fla. 1998) ("Strategic decisions do not constitute ineffective assistance if alternative courses of action have been considered and rejected"); Cherry v. State, 659 So. 2d 1069, 1073 (Fla. 1995) (noting "standard is not how present counsel would have proceeded, in hindsight, but rather whether there was *both* a deficient performance and a reasonable *probability* of a different result"). Indeed, in reviewing Zommer's claims, this Court must be highly deferential to counsel:

Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proven unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance.

Strickland, 466 U.S. at 689; see also Rivera v. Dugger, 629 So. 2d 105, 107 (Fla. 1993) ("The fact that postconviction counsel would have handled an issue or examined a witness differently does not mean that the methods employed by trial counsel were inadequate or prejudicial"); Stano v. State, 520 So. 2d 278, 281, n. 5 (Fla. 1988) (noting fact that current counsel, through hindsight, would now do things differently is not the test for ineffectiveness).

On appeal, when reviewing a trial court's ruling on an ineffectiveness claim, this Court defers to the trial court's findings on factual issues, but reviews the trial court's ultimate conclusions on the deficiency and prejudice prongs *de novo*. Bruno v. State, 807 So. 2d 55, 62 (Fla. 2001). In this case, the postconviction court properly identified the applicable law in analyzing Zommer's claim, correctly applied this law to the facts, and concluded that Zommer was not entitled to postconviction relief.

In rejecting Zommer's ineffective assistance of counsel claim relating to the explanatory psychotropic medication jury instruction, the postconviction court stated:

Claim IB: Jury Instruction Claim

Zommer contends that counsel was ineffective for not requesting an explanatory jury instruction that would have advised the jury that he was under medication for a mental condition during the trial. He

asserts that the jury did not get an opportunity to observe his true demeanor since he was taking psychotropic drugs.

Ms. Cashman testified that she was aware that Mr. Zommer was taking medication during the trial. However, the defense team did not request a special jury instruction regarding the Defendant's medication because they were concerned as to how that information would be received by the jury. Ms. Cashman stated that she did not want the jury to hold the instruction against him, be afraid of him, or think he was crazy. Cashman testified:

We were concerned how the jury would take that and that they would hold it against him, be scared of him, think he was crazy. I mean, Todd's behavior was, um... sort of (indicating) - he was a little bit on edge, as it was, while medicated. And if the jury saw that, they could be fearful that, if he's that way on med's, what if he gets off 'em? You know, what if this happens again? And, you know, as a defense attorney you worry about jurors who are scared of the mentally ill, because there's no cure for it, all you can do is control it and...

(Evid. Hrg., Vol II, page 132).

Ms. Cashman further testified that she believed that a juror is more likely to "kill" a defendant if they think the defendant will likely kill again or are afraid that a defendant will be released and that it was a strategic decision not to request the instruction based on her extensive experience in litigating death penalty cases and input from the mental health experts.

(Evid. Hrg., Vol II, pages 133-34).

Mr. Sims agreed that it was a strategic decision not to seek an instruction informing the jury that Mr. Zommer was under the influence of psychotropic drugs at trial. Sims indicated that the jury might worry that he would hurt someone if they knew that he was under psychotropic medicines. Sims said that, during trial, Zommer had some outbursts, "[n]ot bad in the

great scheme of things for Todd, but I think he commented a little bit on people's testimony where it could clearly be heard by the jury." (Evid. Hrg., Vol II, page 181). Mr. Sims testified that Mr. Zommer seemed to be "always be straining at the leash, even with the best medication," and he didn't want the jury to think that he was a "wild animal" that needed to be drugged during the guilt phase. Sims testified that it was their belief that it could have an impact on the jury's verdict if they knew he was taking psychotropic drugs. He explained:

Mine was simple, in that - and I told Trish, and I believed it - that Todd barely looked under control, and if we were to tell somebody that he's under control based on psychotropic medications, there might be great worry in the jury if Todd would ever get out or if Todd would ever get into - um, get into a more free setting within the jails you know, that would come with a life sentence as opposed to death. (Evid. Hrg., Vol II, page 179).

After considering all of the testimony, the Court finds that trial counsels' decision not to request a special jury instruction regarding defendant's medication at trial was a matter of reasonable trial strategy. "In asserting a claim of ineffective assistance of counsel, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." See *Johnson v. State*, 921 So. 2d 490, 500 (Fla. 2005). "Counsel is entitled to great latitude in making strategic decisions." See also *Dufour v. State*, 905 So. 2d 42, 57 (Fla. 2005). "Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Strickland v. Washington*, 466 U.S. 668, 690 (1984). Moreover, strategic decisions do not constitute ineffective assistance of counsel if alternative courses have been considered and rejected and counsel's decision was reasonable under the norms of professional conduct." *Occhicone v. State*, 768 So. 2d 1037, 1048 (Fla. 2000). **Here, Zommer's experienced trial counsel conferred**

with each other as well as their mental health experts and made a reasonable, strategic decision not to request a jury instruction relating to the fact that the defendant was under psychotropic medication during the trial. Consequently, this claim is denied.

(PCR V4:653-55) (emphasis supplied).

The postconviction court properly denied Zommer's claim and Zommer is not entitled to any relief from this Court.

Trial counsel's postconviction testimony indicates they conferred with one another, sought input from mental health experts and made a strategic decision not to request the jury instruction. (PCR V19:1687-89, 1734). Cashman and Sims were both concerned the instruction would cause the jury to be fearful of Zommer, and more likely to vote for a death recommendation. (PCR V19:1687-88, 1734-36). Cashman's decision regarding the instruction was based on her extensive history in death penalty cases. (PCR V19:1688). Indeed, Cashman has had experience in having to analyze and decide this very issue in prior cases. (PCR V19:1688)

Sims explained the effect the instruction would have during the penalty phase:

At penalty phase, it's like there's nothing that can control him. So we can't put him out into a normal prison society 'cause he could hurt another prisoner -- which I don't think would be that big of a concern -- but he could hurt a prison worker and that would have been a concern. So we didn't request that instruction.

(PCR V19:1735). Sims was concerned if the jury knew Zommer was medicated it would affect the jury's sentencing recommendation. (PCR V19:1736). He explained: "[T]hey'd say we can't ever be sure that this guy's gonna take his medication and he's gonna be all right." (PCR V19:1736). Moreover, Sims testified that Zommer had outbursts during trial and their thought was that they did not want the jury to question "if he's dangerous underneath that amount of drugs, what's he gonna be like if he gets off his drugs. . . ." (PCR V19:1736; 1797-98).

Trial counsel's testimony as outlined by the postconviction court's order and as noted above clearly establishes that the decision not to request the explanatory jury instruction was strategic, and reasonable. Moreover, the decision was made after consultation with one another, and with defense mental health experts.

The law is well established that strategic decisions of trial counsel do not constitute deficient performance. Johnson v. State, 769 So. 2d 990, 1001 (Fla. 2001); Occhicone, 768 So. 2d at 1048. The question "is not what present counsel or this Court might now view as the best strategy, but rather whether the strategy was within the broad range of discretion afforded to counsel actually responsible for the defense." Occhicone, 768

So. 2d at 1049. Additionally, the burden of establishing deficient performance is especially difficult in the instant case because Defendant was represented by experienced trial counsel. See generally Chandler v. United States, 218 F.3d 1305, 1316 & n. 18 (11th Cir. 2000) (en banc) (“When courts are examining the performance of an experienced trial counsel, the presumption that his conduct was reasonable is even stronger.”).

As Zommer’s experienced trial counsel conferred with each other, and defense experts and made a strategic decision not to ask for the explanatory jury instruction Zommer cannot establish trial counsel rendered ineffective assistance. Accordingly, the judgment of the postconviction court must be affirmed.

In any case, Zommer cannot establish that trial counsel acted deficiently nor resulting prejudice as the jury instruction would not have been warranted in his case.

An explanatory instruction pursuant to the Fla. R. Crim. P. 3.215(c)(2) is only required when a there is prior adjudication of incompetency or restoration and the defendant’s ability to proceed to trial is solely because the defendant is being administered psychotropic medication.⁹ Alston v. State, 723 So.

⁹ In fact, the Rule was adopted to address concerns related to a defendant’s competency. See The Florida Bar, In re Rules of Criminal Procedure, 389 So. 2d 610 (Fla. 1980). The Rule’s language actually tracks a 1978 suggested statute relating to

2d 148, 157-58 (Fla. 1998); see also Johnston v. State, 63 So. 3d 730, 741-42 (Fla. 2011) (affirming denial of postconviction relief and finding trial counsel was ineffective for failing to request psychotropic medication jury instruction claim where Defendant was not incompetent); Peavy v. State, 766 So. 2d 1120 (Fla. 2d DCA 2000) (trial judge did not err in refusing to give psychotropic medication instruction where defendant's competency was not at issue and defendant did not exhibit abnormal behavior). In Zommer's case there was not a prior adjudication of incompetency or restoration and the defendant's ability to proceed to trial was not solely because the defendant was being administered psychotropic medication. Any request to give the explanatory psychotropic medication instruction would have been properly denied. As such, Zommer could not establish trial counsel acted deficiently. Indeed, counsel cannot be deemed to be ineffective for failing to raise a nonmeritorious issue. Kokal v. Dugger, 718 So. 2d 138, 143 (Fla. 1998); Breedlove v. Singletary, 595 So. 2d 8, 10-11 (Fla. 1992); see also Hill v.

incompetence to stand trial. See Suggested Statute on Incompetence to Stand Trial on Criminal Charges, MENTAL DISABILITY LAW REPORTER, Vol. 2, No. 5, at p. 643, March-April (1978); see also Statement Concerning Brief in Support of and in Explanation of Proposed Amendments and Revisions to the Florida Rules of Criminal Procedure, FSC Case No. 58988, at p. 22 (filed April 1, 1980) (available at Fla. Dep't of State, Fla. State Archives, ser. 49, carton 3716, Tallahassee, Fla.) (noting language tracks suggested statute).

McNeil, No. 1:09-cv-66-MP-GRJ, 2012 WL 1059158, *3 (N.D. Fla. 2012) (unpublished opinion) (instruction on psychotropic medication only required where ability to proceed to trial is due to medication and failure to request instruction where it was not applicable does not constitute ineffective assistance of counsel); Basile v. McNeil, No. 2:04-cv-454-FtM-29DNF, 2008 WL 4456816, *7-8 (M.D. Fla. 2008) (unpublished opinion) (denying relief of claim counsel was ineffective for failing to request instruction on psychotropic medication where Petitioner's competency was never at issue and Petitioner did not exhibit abnormal behavior that was a result of psychotropic medication).

Defendant's reliance on Rosales v. State, 547 So. 2d 221 (Fla. 3d DCA 1989) is misplaced. Rosales does not stand for the proposition that trial counsel is ineffective for failing to request an explanatory medication instruction pursuant to Fla. R. Crim. P. 3.215(c)(2). Instead, Rosales stands for the proposition that when such an instruction is requested, **and applicable to the case** a failure to give the instruction may require reversal. The facts in Rosales are easily distinguishable from the instant case. First, and most importantly, in Rosales there was a hearing immediately before trial where a psychiatrist testified that Rosales was competent to stand trial **only** because he had received an injection of

psychotropic medication. Rosales, 547 So. 2d at 223; Alston, 723 So. 2d at 158 (distinguishing Rosales) (emphasis supplied). Further, Rosales' only defense was insanity, with expert evidence adduced that he suffered from paranoid schizophrenia, that he did not know the difference between right and wrong and that he was insane at the time of the crime. Also, there was evidence that Rosales had been involuntarily hospitalized under the Baker Act on at least two occasions and had spent seventeen years in and out of mental hospitals, with the last three hospitalizations taking place one year, nine months and six months prior to the murder for which he was being tried. Based on this record, the third district concluded that the trial court improperly denied the defendant's request for an instruction on psychotropic medication. Rosales, 547 So. 2d at 222-23.¹⁰

Here, Defendant had never been declared incompetent and, in fact, Defendant's postconviction claim that counsel failed to move for a competency evaluation was squarely and properly

¹⁰ In response to the Rosales decision, a new jury instruction was adopted. See Standard Jury Instructions in Criminal Cases (93-1), 636 So. 2d 502 (Fla. 1994) (adoption of insanity-psychotropic medication instruction based upon Rosales and noting to give instruction if requested at the beginning of trial and in the charge to the jury); Florida Standard Jury Instructions in Criminal Cases, Instruction 3.6(c) Insanity-Psychotropic Medication, The Florida Bar (adopted 1994).

rejected. Indeed, as the trial court found:

Here, counsel had **no basis to move for a competency evaluation** during trial - their mental health experts found Zommer competent to proceed, there was no apparent change in his behavior from the time of the evaluations up to and through the trial, and there was nothing in counsel's interactions with or observations of Zommer that gave them a basis to believe his competency status had changed.

(PCR V4:652) (emphasis supplied).

Furthermore, the fact Zommer made a statement to Court Deputy Felton does not establish his "mental illness actually affected his trial." Initial Brief of Appellant at p. 47. This statement was addressed below at the evidentiary hearing in regard to Zommer's claim trial counsel was ineffective for failing to move for a competency evaluation. As the trial court found:

. . .

The court deputy was called as a witness by the State and testified that Zommer told him that from the very beginning he told law enforcement that he did it, that he didn't understand why the system was making him and the families go through "this", and that he just wanted to give his side of the story. (Trial Tr., Vol XI, pages 1205-1206).

. . .

Patricia Cashman, lead trial counsel for Zommer, testified at the evidentiary hearing that she was not surprised by Zommer's comments to the court deputy as he had confessed to law enforcement, gave multiple interviews, wrote letters to others regarding his involvement in the murder and continually and

consistently told anyone who would listen to him that he committed the murder. (Evid. Hrg., Vol II, pages 112-113, 131). Zommer made similar statements to the defense mitigation expert, Toni Maloney. (Evid. Hrg., Vol II, pages 154, 155). Ms. Cashman stated:

We didn't have a good-faith belief that Todd was incompetent to stand trial. In his letters, in his communications with me, he understood the proceedings and understood the potential outcome. And there was nothing in the sentence he uttered to Deputy Fenton that led me to believe he was incompetent.

He had also been examined numerous times throughout my representation of him by doctors. Never – and none of them ever raised the issue that they believed he was incompetent or unable to proceed.
(Evid. Hrg., Vol II, pages 115-16).

Co-counsel, Kelly Sims, similarly testified that he was not alarmed by Zommer's statement to Deputy Fenton and that it did not lead him to move for a competency evaluation because the statement was consistent with his behavior throughout Sim's representation of him during which he had been "adjudged to be competent via our experts." (Evid. Hrg., Vol II, page 171). **Sims testified that Zommer's statement to the court deputy was "classic Todd".** (Evid. Hrg., Vol II, page 170).

. . .

(PCR V4:651-52); see also Zommer, 31 So. 3d at 744 (noting Zommer has "consistently admitted that he murdered Robinson.").

Lastly, Defendant cannot establish prejudice in this case as the jury was aware the Defendant was taking medication and was in a position to observe his demeanor. Dr. Danziger testified Defendant was being treated with antidepressants and

Dr. Tressler testified the jail records indicated Defendant was being treated with Sinequan and Atarax. (DAR V34:1750-52; V35:1809, 1811-12).¹¹ While Defendant argues the jury was not able to "observe his true demeanor due to the fact [he] was taking psychotropic drugs", this assertion is refuted by the record. Initial Brief of Appellant at p. 47. The record reveals that during the State's cross-examination of Dr. Toomer, Defendant exclaimed "Bullshit" and during the State's direct examination of Dr. Tressler, Defendant announced "You guys are so wrong." (DAR V34:1597; V35:1798). Furthermore, during Defendant's testimony the jury witnessed Defendant rambling and his difficulty in answering the questions posed to him. (DAR V30:1288-91, 1292, 1296, 1300, 1305, 1306, 1309, 1310, 1311, 1314, 1331-32, 1372). Viewed through any permeation of the facts, Zommer did not and cannot establish counsel rendered ineffective assistance.

Lastly, even if this case had been tried as collateral counsel insists it should have been, the result would not have been any different. Zommer committed a senseless and heinous murder of a 77-year-old woman, his death sentence is supported

¹¹ The jury was reminded during trial counsel's closing argument Defendant was on medication, that he was in a "manic phase" that drugs were trying to "tamp down" but could not and that they were able to "witness it" while Defendant testified. (DAR V36:1911-12).

by three of the "weightiest" aggravator factors in Florida - CCP, HAC, and prior violent felony and nothing offered in postconviction or in Zommer's arguments before this Court establishes that Zommer would not have been sentenced to death. See Zommer, 31 So. 3d at 750-52 (finding Zommer's death sentence proportionate and noting three of the aggravating circumstances- CCP, HAC, and prior violent felony found by this Court to be "three of the weightiest" in Florida). Relief must be denied.

ISSUE II

WHETHER TRIAL COUNSEL WAS INEFFECTIVE DURING THE PENALTY PHASE REDIRECT EXAMINATION OF DEFENSE EXPERT DR. JEFFERY DANZIGER. (Restated by Appellee)

Zommer alleges trial counsel was ineffective during the redirect examination of Dr. Jeffery Danziger regarding Danziger's diagnosis that Zommer suffered from antisocial personality disorder. As noted, in Issue I, supra, in order for Zommer to prevail on his claim of ineffective assistance of counsel, he must identify a particular act or omission by trial counsel that is shown to be outside the broad range of reasonably competent performance under prevailing professional standards, and that the deficiency so affected the fairness and reliability of the proceeding that confidence in the outcome is undermined. Strickland. Here, as noted in Issue I, supra, Defendant's argument and the testimony from the postconviction hearing establish only that collateral counsel disagrees with trial counsel's strategic decisions. This is not the standard to be considered. Rutherford, 727 So. 2d at 223; Cherry, 659 So. 2d at 1073; Rivera, 629 So. 2d at 107; Stano, 520 So. 2d at 281, n. 5. Indeed, in reviewing Zommer's claim, this Court must be highly deferential to counsel. Strickland, 466 U.S. at 689.

As Zommer is challenging trial counsel's performance at the penalty phase, as noted in Issue I, supra, in order to obtain a

reversal of his death sentence, he must show deficient performance that prejudiced the defense such that, without the errors, there is a reasonable probability that the balance of aggravating and mitigating circumstances would have been different. Occhicone, 768 So. 2d at 1049; Strickland, 466 U.S. at 694 (for prejudice finding, sentencer would have weighed the aggravating and mitigating factors and found that the circumstances did not warrant the death penalty).

When reviewing the lower court's order denying Zommer's claim, this Court defers to the lower court's factual findings and reviews the court's conclusions on the deficiency and prejudice prongs *de novo*. Bruno, 807 So. 2d at 62. In this case, the postconviction court properly identified the applicable law in analyzing Zommer's claim, correctly applied this law and concluded that Zommer was not entitled to postconviction relief.

In rejecting Zommer's ineffective assistance of counsel claim relating Dr. Danziger, the postconviction court found:

Mr. Zommer alleges that trial counsel was ineffective for failing to "rehabilitate" (impeach) Dr. Danziger regarding his diagnosis that Zommer suffered from antisocial personality disorder. Zommer claims that counsel should have "rehabilitated" Danziger in the same manner in which he rehabilitated Dr. Toomer regarding his contention that Zommer had antisocial personality disorder.

At the evidentiary hearing, Zommer called Dr. Michael Maher, a clinical psychiatrist, to testify

about the practice of making concurrent Axis I and Axis II diagnoses as categorized in the DSM-IV manual. [fn5] Maher explained that an Axis I diagnosis is the primary psychiatric diagnosis, which includes bipolar disorder, schizophrenia, primary depression, anxiety disorders, post traumatic stress disorder and substance abuse, to name a few. He further explained that an Axis II diagnosis is reserved for personality disorders, which include dependent personality, narcissistic personality, and antisocial personality.

fn5. Dr. Maher was retained to evaluate Mr. Zommer for the purpose of his Rule 3.85 1 Motion.

Maher found that Zommer suffered from bipolar disorder and poly-substance abuse disorder, which is an Axis I diagnosis. He testified that he did not diagnose Zommer with an Axis II disorder and openly disagreed with Dr. Danziger's Axis II diagnosis of antisocial personality disorder. Maher indicated that it is improper to add an Axis II diagnosis if an Axis I finding fully describes the patient's symptoms. However, on cross examination, Maher acknowledged that it can be appropriate to diagnose antisocial personality disorder (Axis II) along with bipolar disorder (Axis I) under certain circumstances. Maher further testified that his findings applied particularly to Mr. Zommer's case.

At the evidentiary hearing, Dr. Danziger mirrored the testimony he gave at the penalty phase, repeating that Zommer suffered from bipolar disorder, poly substance dependence and antisocial personality disorder. Danziger further testified that it is appropriate to diagnose an individual with Axis I bipolar disorder and Axis II antisocial personality disorder. Danziger explained that two are not mutually exclusive.

At the evidentiary hearing, Sims stated that it was a strategic decision to call Dr Danziger as an expert witness during the penalty phase. Sims testified that Danziger was hired for a number of reasons: (1) he had a strong presence in front of the jury; (2) his education and hands- on background; (3)

he is a well-credentialed expert who frequently testifies for the prosecution; and (4) based on his theory of the "perfect storm." (Evid. Hrg., Vol II, page 234).

Dr. Danziger was the only psychiatrist called to testify by either side during the penalty phase (the other experts being psychologists), and the only mental health expert to testify that Zommer suffered from a bipolar disorder. Sims explained that it was important to present testimony about Zommer's bipolar disorder for the jury to consider it as a mitigating factor as bipolar disorder has been found to be a mitigator under proper circumstances. (Evid. Hrg., Vol II, page 235).

Mr. Sims indicated that he was aware of Danziger's findings that Zommer suffered from antisocial personality disorder prior to calling him as a witness. Sims testified that he did not elicit on direct examination any testimony from Danziger about his findings that Zommer suffered from antisocial personality disorder because it didn't help Zommer's defense. Sims stated that Danziger's finding was an unfavorable fact and something that he did not want to point out to the jury or judge because they do not react well to it. He indicated that "the good we could get from him was worth the risk of the bad, especially when you had another doctor that said he wasn't diagnosed with that disorder- - or did not diagnose with that disorder." (Evid. Hrg., Vol II, page 238).

Sims testified that he did not impeach Danziger's diagnosis on redirect concerning his findings because he did not want to attempt to discredit his own expert. Sims further testified that Dr. Toomer was able to explain why Zommer did not suffer from antisocial personality. He explained that if he attempted to confront Dr. Danziger with Dr. Toomer's diagnosis, with which Danziger did not agree, "some worse factual issues had a chance of coming out." Sims also testified that impeaching Danziger was not a consistent approach to a witness and that he wasn't going to fight with his own expert about his findings:

And the bottom line was, I didn't want to get in front of the jury and say, this is a great expert, he's perfect, he's told you exactly how this crime occurred and why Todd should not get the ultimate penalty with regards to A, B, and C, but as far as D goes, oh, don't listen to that, because that he doesn't know anything about. That's not a consistent approach to a witness and I wasn't going to fight with my own witness over that.

(Evid. Hrg., Vol II, pages 238, 239).

The Court finds that counsel made a sound strategic decision to call Danziger and purposefully did not attack or "rehabilitate" Danziger regarding his findings of antisocial personality disorder. It is clear that the defense relied heavily on Dr. Danziger's strong credentials, his status as a psychiatrist, and the fact that he often is called by the State to testify in death penalty cases as a reasons the jurors should credit his testimony regarding whether Zommer was suffering from bi-polar disorder - a diagnosis the defense felt critical to their mitigation arguments. (Trial Tr. Vol. XVIII pages 1904-1904). Reasonable decisions regarding trial strategy, made after deliberation by a defendant's trial attorneys in which available alternatives have been considered and rejected, do not constitute deficient performance under *Strickland*. *Schoenwetter v. State*, 46 So. 3d 535, 554 (Fla. 2010). Here, counsel weighed the pros and cons of Danziger's testimony and decided that his beneficial testimony about Zommer was worth the risk of harmful testimony. Sims testified that he did not want to discredit his own expert. Moreover, as evidenced by Sims testimony, attacking Dr. Danziger's diagnosis of antisocial personality disorder would not aid in their defense and could have potentially placed harmful factual issues in front of the jury. Trial counsel is not deficient for failing to present testimony that would have informed the jury of negative information about a defendant. *Windom v. State*, 886 So. 2d 915, 923 (Fla. 2004). Consequently, Zommer has failed to demonstrate counsel was ineffective.

Furthermore, as argued by the State, Dr. Maher's testimony does not establish that trial counsel was deficient nor does it establish prejudice. The mere fact that Dr. Maher's disagreed with Danziger's findings does not amount to ineffective assistance of counsel. See *Cherry v. State*, 781 So. 2d 1040, 1052 (Fla. 2000) (the fact that movant seeking postconviction relief found a new mental health expert who reached conclusions at postconviction hearing that were different from those of his expert appointed during trial did not mean that relief was warranted on movant's contention that counsel was ineffective); *Dufour v. State*, 905 So. 2d 42, 58 (Fla. 2005) (simply presenting the testimony of experts during the evidentiary hearing that are inconsistent with the mental health opinion of an expert retained by trial counsel does not rise to the level of prejudice necessary to warrant relief); *Asay v. State*, 769 So. 2d 974, 986 (Fla. 2000) (stating that trial counsel's reasonable investigation into mental health mitigation is not rendered incompetent merely because the defendant has now secured the testimony of a more favorable mental health expert). Therefore, the Court finds that Zommer has failed to demonstrate prejudice and this claim is denied.

(PCR V4:659-61) (emphasis supplied).

At the evidentiary hearing Dr. Danziger reiterated his diagnosis of Zommer. Danziger's opinion was and **remains** that Zommer has antisocial personality disorder. (PCR V19:1744, 1750-51, 1771, 1773, 1779-80, 1785). Danziger testified it is proper to diagnose someone with Axis I bipolar disorder and Axis II antisocial personality disorder. (PCR V19:1744-45). The two are not mutually exclusive. (PCR V19:1745). Danziger's opinion was based upon his review of the DSM-IV-TR, his 30 years of experience, and training. (PCR V19:1745).

Regarding why he did not question Danziger on redirect regarding the criteria for antisocial personality disorder, Sims explained:

While with Dr. Toomer I was able to go back and talk to him about that, and he was able to explain -- 'cause he didn't have that diagnosis, he was able to explain why this didn't work. To do the same thing with Dr. Danziger would just have him explain why that diagnosis was correct to me. **He wasn't going to come off that diagnosis; some worse factual issues had a chance of coming out.**

And the bottom line was, I didn't want get in front of the jury and say, this is a great expert, he's perfect, he's told you exactly how this crime occurred and why Todd should not get the ultimate penalty with regards to A, B and C, but as far as D goes, oh, don't listen to that, because that he doesn't know anything about. **That's not a consistent approach to a witness and I wasn't going to fight with my own witness over that.**

(PCR V19:1793-94) (emphasis supplied). Sims further testified arguing with Danziger would have been "devastating." (PCR V19:1813-14).

Here, trial counsel made a strategic decision to call Dr. Danziger,¹² and made a well-reasoned, strategic decision not to

¹² Trial counsel discussed Defendant's diagnosis of antisocial personality and made a strategic decision to call Danziger. (PCR V19:1682-84, 1790-93, 1809). Dr. Danziger's testimony was key to the defense's mitigation case as it attempted to explain the murder by tying together Zommer's drug use, and mental illness as the "perfect storm" which caused this "terrible crime". (DAR V34:1756-57; PCR V19:1789-90, 1812). In fact, trial counsel relied upon Danziger's "sparkling" credentials and testimony during closing argument where counsel argued Zommer

argue with Danziger on redirect examination over his diagnosis. Trial counsel's strategic decision regarding Dr. Danziger cannot be considered to be deficient performance. Johnson; Occhicone. Indeed, the law is clearly established that strategic decisions are "virtually unchallengeable" under the Sixth Amendment. Strickland, 466 U.S. at 691; Wiggins v. Smith, 539 U.S. 510, 521-22 (2003).

Furthermore, while Zommer attempts to assert that trial counsel failed to "rehabilitate" Dr. Danziger, there was no rehabilitation to conduct. Initial Brief of Appellant at pp. 79, 82. Danziger's credibility was not attacked nor was he impeached. See generally Charles W. Ehrhardt, EHRHARDT'S FLORIDA EVIDENCE §611.2 (2013 ed.) (discussing rehabilitation where witness credibility attacked); Monday v. State, 792 So. 2d 1278 (Fla. 1st DCA 2001) (discussing use of prior consistent statement to rehabilitate impeached witness). During Dr. Danziger's cross-examination, he testified he had diagnosed Zommer with antisocial personality disorder. (DAR V34:1758-59). As this was his medical finding, there was no fact to "rehabilitate" Dr. Danziger on. Moreover, deficient performance was not and cannot be established as Danziger's testimony was

should receive a life sentence. (V36:1891-92, 1896, 1902-05, 1913-14, 1920-24).

and remains that Zommer suffers from antisocial personality disorder. Indeed, this fact remains despite collateral counsel's questioning of Danziger at the postconviction evidentiary hearing. (PCR V19:1752-87). See also Zommer, 31 So. 3d at 748-49 (trial court did not err in accepting diagnosis of antisocial personality disorder and recognizing the record reflects that Zommer "satisfies all seven criteria for antisocial personality disorder."). Apparently collateral counsel wished for trial counsel to argue with Dr. Danziger over his diagnosis before the jury. However, as Sims testified this would have been "devastating". (PCR V19:1813-14).

The testimony of Dr. Maher adds nothing to Zommer's claim. It does not establish trial counsel was deficient nor does it establish prejudice. Maher's testimony was simply that he disagreed with Dr. Danziger's diagnosis. However, Zommer's claim was not that trial counsel should have called Maher or even that trial counsel erred in calling Danziger. Even if Zommer raised such a claim, he would not be entitled to relief. See Dufour v. State, 905 So. 2d 42, 58 (Fla. 2005) ("Simply presenting experts during the evidentiary hearing that are inconsistent with the opinion of a mental health expert retained by trial counsel does not rise to the level of prejudice to warrant relief); Asay v. State, 769 So. 2d 974, 986 (Fla. 2000)

(stating that trial counsel's reasonable investigation is not rendered incompetent merely because the defendant has now secured the testimony of a more favorable expert in postconviction); Jones v. State, 732 So. 2d 313 (Fla. 1999) (stating mental health expert's opinion is not rendered less competent merely because collateral counsel has retained an expert in postconviction to come to a different conclusion based on similar evidence); see also Morton v. Sec'y, Fla. Dept. of Corrections, 684 F. 3d 1157, 1167-68 (11th Cir. 2012) (capital trial counsel does not render deficient performance as a matter of law when they present evidence of a defendant's antisocial personality disorder); Waters v. Thomas, 46 F.3d 1506, 1512 (11th Cir. 1995) (en banc) ("Which witnesses, if any, to call, and when to call them, is the epitome of a strategic decision, and it is one that we will seldom, if ever, second guess.").

The testimony from the evidentiary hearing establishes that trial counsel adopted a defense theory which he believed to be most beneficial to his client, and made a strategic decision to call Dr. Danziger and not to argue with him regarding his diagnosis of antisocial personality disorder.

The current hindsight arguments by collateral counsel is simply a disagreement over the chosen strategy employed by trial counsel, and since trial counsel's strategy was reasonable, this

disagreement is insufficient to entitle Zommer to postconviction relief. Occhicone, 768 So. 2d at 1048; Cherry, 659 So. 2d at 1073.

Lastly, Zommer has failed to establish how the result of the penalty phase would have been different. Given the opportunity to question Dr. Danziger, collateral counsel did not establish there was any "incorrect diagnosis" nor did collateral counsel "rehabilitate" Danziger as he asserts trial counsel should have. Initial Brief of Appellant at pp. 79, 82. Assuming, for the sake of argument, Dr. Danziger disavowed his finding, this would have done nothing to mitigate the significant aggravation found by the trial court. (DAR V13:1863-68). See Zommer, 31 So. 3d at 750-52 (finding Zommer's death sentence proportionate and noting three of the aggravating circumstances - CCP, HAC, and prior violent felony found by the trial court to be "three of the weightiest" in Florida). That is, there is no reasonable probability that Zommer would not have been sentenced to death. Zommer is not entitled to a new penalty phase. Relief must be denied.

CONCLUSION

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

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished electronically to Richard E. Kiley, and Ali A. Shakoor, Assistants CCRC-M at **kiley@ccmr.state.fl.us**, **shakoor@ccmr.state.fl.us** and **support@ccmr.state.fl.us**, Office of the Capital Collateral Regional Counsel, Middle Region, 3801 Corporex Park Dr., Suite 210, Tampa, Florida 33619-1136, on this 19th day of November, 2013.

CERTIFICATE OF FONT COMPLIANCE

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

Respectfully submitted,

PAMELA JO BONDI
ATTORNEY GENERAL

s/ Katherine M. Diamandis
KATHERINE MARIA DIAMANDIS
Assistant Attorney General
Florida Bar No. 069116
Concourse Center 4
3507 East Frontage Road, Suite 200
Tampa, Florida 33607-7013
Telephone: (813) 287-7910
Facsimile: (813) 281-5501
capapp@myfloridalegal.com [and]
katherine.diamandis@myfloridalegal.com

COUNSEL FOR APPELLEE