IN THE SUPREME COURT OF FLORIDA

THOMAS RIGTERINK,

Appellant,

v.

CASE NO. SC14-971
L.T. No. CF03-006982-XX

STATE OF FLORIDA,

Appellee.

_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE TENTH JUDICIAL CIRCUIT,
IN AND FOR POLK COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

Citations to the direct appeal record will be designated with "R" followed by the appropriate page numbers. Citations to the direct appeal transcript will be designated with "T" followed by the appropriate page numbers. The record on appeal from the denial of Rigterink's motion for post-conviction relief, will be referred to as "V" followed by the appropriate volume and page numbers.

STATEMENT REGARDING ISSUES

Appellee has titled the issues in this brief in an attempt to correspond as closely as possible to those in Appellant's brief.

STATEMENT OF THE CASE AND FACTS

I. Trial Facts

The facts of this case were summarized by this Court on direct appeal after remand from the Supreme Court. Rigterink v. State, 66 So. 3d 866, 870-877 (Fla. 2011). In addition to Rigterink's partial confession, the State presented considerable physical and circumstantial evidence linking him to the murders. Just 30 minutes before the murders, Rigterink called victim Jarvis to confirm that he had just acquired a new supply of marijuana for sale. Rigterink was out of work and had no money to support his acknowledged drug habit. Two witnesses driving near the storage area described Jarvis's attacker in a way that matched the Defendant. The victim's blood was found in the truck that Rigterink was driving the day of the murders. (T3128, 3133, 3194). DNA consistent with Rigterink's was found under the fingernails of victim Jarvis who suffered the brunt of the attack. Rigterink's bloody finger/palm prints were found at the scene. Rigterink owned a knife which was similar to the one which caused the fatal injuries. Defendant made changes to his appearance shortly after the crime. He avoided giving fingerprint samples to detectives and hid from questioning. When ultimately questioned by detectives, Rigterink gave inconsistent explanations of his behavior on the day of and on the days after the crime.

This Court went on to discuss in detail Rigterink's statements to the police,

including the description of his various stories to the detectives which related a sequentially different or altered version of events leading finally to his Mirandized statement wherein he acknowledged snapshot memories of having committed the murders. Rigterink, 66 So. 3d at 878-883. This Court went on to describe Rigterink's yet different account provided in his trial testimony. Rigterink claimed no responsibility for the murders and asserted that he feared for his life and named Marshall Mark Mullins and his associates as the real perpetrators. Rigterink, 66 So. 3d at 878-883.

II. **Post-Conviction Facts**

A post-conviction hearing was held between the 19th and 23rd of August, 2013. As recounted by the trial court, the following witnesses testified:

> Trial counsel for the Defendant, Byron Hileman and David Carmichael were called as witnesses by both the Defendant and the State, Other witnesses that were called by the Defendant included, Dick Rigterink, the Defendant's uncle; Mary Dezialo, the Defendant's sister; Courtney Sheil Betz; Catherine Enriquez, the former wife of the Defendant; Rosalie Bolin, a private investigator; Julie Dantzler; a licensed mental health counselor; Dr. Daniel Buffington, a Clinical Pharmachologist [sic]; Dr. Harry Krop, a Psychologist; Dr. Tracy Hartig, a Psychologist; Dr. Thomas McClane, a retired Psychiatrist; and Dr. Jeffrey Hunter, a Doctor of Internal Medicine. Other witnesses that were called by the State included, Dr. Enrique Suarez, a Psychologist; Captain Britt Williams, Polk County Sheriff's Office (PCSO); Lieutenant Jerry Connolly, PCSO; Sergeant Raczynski, PCSO; and Sergeant Ivan Narvarro, PCSO.

(V15/2716).

A) The Trial Attorneys

i) The Defense Attorneys background and experience

Byron Hileman testified that he has been licensed to practice law in Florida for 36 years. (V7/1310). He was Chief of the homicide division in the Regional Counsel's Office in Bartow. He handles nothing but first degree murder death penalty cases, supervising 5 circuits in 15 counties. (V8/1311). When he represented Rigterink in 2003, he was in private practice which was predominantly focused on criminal cases. He started doing death penalty work as a second chair in the late '80s, early '90s and became first chair qualified.[1] Hileman thought he and Jim Rigterink came to an agreement for his retainer on October 23 [2003], approximately one week after Rigterink's arrest. (V8/1314, 1484-85).

Hileman testified that Carmichael was appointed as penalty phase lawyer/second chair by early January, 2004. He had done 3 death penalty trials with Hileman, including the T.J. Wright case. (V8/1367). Hileman believed Carmichael was very conversive with psychiatric and neurological evidence from his work as a prosecutor handling Jimmy Ryce cases. That was one of the reasons Hileman chose him to be second chair in this case. (V8/1368). It was their informal understanding that Carmichael would be primarily responsible for penalty phase, but Hileman would be heavily involved with the family because he had a long term

[1] Hileman has attended various capital seminars every year since the early '80s.

relationship with the Rigterinks. (V8/1369).

David Carmichael testified that he had eight years experience as a prosecutor with the state attorney's office before entering private practice. (V6/953). He started in misdemeanor before moving to the felony division and was assigned to the sex crimes prosecution unit. He was promoted to director of that program then began handling Jimmy Ryce cases. (V6/953-54). He also handled some 100 post-conviction cases while at the state attorney's office. (V6/954). Carmichael has been board certified in criminal trial practice since 1998 or 1999. (V6/955). He practices primarily in criminal law and many of his cases involve complex issues, white collar cases, sexual battery, and cases with fatalities. (V6/958).

Prior to representing Rigterink, Carmichael was involved in the T.J. Wright case where the State was seeking the death penalty. (V6/959). In that case, he investigated and addressed the defendant's mental health issues, drug abuse, and possible fetal alcohol syndrome or congenital birth defect. (V6/961).

ii) Investigation and presentation of guilt phase issues and their related impact upon the penalty phase

Hileman and Carmichael investigated the possibility of moving to suppress Rigterink's confession on the basis of drug abuse and voluntariness. Hileman received a letter from Dr. Hartig in which she said it might be important to explore Rigterink's ability to waive Miranda, considering his substance abuse at the time of

his arrest. Hileman and Carmichael deposed Dr. Bruce Goldberger who was a state toxicology expert on the subject. They also retained Dr. Mark Montgomery, an independent toxicologist, for a consult. They asked him if he could do a retroactive extrapolation of the values from the blood test back to the date of the interrogation. (V8/1335). They hoped to ascertain whether the blood tests might raise a basis to challenge the voluntariness of the statement. (V8/1336). This investigation did not prove fruitful.

There was one brief conversation about Dr. Hunter and his urinalysis screen before the murders that showed amphetamines, but, it could have meant meth or any other type of amphetamine. (V6/969). Carmichael also consulted with Dr. Montgomery, an independent toxicology expert, about that particular screen and the other screens from Dr. Hunter and law enforcement [taken after Rigterink was arrested]. (V6/970). Dr. Montgomery was of the opinion that those results were not consistent with a "clinical dosage that would affect your thinking or reasoning or otherwise." Carmichael explained that "frankly, the cannabinoids were also not particularly high." Id. It was consistent with recreational use of the drugs. (V6/971).

Hileman watched the videotape of Rigterink's statement numerous times before trial. In the video, Rigterink appears to be coherent, calm, responsive.

Hileman didn't see any signs indicative of drug intoxication. He was alert. (V9/1540). There did not appear to be any confusion on Rigterink's part in responding to the officers' questions. His answers to the questions the officers asked were appropriately responsive. Nor, Hileman testified, did there appear to be anything about the officers' behavior which would provide a good faith foundation for a suppression motion. (V9/1541).

In discussing a potential suppression motion, Carmichael also considered that Jim and Nancy Rigterink were with Rigterink and drove him to the police station. (V6/971-72). In their extended contact with him, they did not note anything unusual, only that he was slightly agitated and somewhat distant. But, he exhibited no unusual behavior and that was one reason Nancy, in particular, was so shocked when the police arrested Rigterink. (V6/972). Moreover, none of the police reports indicated or suggested that Rigterink was under the influence when they had contact with him. Id. Carmichael, like Hileman, also reviewed the taped confession in great detail and did not discern any abnormal behavior or difficulty in Rigterink responding to questions which would suggest he was under the influence of drugs. (V6/973).

Hileman did not think there was sufficient evidence of any factor that would have led to them to challenge the voluntariness of the statement. (V9/1542).

Hileman testified that the motion to suppress Rigterink's confession was a joint effort with Carmichael. (V8/1404). The suppression motion did not incorporate any of the oral statements that occurred prior to police giving the Miranda warnings. (V8/1406). A motion to suppress the previous statements was not made because they had no good faith basis to believe the non-recorded statements were involuntary. (V8/1409).

The defense also consulted a false confession expert in this case, Dr. Yuille. Carmichael testified that Dr. Yuille was abandoned by the defense as his conclusions were not helpful, but, also because Rigterink's story had changed. (V6/999-1000). Hileman also recalled that Dr. Yuille became irrelevant when Rigterink recanted his story and claimed he did not do it. Rigterink explained why he had told the false story in his confession to the police and it had nothing to do with police misconduct or pressure. (V9/1547-48).

In moving to suppress, the defense relied entirely on the *West* decision [inadequate Miranda warning]. Hileman did not feel they had sufficient information to make a serious challenge to the admission of the earlier statements based on involuntariness. Hileman thought they had a strong argument on the Miranda issue which turned out to be true when the Florida Supreme Court reversed the case. (V8/1411).

Initially, Hileman explained, their objective was to develop mitigation of drug abuse and psychological problems to save Rigterink's life, not to defend the murders. Hileman viewed this case as a predominantly penalty phase oriented case. (V9/1507-09). Hileman discussed with Rigterink the possibility of pleading to 2 counts of first degree murder to avoid a death sentence. Rigterink wasn't interested. The guilt phase looked to be rather unpromising. (V9/1514-15).

Rigterink's account of the offenses to the defense attorneys for the first five or six months was the same; snapshot memories of holding a knife and having blood on him. (V8/1414). At some point, Hileman told Rigterink that evidence of drug use and snapshots was only going to be used as mitigation and would not provide a murder defense. Hileman told Rigterink that if found guilty he would be facing at least life in prison without parole. (V8/1499-1500). Hileman testified that Rigterink came up with his final version after learning this information. (V8/1500; V9/1501, 1506). On May 17, 2004, Hileman talked to Rigterink at the jail and Rigterink now offered the "SODDI" defense (Some Other Dude Did It). (V8/1417).

Hileman talked extensively to Rigterink about testifying at trial. Hileman advised Rigterink not to testify; number one, because it would not provide them with a successful defense and, number two, it would tarnish his credibility and

their defense in the penalty phase. Nonetheless, Rigterink was determined to present his case. Rigterink chose to disregard Hileman's advice. Rigterink told Bolin, as recounted in Hileman's notes, "give me 20 minutes with that jury and I can convince them." (V9/1525-26).

Hileman made efforts to investigate the new story and the Jarvis-Mullins and Mullins-Farmer connection. By then, Mark Mullins had died. (V8/1418). Rigterink claimed that it was Mullins and Farmer who committed the murders and Rigterink had just stumbled upon the scene after the fact. Rigterink also identified a fellow named Bohannon in the van. (V8/1419-20). Hileman investigated those potential witnesses or suspects. The investigation was not fruitful. Farmer was the only plausible witness that Hileman thought might prove helpful. It turned out he wasn't helpful at all. (V8/1430). Hileman did not conclude that Rigterink was lying to him. He concluded that the line of investigation (Mullins, Farmer, Bohannon) was fruitless and they had exhausted it. (V8/1465).

In preparation for trial, Hileman discussed Rigterink's potential trial testimony and again recalled trying to talk him out of it.[2] (V8/1431). Hileman told Rigterink specifically that he knew that the video [confession] was going to be

[2] Hileman confronted Rigterink about why he lied to the police and finally Rigterink gave him a plausible answer. He said he'd been threatened, they're going to kill my family, I don't dare say anything. He said the reason he held to that story for six months was because he feared for his family's safety. (V9/1502).

used to impeach him and that his testimony was going to be inconsistent with eyewitness' testimony. (V8/1433). They went through Rigterink's story and how they would elicit his testimony. Hileman didn't remember doing a mock cross examination. (V8/1434-35). However, Hileman remembered pointing out specific cross examination questions that he thought would be asked and warned Rigterink about the pitfalls. (V8/1436).

Rigterink's changed story and desire to testify in the guilt phase had a direct impact upon the defense presentation in the penalty phase. The defense would have been taking inconsistent positions if they put on doctors to admit that Rigterink told them things that weren't true. It would have given the defense no credibility with the jury. (V9/1527-28).

Carmichael also had conversations with Rigterink about his anticipated trial testimony. (V6/981-82). Initially, Carmichael too believed that they were going with the Polaroid images but, the later version of events involved Rigterink coming upon the scene but not being involved. Carmichael got to the point of investigating a textbook and talking to a professor of Rigterink's, which did "in fact, reflect some of the material regarding Polaroid images as being abnormal psychology case that he had been involved with." (V6/983).

Carmichael did not understand why the story had changed at this late

juncture. (V6/994). Carmichael thought this change in story occurred only after they had exhausted the false confession angle. Id. Carmichael was concerned that months had gone by and now it was going to be difficult to persuade a jury of this story's veracity. Carmichael thought that if Rigterink was really worried about his family or his wife, he would have warned his family and told his lawyers.[3] (V6/995).

Carmichael thought that Rigterink's theft from an employer might have been relevant in this case. At the time, Rigterink was using the credit card for personal expenses. Rigterink had been fired and he was separated from Kate who was the only one employed in the household. (V6/1000). The State had filed a motion indicating that this information would be used for impeachment and rebuttal. (V6/1001-02). Carmichael knew that the state attorney's office believed such information was relevant to show Rigterink's financial situation and motive. (V6/1002-03).

[3] Carmichael asked investigator Rosalie Bolin if there was any way to corroborate the threat or concerns Rigterink is now expressing. (V6/996). A letter or will was discussed as something that might corroborate the story. (V6/996-97). Carmichael asked Bolin to look into it. (V6/997). Subsequently, a letter was recovered by Ms. Bolin, purportedly written by Rigterink in October of 2003. This letter essentially tracked Rigterink's trial testimony in that he explained that how he was in fear for his and his family's lives. Only when facing trial, did Rigterink believe he could come forward. (V6/1014). Hileman and Carmichael did not use the letter at trial because of admissibility problems and because they had serious concerns about its veracity and reliability. (V6/1014-16).

(iii) Investigation and presentation of penalty phase issues

Hileman knew that Pete Mills of the public defender's office had been initially appointed to represent Rigterink and Hileman talked to him. Hileman was aware that Dr. Hartig had been hired by the Public Defender to evaluate Rigterink. Hileman had used her on other cases where she did neuropsych screening. (V8/1316).

Hileman spoke with Dr. Hartig over the phone and they exchanged letters. She wrote him a letter summarizing her findings and recommendations. (V8/1317). Hileman remembered Dr. Hartig had some rule-out type recommendations and mentioned substance abuse. Specifically, she was primarily focusing on the MJ because he admitted to almost daily use of that. And, he believed she mentioned doing further neuropsych work as a precaution, not because she had made any findings specifically, but because she felt that was prudent. She suspected that the incident was substance-abuse related. (V8/1328-29).

Hileman was aware that the PD obtained a blood draw from Rigterink shortly after his arrest. (V8/1319). Hileman hired Dr. McClane because he had worked with him on probably 8 to 10 cases over the prior 20 years. (V8/1370). Hileman did not recall Dr. McClane telling him that Rigterink claimed to have used MJ, and meth 2 days before the offense or smoked, or taken Xanax, within 6

hours before the incident. Nor did Hileman recall being informed that Rigterink claimed to have smoked meth over 2 hours at approx. 2:00 p.m. with the offense beginning at 3:00. (V8/1359).

Hileman also did not recall seeing Bolin's memorandum which reported Rigterink's more substantial drug use.[4] However, Hileman did know that he received information on drug use from various sources, including Rigterink. Rigterink stated that he used primarily marijuana and had experimented with a number of other drugs. (V8/1320). Rigterink did tell Hileman and others that he had experimented with various drugs and that meth may have been one of them. Hileman reviewed the PSI where Rigterink told the probation officer basically the

[4] As to the memo dated 10/22/03 (Defense Exhibit 1, authored by investigator Bolin, Hileman did not recall seeing it. (V8/1345). There were internal inconsistencies in the information contained in the memo that concerned him. It was a memo from Bolin to him regarding her initial client interview. Hileman sent her to the jail to interview Rigterink. However, the memo indicates she made contact with Rigterink on Monday, 10/20/03 at 1:00 p.m. (V8/1346). Hileman believed he would not have directed Bolin to go see Rigterink on the 20th. He was not yet retained on the case. Mr. Mills [public defender] was and he would not contact Rigterink while another attorney was still counsel of record. (V8/1350-51). Further, at the top of the document, it did not have his fax number, but, Bolin's. (V8/1351-52). Hileman had never in his career hired an investigator and sent them to talk to a defendant prior to his becoming counsel of record because the investigator would not be covered by the attorney-client privilege. (V8/1348). Moreover, Hileman would not have hired anyone without having either the money in the trust account to pay them or authorization from JAC under a partial indigency order. (V8/1349). In addition, some information in the memo was inconsistent with what he was being told by Rigterink, Bolin and Carmichael at the time of trial. (V8/1362).

same thing he had told Hileman: that his drug of choice was MJ, he used it daily, he experimented with a lot of other drugs but did not use them on a regular basis and did not consider he had a drug problem with them. (V8/1322). Hileman knew that drugs were a potential issue in the case and from a defense point of view; it was important to develop that because sometimes drug usage can lead to potential mitigating circumstances in the penalty phase. (V8/1395).

Hileman never received any credible information that Rigterink had used "Ice." (V8/1355). Hileman received an anonymous telephone call from a man who claimed that Rigterink was on crystal meth. Hileman begged the man for his contact information, but the guy hung up. The call alarmed Hileman. He confronted Rigterink about this information and asked him directly if he had been using crystal meth, ice. Rigterink denied it. (V8/1399).

Carmichael was familiar with a lab report which indicated that in addition to marijuana, Xanax and Darvocet were detected on Dr. Goldberger's summation. He discussed this drug result with Rigterink and from that conversation learned that Rigterink used the Xanax while on his parents' roof evading law enforcement. (V6/967). During their conversations, Rigterink told Carmichael that he had experimented with a number of drugs, particularly when he was in Miami and Milan. (V6/968). However, Rigterink told him that those other drugs were not a

problem. He used the term, "experimented" with them.[5] Id.

Carmichael also discussed drug use with Rigterink's parents. They presented him a timeline which indicated that Rigterink had been abusing marijuana on and off for a decade. Jim Rigterink thought that his son and Kate were using the money that they were providing him to buy marijuana. He also stated that Rigterink did not follow through with an agreement he made for drug testing and counseling. (V6/969).

When they started out in the case, Hileman thought they were going to have a successful exploration of mental health mitigation based upon the descriptions of blackouts, snapshot memories that seemed to be describing a very unusual and perhaps pathological mental phenomena. Then, in May 2004 Rigterink told him he lied to the police in the videotape and made up the story about blackouts and snapshots. (V8/1441). When the story changed and the possibility of brain damage

[5] Carmichael, like Hileman, did not recall seeing a memo from Bolin relaying much more significant drug usage at the time of the offense. (V6/976). Nor did Bolin tell Carmichael that she talked to Rigterink and who claimed to have used Xanex, Darvocet, and ice within an hour of each other before 2:00 p.m. on the 24th. (V6/977). Nor, did Ms. Bolin tell Carmichael that Rigterink told her he had used acid 1200 times, cocaine, 30 times, weed 30 times, meth 40 to 50 times. "I never heard that information before today." Id. Carmichael testified that he probably spent some 9 to 15 hours with Bolin about the trial and penalty phases. (V6/978). Bolin presented a list of potential witnesses for the penalty s phase, but did not include any medical doctors. The two PHDs on the list were friends or acquaintances of Rigterink's who live in Cypress Woods. (V6/978-79). That witness list was Bolin's own work product and from her own recommendations. (V6/979).

phenomena seemed to be false based on Rigterink's retraction, they had to take stock on where they were going. (V8/1442).

Carmichael had a similar recollection as to the reason the defense did not present expert testimony in the penalty phase. Carmichael testified that the defense had initially prepared to present mental health evidence. Dr. McClane and Hartig were potential guilt and penalty phase witnesses. (V6/1018). This defense strategy included exploring the effects of drug abuse on Rigterink. (V6/980). However, once Rigterink's story changed to Mullins did it and he had been framed, Carmichael had to consider what Rigterink had previously told those doctors. That was one of the reasons that they did not call either Dr. McClane or Dr. Hartig as witnesses. (V6/1018-19).

Carmichael was aware that Dr. McClane was working on the case and had conversations with him by phone. Carmichael learned that Rigterink had an above average IQ, had some difficulties with his divorce, marijuana use, and, some depression. (V6/989). He also received a one page summary from Dr. Hartig which reflected that personality testing revealed that Rigterink was an "anti-social individual who was impulsive, aggressive, and at time[s] engaged in irrational behaviors." (V6/990). Carmichael did not want the jury to hear that description of Rigterink. That was another reason he did not want to present Dr. Hartig in the

penalty phase. Id.

Carmichael testified that he personally talked with a number of Rigterink's family members and did not simply rely upon Bolin to do so. (V6/985-86). In preparing for the penalty phase, Carmichael looked at case law, manuals, and talked to attorneys in the area about how they would present this case. (V6/986).

Carmichael also recalled investigating Rigterink's drug usage. Carmichael discussed numerous times with Hileman whether or not Rigterink was using methamphetamine and Hileman told Carmichael that he denied it. (V6/987). Further, in talking with Dr. Sesta, Carmichael told him that if the client wasn't cooperating, and, was giving mixed reports on drug usage, he would not be helpful. Id. Rigterink's inconsistent reporting made presenting drug use difficult. And, if it was not strong and clear, they thought the better strategy was to present Rigterink as a good person, who lived a good life, than attempting to portray him as heavily involved in drugs and under the influence of drugs when he killed two people. (V6/988).

Carmichael thought that there was some evidence of drug usage aside from marijuana, and that Kate was aware that Rigterink had experimented with other drugs. (V6/991). Rigterink also admitted to such experimentation in the PSI. (V6/991-92). So, it was Carmichael's understanding that there was no substantial

drug usage aside from marijuana. (V6/992). Further, in his many hours of contact with Bolin she did not claim or recite the extent of the drug usage contained in the memo, purportedly from Bolin's interview with Rigterink. "Again, I have not gotten that information until I was told about it for this hearing." (V6/1018). The PSI recitation by Rigterink of his drug use history was also consistent with what they understood from Rigterink and his family members. (V6/1021-22). Marijuana was Rigterink's drug of choice and he used it on a daily basis. But, he had also experimented with a variety of drugs, including methamphetamine, cocaine, ecstasy, Xanax and LSD. (V6/1022). The defense ultimately elected to present Rigterink's drug usage through family members and their account was consistent with the amount and type of drugs Rigterink had been reporting to Hileman and Carmichael.[6] (V6/1019).

Ultimately, Carmichael made a tactical decision not to use or present drug use--beyond marijuana--in the penalty phase. (V6/1004). They did not believe they had a sufficient basis to show substantial drug use [aside from marijuana] and the

[6] Carmichael recalled discussing drug use with Kate Rigterink when he interviewed her on two occasions and had two telephone conferences with her. (V6/948). Rigterink's drug use had been an ongoing concern, Kate had used drugs as well early in the relationship but had dried out. She was concerned that Rigterink was still having problems with marijuana. (V6/949). She never mentioned ecstasy or pills. Kate did relay that on two occasions, Rigterink had acted aggressively and gotten sick. Kate thought that these two occasions were associated with "bad marijuana." Id.

jury had already heard of his marijuana use. The jury would not likely give Rigterink some kind of benefit for using drugs. Id. He, like Hileman, thought that drug use was going to be counterproductive and that they should instead focus on the person he was, the support system he had, and what he could do in the future. (V6/1005). Hileman focused on the family witnesses. They got a 7 to 5 recommendation. They did a really strong presentation on family and friends. (V8/1448). The penalty phase strategy was discussed with Rigterink. Rigterink agreed to that approach.[7] (V9/1533).

During the penalty phase, Nancy Rigterink [Rigterink's mother] testified to Rigterink's drug use and the attendant effects of that. (V9/1529). Carmichael was the primary advocate of their penalty phase defense but Hileman ultimately agreed. Presenting Rigterink as a nice, handsome, young man who's lived virtually a crime-free life; maybe driving with a suspended license or credit card abuse but nothing violent, decent person, very intelligent young man who was helpful to his fellow prisoners and that he had some issues with drugs, primarily MJ. (V9/1530). Hileman testified that he discussed with all the family members what they would

[7] Bolin never informed Hileman that she was going to get the opinion of the Florida Bar regarding Hileman's presenting Rigterink's trial testimony. Hileman was never in contact by the Florida Bar at anytime regarding Rigterink's case. Bolin sat in on a number of conferences, both in the holding cells, during the trial and conferences between the lawyers so she was aware that Rigterink was going to testify at trial. (V11/1999)

like for them to address in their penalty phase testimony. (V11/1994).

As to the drug use, there were 2 choices: drug abuse over a very long period of time and he would have been involved in criminal behavior for years leading up to the event, abusing drugs, selling and buying drugs. Hileman thought drug use at the time of the offense might have been mitigation but a long history would have been a negative factor. (V9/1532). The majority of the death penalty cases Hileman tried were in Polk County. (V9/1537). In his experience, Hileman did not find that utilizing drug use, particularly methamphetamine as a mitigator, to be effective with juries unless there was substantial support that the person had suffered permanent brain damage or other serious damage from long-term use. (V9/1539).

Carmichael made the concession during penalty phase closing argument that the State had proven prior violent felony and HAC. Carmichael testified that he discussed with Rigterink his belief that conceding two aggravators, HAC, and prior violent felony was the best strategy. Carmichael felt that these aggravators had been proven by the State. (V6/950). Carmichael believed the State had proved those two aggravators and he did not want to argue against something that was inevitable. (V6/1006, 1007-08).

As to Castillo's arguing nonstatutory aggravating factors in closing, Hileman didn't object because they had opened the door with the family witnesses and the

State could rebut it by reciting other evidence that was contrary. (V8/1474). As to the prosecutor's comment on Rigterink's self-centeredness, Hileman thought it a fair inference from the evidence and didn't think it objectionable. He also did not think the terminology shockingly evil was objectionable. (V8/1475).

Any additional facts based upon evidentiary hearing testimony will be addressed in the argument, *infra.*

SUMMARY OF THE ARGUMENT

ISSUE I—-The record of this hearing establishes that trial counsel undertook an objectively reasonable mitigation investigation, hired relevant, competent experts, and, investigated Rigterink's background. However, once Rigterink, changed his story and against counsel's advice, decided he would testify in the guilt phase, completely denying culpability, trial counsel made reasonable tactical decisions as to how to best present his case in mitigation. Given the heavy deference provided to counsel's tactical decisions, Rigterink has fallen far short of establishing counsel rendered ineffective assistance under Strickland. Nor, did Rigterink establish any prejudice.

The evidence presented by post-conviction counsel as to Rigterink's mental state and drug use was hardly compelling and countered by testimony from a state expert and to some extent Rigterink's own witnesses [Rigterink's reports of drug usage were, at best, contradictory]. In addition, the alternate course proposed by Rigterink's current counsel carried grave risks, including the fact it would contradict the story Rigterink had just provided to the jury under oath and would undermine both the credibility of Rigterink and his defense attorneys in the penalty phase. Accordingly, there is no reason to believe that the outcome of Rigterink's penalty phase in this heavily aggravated double homicide would have been any

different had counsel chosen the path rejected by the trial attorneys but now urged by collateral counsel.

ISSUE II—-Rigterink's numerous shotgun style allegations of ineffective assistance were all without merit and suffer from a common failure to establish prejudice. Hileman and Carmichael clearly investigated the possibility of moving to suppress Rigterink's statement on the basis of drug use, and voluntariness but, after exploring the possibility, determined that such a motion was not viable. This tactical decision has not been shown to be unreasonable, and, more importantly, Rigterink has fallen far short of showing that such a suppression motion would have been granted.

Rigterink's remaining claims too, fall far short of establishing either deficient performance or resulting prejudice in this case where Rigterink's guilt was supported by compelling physical and circumstantial evidence.

ARGUMENT

I. [Claim C of Appellant's Brief]

TRIAL COUNSEL WERE NOT INEFFECTIVE IN FAILING TO FULLY INVESTIGATE DEFENDANT RIGTERINK'S DRUG ABUSE AND MENTAL HEALTH AND PRESENT SUCH EVIDENCE IN EITHER THE GUILT OR PENALTY PHASES OF RIGTERINK'S TRIAL WHERE RIGTERINK'S OWN STATEMENTS AND DESIRE TO TESTIFY IN THE GUILT PHASE AGAINST COUNSEL'S ADVICE INFORMED AND GUIDED COUNSELS' STRATEGY.

Rigterink first accuses his trial attorneys of rendering ineffective assistance in the guilt and penalty phases of his trial due to counsel's alleged failure to investigate and present evidence of Rigterink's mental health and drug abuse through lay and expert witnesses. As discussed below, and, as found by the trial court, Rigterink's allegations fall far short of establishing either deficient performance or resulting prejudice.

A. The Standard Of Review On Appeal And The Ineffective Assistance Standard

When reviewing a trial court's ruling on an ineffectiveness claim, this Court must defer 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*.[8] Bruno v. State, 807 So. 2d 55, 62 (Fla. 2001); Sochor v. State, 883 So. 2d 766,

[8] This standard of review applies to all issues of ineffectiveness addressed in this brief.

771-72 (Fla. 2004).

Of course, pursuant to Strickland v. Washington, 466 U.S. 668, 690 (1984), a defendant 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. "The defendant carries the burden to 'overcome the presumption that, under the circumstances, the challenged action' might be considered sound trial strategy." Davis v. State, 928 So. 2d 1089, 1105 (Fla. 2005)(quoting Michel v. Louisiana, 350 U.S. 91, 101 (1955)). Second, the clear, substantial deficiency shown must further be demonstrated to have so affected the fairness and the reliability of the proceeding that confidence in the outcome is undermined.

In Harrington v. Richter, 562 U.S. 86, 131 S.Ct. 770, 788 (2011), the Supreme Court reiterated (emphasis added) how difficult it is to meet Strickland's ineffective assistance standard:

> "Surmounting *Strickland*'s high bar is never an easy task." *Padilla v. Kentucky*, 559 U.S. 356, ----, 130 S.Ct. 1473, 1485, 176 L.Ed.2d 284 (2010). An ineffective-assistance claim can function as a way to escape rules of waiver and forfeiture and raise issues not presented at trial, and so the *Strickland* standard must be applied with scrupulous care, lest "intrusive post-trial inquiry" threaten the integrity of the very adversary process the right to counsel is meant to serve. *Strickland*, 466 U.S., at 689–690, 104 S.Ct. 2052. **Even under *de novo* review, the standard for judging counsel's representation is a most deferential one.** Unlike a later reviewing court, the attorney

> observed the relevant proceedings, knew of materials outside the record, and interacted with the client, with opposing counsel, and with the judge. It is "all too tempting" to "second-guess counsel's assistance after conviction or adverse sentence." *Id*., at 689, 104 S.Ct. 2052; *see also Bell v. Cone*, 535 U.S. 685, 702, 122 S.Ct. 1843, 152 L.Ed.2d 914 (2002); *Lockhart v. Fretwell*, 506 U.S. 364, 372, 113 S.Ct. 838, 122 L.Ed.2d 180 (1993). The question is whether an attorney's representation amounted to incompetence under "prevailing professional norms," not whether it deviated from best practices or most common custom. *Strickland*, 466 U.S., at 690, 104 S.Ct. 2052.

B. Counsel's Alleged Failure To Investigate And Present Evidence In the Penalty Phase

i) Counsel conducted a reasonable investigation into Rigterink's mental health and made a reasonable tactical decision, based upon Rigterink's change in story and insistence on testifying, not to further pursue or present such testimony in the penalty phase

Rigterink's burden of establishing ineffective assistance in this case is an especially difficult one as he was represented by two very experienced defense attorneys. See Chandler v. United States, 218 F.3d 1305, 1316 (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."). Lead counsel, Mr. Hileman, had extensive experience representing criminal defendants, and, in particular, substantial experience representing capital defendants. Mr. Carmichael too, was a board certified criminal trial lawyer with significant experience both prosecuting and defending criminal defendants.

Rigterink faults counsel for failing to properly investigate and present a case

in mitigation during the penalty phase. However, the record of this hearing establishes that trial counsel undertook an objectively reasonable mitigation investigation, hired relevant, competent experts, and, investigated Rigterink's background. However, once Rigterink, changed his story and against counsel's advice decided he would testify in the guilt phase, completely denying culpability, trial counsel made reasonable tactical decisions as to how to best present his case in mitigation. Given the heavy deference provided to counsel's tactical decisions, Rigterink has fallen far short of establishing counsel rendered ineffective assistance under Strickland.

Rigterink claims that trial counsel was ineffective for failing to utilize an expert to testify in the penalty phase. The court below found that counsel investigated and considered Rigterink's potential mental health issues, consulting two mental health experts. (V15/2735). In fact, the court noted counsel intended to both investigate and present mental mitigation, including the extreme mental or emotional distress mitigator until Rigterink's story changed. (V15/2736). The trial court concluded:

> The evidence shows that counsel did not ignore mental mitigation. They consulted with mental health experts and considered drug abuse issues. Ultimately, they made a reasonable tactical decision consistent with Mr. Rigterink's decision to testify and his statements to them that he did not commit the crimes, that he and his family had been threatened, that he made up a story about flashbacks

> and blackouts. The defense decided against presenting a penalty phase argument that would have been completely contradictory to Mr. Rigterink's claim of innocence. Dr. Krop, called by the defense as a witness at the evidentiary hearing testified that he would not diagnose Mr. Rigterink as having a major mental illness or a psychiatric disorder, just a substance abuse disorder, The evidence presented at the evidentiary hearing does not support a conclusion that substantial mental health mitigation was ignored. Counsels' performance did not fall below an objective standard of reasonableness with regard to the allegations in Subclaim Al of Claim 2 of the Defendant's Amended Motion. Subclaim Al of Claim 2 of the Defendant's Amended Motion is denied.

(V15/2739).

The record provides ample support for the trial court's conclusions. Early on in the case the defense attorneys consulted with mental health experts, including a psychiatrist with experience and expertise in drug addiction, Dr. Thomas McClane, and, Dr. Tracey Hartig, an experienced forensic psychologist. In addition, trial counsel consulted with additional experts including Dr. Sesta, with whom counsel had recently worked with in another capital case.

When they started out the case, they thought they were going to have a successful exploration of mental health mitigation based upon the descriptions of blackouts, snapshot memories that seemed to be describing a very unusual and perhaps pathological mental phenomena. Then, in May 2004 Rigterink told him he lied to the police in the videotape, "I made up the story about the blackouts and the snapshots, I read that in a psychology textbook." (V8/1441). When the story

changed and the possibility of brain damage phenomena seemed to be false based on Rigterink's retraction, they had reconsider their strategy. (V8/1442).

Hileman knew that Pete Mills of the public defender's office had been appointed and he talked to him. His normal practice would have been to have gotten a release for the PD's file.[9] He knew that Dr. Hartig had been hired by the PD to evaluate Rigterink. Hileman had used her on other cases where she did neuropsych screening. (V8/1316).

Hileman remembered Dr. Hartig had some rule-out type recommendations. She mentioned substance abuse. Specifically, he remembered that she was primarily focusing on the MJ because he admitted to almost daily use of that. And, he believed she mentioned doing further neuropsych work as a precaution, not because she had made any findings specifically, but because she felt that was prudent. (V8/1329-30). While Rigterink faults trial counsel for failing to follow up or pursue the recommendations for additional testing for neurological damage and potential relation to Rigterink's claim of blackouts or memory impairments, he failed to prove that such a follow up would lead to any additional credible

[9] Not only is Rigterink's criticism of defense counsel for failing to consult with the PD not accurate, it is also insignificant. Hileman and Jim Rigterink came to an agreement for his retainer within a week or so of Rigterink's arrest. (V8/1315, 1484-85). Consequently, even if counsel failed to consult with the former PD, this criticism is insignificant given the very brief period the PD was actually assigned to Rigterink's case.

mitigating evidence. Dr. Krop, Rigterink's post-conviction mental health expert, administered a full neuropsychological battery, and concluded that Rigterink did not suffer from brain damage. (V7/1215). Dr. Krop also acknowledged that Rigterink did not suffer from any psychiatric disorder. (V7/1220). Thus, there is no evidence that he suffers from any brain damage or psychiatric condition that defense counsel failed to uncover.

At some point, Hileman told Rigterink that the drug evidence or snapshot was not going to be a defense and that if found guilty, it would be at least, life in prison without parole. (V8/1499-1500). It was after communicating this, that Rigterink came up with his final version of what happened. (V8/1500; V9/1501).

Initially, Dr. McClane and Hartig were possibly witnesses in both the guilt and penalty phases of the trial. (V6/1018). However, once Rigterink's story changed to Mullins was involved and he had been framed, he considered that what Rigterink had previously told those doctors would now been inconsistent with Rigterink's trial testimony. (V6/1018-19). The decision not to present such inconsistent evidence was a reasonable tactical decision under the facts of this case. See Windom v. State, 886 So. 2d 915, 922 (Fla. 2004)("A strategic or tactical decision is not a valid basis for an ineffective claim unless a defendant is able to show that no competent trial counsel would have utilized the tactics employed by

trial counsel."). This Court and others have recognized that defense attorneys are not ineffective for failing to present inconsistent defenses in the hope of maintaining credibility with the jury.

Hileman advised Rigterink not to testify because it would not provide them with a successful defense and it would tarnish his credibility and their defense in penalty phase. Rigterink was determined to present his case. (V9/719). Rigterink testified in the guilt phase contrary to Hileman's advice. See Dennis v. State, 109 So. 3d 680, 691 (Fla. 2012)(stating that "counsel is not ineffective for following his client's wishes.")(citing Cole v. State, 841 So. 2d 409, 426 (Fla. 2003)). The penalty phase strategy was discussed with Rigterink. He agreed to that approach. (V9/1533). In presenting mental health experts the defense would have been taking inconsistent positions in the guilt and penalty phases, which would give them no credibility with the jury. (V9/1528).

Carmichael was aware that Dr. McClane was working on the case, but, did not see a report. He had conversations with him by phone and learned that he had an above average IQ, had some difficulties with his divorce, drug use, and, some depression. (V6/989). He also received a one page summary from Dr. Hartig which reflected that personality testing revealed that Rigterink was an "anti-social individual who was impulsive, aggressive, and at time engaged in irrational

behaviors." (V6/990). Carmichael did not want the jury to hear that description of Rigterink. Id.

Thus, the record of the evidentiary hearing establishes that the experienced trial attorneys in this case were preparing for a potential mental state penalty phase presentation. However, once Rigterink provided his last version of events, asserting his claims of memory impairment were false, and, that he had nothing to do with the murders, counsel were forced to reevaluate their penalty phase strategy. Rigterink was advised against testifying and pursuing this avenue and was informed of its potentially detrimental effect on their penalty phase strategy. Nonetheless, Rigterink insisted upon this course of conduct. Rigterink expressed confidence in his own abilities to be persuasive in front of the jury. Rigterink told Bolin, "give me 20 minutes with that jury and I can convince them." (V9/1525-26).

Essentially, Rigterink faults trial counsel for accepting the story Rigterink insisted upon presenting in an effort to escape responsibility for his crimes. Since Rigterink's own decisions guided and shaped counsel's strategy, he should not be heard to complain now after an adverse outcome. See Dennis, 109 So. 3d at 691("counsel is not ineffective for following his client's wishes.")(citing Cole, 841 So. 2d at 426); Krawczuk v. State, 92 So. 3d 195, 205 (Fla. 2012)(concluding that trial counsel could not be deemed ineffective for "following their client's

wishes")(citations omitted). Indeed, since Rigterink was cautioned against this strategy, and, nonetheless, chose it, the case law is clear that counsel cannot be faulted for following Rigterink's wishes.[10] See Rose v. State, 617 So. 2d 291, 294 (Fla. 1993)("When a defendant preempts his attorney's strategy by insisting that a different defense be followed, no claim of ineffectiveness can be made.")(citing Mitchell v. Kemp, 762 F.2d 886, 889 (11th Cir. 1985)); Pooler v. State, 980 So. 2d 460, 465 (Fla. 2008)(counsel not ineffective for failing to pursue an involuntary intoxication defense where defendant "refused to participate in any defense that required him to admit that he did the shooting.")(citing the trial court's order).

In DeHaven v. State, 618 So. 2d 337, 339 (Fla. 2d DCA 1993), the defendant alleged that his counsel was ineffective because his trial strategy was to present a false theory that a masked intruder had killed the victim, rather than the defendant having killed the victim in self defense, the alleged true version. The court denied relief, quoting from decisions from other states, noting that to award relief on the basis of ineffective assistance of counsel in such a circumstance would amount to "'reward[ing]" a perjurer for his perjury.'" DeHaven, 618 So. 2d at 339

[10] If a reasonable investigation has been conducted, subsequent decisions based on that investigation (such as the decision not to call a particular witness at trial) are presumed to be reasonable and strategic and are "virtually unchallengeable." Strickland, 466 U.S. at 690. A defendant can rebut this presumption only by establishing that "no competent counsel" would have made the same decision. White v. State, 729 So. 2d 909, 912 (Fla. 1999).

(quoting Commonwealth v. Alderman, 292 Pa. Super. 263, 437 A.2d 36, 40-41 (1981). The court's closing observations are particularly relevant to the factual situation presented here:

> This motion does not present the picture of a hapless defendant whose lawyer knowingly or negligently ignored available evidence in favor of a less viable defense, nor of an unsophisticated individual deceived by an overzealous or unscrupulous advocate. It is an admission of having knowingly perpetrated a fraud upon the court.

DeHaven, 618 So. 2d at 339.

Had defense counsel pursued the strategy of calling Dr. McClane and Dr. Hartig, the jury would learn that well after the murders, Rigterink did not deny responsibility to the doctors, but, instead, acknowledged holding the knife, and struggling with Jarvis, consistent with his final confession to the police. Yet, Rigterink had just emphatically testified in the guilt phase that his account given to the police was false and that he had nothing to do with the victims' murders. Defense counsels' as well as Rigterink's credibility would have been destroyed. (V6/1018-19; V9/1533). Such a presentation would be highly detrimental to Rigterink. Instead of pursuing this strategy, counsel chose to focus of humanizing Rigterink, and, concentrating on his perceived positive attributes from family and friends. Drug abuse testimony was limited almost exclusively to humanizing testimony from Rigterink's mother and largely to his struggle with marijuana addiction. (V9/1530-32). As Hileman testified, juries, particularly Polk County

juries do not view methamphetamine use favorably.[11] See Reed v. State, 875 So. 2d 415, 437 (Fla. 2004)("An ineffective assistance claim does not arise from the failure to present mitigation evidence where that evidence presents a double-edged sword.")(citations omitted); Gore v. State, 846 So. 2d 461, 470 (Fla. 2003)("Moreover, an attorney's reasoned decision not to present evidence of dubious mitigating value does not constitute ineffective assistance.")(citing Gorby v. State, 819 So. 2d 664, 675 (Fla. 2002)).

In Heath v. State, 3 So. 3d 1017, 1028-29 (Fla. 2009), this Court rejected a similar claim of ineffective assistance based upon counsel's failure to pursue contradictory guilt and penalty phase strategies. This Court noted that counsel made a reasonable tactical decision not to present inconsistent theories, stating:

> Since Heath never admitted being at the crime scene, it would have been inconsistent for trial counsel to argue that he was present and assisted in the murder of Sheridan, but was too intoxicated to know what he was doing. Further, the decision to not present inconsistent defenses for fear of harming credibility with the jury was a matter of trial strategy. (*See Remeta v. Dugger*, 622 So. 2d 452, 455 (Fla. 1993)(trial counsel not ineffective for making a tactical decision not to present a voluntary intoxication defense where the theory of the defense was that an accomplice was "the primary perpetrator and trigger man in the killing [and a]n intoxication defense would be inconsistent with Remeta's contention that he did not commit the crime")(quoting trial court's order)). Moreover, witnesses were available who could (and did) testify in favor of Heath's alibi defense. *Cf. id*. at 455 ("The decision not to present a voluntary intoxication defense was a tactical one based on what Remeta's counsel felt the

[11] Hileman explained that he would have.

> facts of the case supported."). The fact that this defense strategy was ultimately unsuccessful with the jury does not render counsel's performance deficient. *See Johnson v. State*, 769 So. 2d 990, 1001 (Fla. 2000)("Simply because the ... defense did not work, it does not mean that the theory of the defense was flawed." (quoting trial court's order)).
>
> Heath, 3 So. 3d at 1028-29.

The decision made by the experienced trial attorneys in this case was not unreasonable or unprofessional. See Cummings-El v. State, 863 So. 2d 246, 267-68 (Fla. 2003)(crediting trial counsel's tactical decision that "drug abuse testimony would have been helpful if the Defendant had claimed to have committed the crime while in a cocaine rage" but since "the defense's strategy was to convince the jury that the Defendant was not present at the scene of the crime and did not commit the crime . . .testimony of drug abuse at the penalty phase would not have been supportive of counsel's efforts."); Hannon v. State, 941 So. 2d 1109, 1127 (Fla. 2006)(counsel not ineffective in penalty phase presentation in order to present a consistent theme to the jury rather than attempt to change theories to admit and explain the murders through mental health expert); Jackson v. Shanks, 143 F.3d 1313, 1320 (10th Cir. 1998)(finding that counsel was not ineffective in failing to present inconsistent theories where "[p]ursuing a diminished capacity defense would have been inconsistent with Mr. Jackson's complete denial of involvement in the robbery.").

Rigterink faults defense counsel for failing to follow up on recommendations for additional neurological testing made by either Dr. Hartig or Dr. McClane. Such an allegation is meritless based upon this record. While Dr. Hartig and Dr. McClane may have suggested additional avenues of investigation, once Rigterink altered his story, a mental health presentation became problematic for the reasons stated by Hileman and Carmichael. See Strickland, 466 U.S. at 691 ("And when a defendant has given counsel reason to believe that pursuing certain investigations would be fruitless or even harmful, counsel's failure to pursue those investigations may not later be challenged as unreasonable."); Rogers v. Zant, 13 F.3d 384, 388 (11th Cir. 1994)("Once we conclude that declining to investigate further was a reasonable act, we do not look to see what a further investigation would have produced."). Regardless, even if counsel could be faulted for failing to conduct additional investigation, collateral counsel failed to establish any significant or material mitigation through presentation of either Dr. McClane or Dr. Hartig.

Another factor influencing counsels' decision against presenting Dr. Hartig's testimony was her description of Rigterink's personality, noting that Rigterink was an "anti-social individual who was impulsive, aggressive, and at time engaged in

irrational behaviors."[12] (V6/990). Carmichael did not want the jury to hear that description of Rigterink. See Reed, 875 So. 2d at 437 (Fla. 2004)(noting that this Court has acknowledged in the past that antisocial personality disorder is "'a trait most jurors tend to look disfavorably upon.'")(quoting Freeman v. State, 852 So. 2d 216, 224 (Fla. 2003)). Again, a defense attorney's strategic decisions do not constitute ineffective assistance if, as in this case, alternative courses have been considered and rejected. State v. Bolender, 503 So. 2d 1247, 1250 (Fla. 1987). See also Chandler, 218 F.3d at 1314 (a reviewing "court must not second-guess counsel's strategy.").

Similarly, as to counsel's failure to present in mitigation use and abuse of different drugs, defense counsel made a similar tactical decision. The trial court, crediting the testimony of the experienced defense attorneys, found that the trial attorneys did investigate "the Defendant's drug usage and made a reasonable tactical decision not to emphasize the drug usage which they reasonably thought would have a negative impact on the jury." (V15/2747). The trial court's conclusion is well supported by the record.

As for presenting Rigterink's drug usage, the trial attorneys pursued a reasonable penalty phase strategy based not only upon Rigterink's changed story,

[12] It matters little whether or not Rigterink was diagnosed with a full blown antisocial personality disorder or merely possessed antisocial traits. In the eyes of a jury, it may well be a distinction without much of a difference.

but, also based upon the facts available to them at the time of trial. Rigterink misinterprets and distorts the evidentiary hearing testimony to draw legally unsupportable conclusions about counsel's effectiveness in presenting drug abuse evidence in mitigation. (Appellant's Brief at 30-31). For example, he faults counsel for failing to present and explain the effects of use or abuse of methamphetamine. However, at the time of trial most of the information at counsel's disposal, including from Rigterink himself, was that Rigterink was a chronic abuser of marijuana and had only experimented with other drugs. See Blankenship v. Hall, 542 F.3d 1253, 1276 (11th Cir. 2008)("the petitioner is often in the best position to inform his counsel of salient facts relevant to his defense"). Rigterink cannot fault counsel for failing to present evidence of more serious drug abuse that Rigterink himself denied at the time of trial.

Curiously, Rigterink faults counsel for failing to contact and call to testify a drug abuse counselor Rigterink had seen shortly before the offenses, Julie Dantzler. However, her testimony, presented during the evidentiary hearing, was consistent with the information possessed by counsel at the time of trial, that Rigterink had experimented with other drugs, but, was a chronic abuser of marijuana.

Rigterink reported to Dantzler shortly before the murders that marijuana was

his drug of choice but that he had acknowledged he had used a variety of drugs. (V6/1063-64). Her diagnosis of Rigterink was "cannabis dependence." (V6/1065). When Rigterink quit using marijuana he would experience "symptoms of anxiety and agitation, difficulty with sleep." Id. Dantzler suspected he may have been using other drugs, but, Rigterink was **only** acknowledging marijuana use. (V6/1066).

Similarly, Courtney Sheil, Rigterink's girlfriend testified during the post-conviction hearing that Rigterink's drug of choice was marijuana and he used it constantly. She and Rigterink only used methamphetamine twice in the months leading up the murders. (V10/1777). Ms. Sheil agreed that Rigterink only used drugs, other than marijuana, infrequently. (V10/1806). Moreover, Rigterink called her the afternoon of the murders around 4:30 pm to make plans to meet later that night. When she observed Rigterink later on that evening, he acted and appeared normal. (V10/1795).

Rigterink's ex-wife, Catherine Enriquez also testified that while Rigterink would use other drugs on occasion, his drug of choice was marijuana. Rigterink used it daily. (V9/1606). Rigterink's other use of drugs, like cocaine and ecstasy, she would describe as "infrequent" or recreational. (V9/1607). She moved out in May of 2003. (V9/1609). Moreover, money was tight and Rigterink did not have

much money to buy drugs. (V9/1614). At one period, he would take a pill before going to bed. (V9/1617). But, his drug use did not prevent him from going to school or work. (V9/1618). He used LSD during the course of their marriage, maybe ten times. (V9/1633).

Thus, the third party testimony presented by Rigterink during the evidentiary hearing contradicted the notion that Rigterink had a severe problem with anything but marijuana. His use of other drugs was sporadic and infrequent. This was consistent with what counsel was told by Rigterink during their interviews and conversations. Moreover, Rigterink's own statement in the PSI was consistent with this account, and, notably inconsistent with his later claims of using methamphetamine on a regular basis prior to the offenses. (V6/1021-22). As noted above, defense counsel could make a reasonable tactical decision not to present such inconsistent and infrequent use of drugs other than marijuana, based upon his assessment of how the jury would view such evidence.

In any case, defense counsel presented Rigterink's history of drug abuse during the penalty phase and drug abuse was found as a mitigating factor by the trial court.[13] Indeed, Rigterink himself testified about his drug abuse history during

[13] Rigterink's mother, Nancy Rigterink, testified that when Rigterink's wife left him in May, 2003, she told Nancy that her son had a serious drug problem. Immediately, Rigterink's mother and father began gathering information about how to help their son, and had a meeting with him in June. Rigterink agreed he

the guilt phase. Rigterink fails to show the testimony he presented in post-conviction varies significantly in either nature or quality such that it would cast doubt upon the outcome of his penalty phase. See Atwater v. State, 788 So. 2d 223, 233 (Fla. 2001)(rejecting an ineffectiveness claim for failing to present mitigation because Atwater's personal and family history were, in fact, presented during the penalty phase); Downs v. State, 740 So. 2d 506, 515-16 (Fla. 1999)(rejecting ineffective assistance claim for failing to present mitigating evidence where most, if not all, of the evidence was, in fact, presented.). Further, as discussed above, Rigterink's claim of severe drug use, aside from marijuana, based upon his own self-serving and contradictory statements, was simply not shown to be credible.

Carmichael discussed numerous times with Hileman whether or not Rigterink was using methamphetamine and Hileman told Carmichael that Rigterink denied it. (V6/987). Further, in talking with Dr. Sesta, Carmichael told him that if the client wasn't cooperating, and, was giving mixed reports on drug usage, he would not be helpful. Id. Rigterink's inconsistent reporting made presenting drug use difficult. And, if it was not strong and clear, the defense attorneys thought the better strategy was to present Rigterink as a good person,

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would stop using drugs and attend counseling. But, in late August 2003, a drug test of Rigterink's urine, done by the family physician, showed meth, opiates and marijuana. After a family intervention over Labor Day weekend, Rigterink again agreed to regular drug testing and counseling. (T4921-24, 4928-36). He never did either one. (T4938).

who lived a good life, rather than attempting to portray him as heavily involved in drugs and under the influence of drugs when he killed two people. (V6/988).

Rigterink faults his experienced trial attorneys for failing to follow the advice of the investigator used at the time of trial, Rosalie Bolin, and further investigate or pursue Rigterink's drug usage. (Appellant's Brief at 35). However, assuming that is true, experienced defense attorneys such as Mr. Hileman and Mr. Carmichael were in charge of strategy and tactics; not an investigator. Moreover, Ms. Bolin's credibility was strongly challenged by both defense attorneys during the evidentiary hearing.[14] The PSI recitation by Rigterink of his drug use history was consistent with what they understood from Rigterink and his family members at the time of trial. (V6/1019, 1021-22).

Nancy Rigterink testified to Rigterink's drug use and the attendant effects of that. (V9/1529). Carmichael was the primary advocate of their penalty phase defense but Hileman ultimately agreed. Presenting Rigterink as a nice, handsome, young man who's lived virtually a crime-free life, maybe driving with a suspended license or credit card abuse but nothing violent, decent person, very intelligent

[14] Curiously, Ms. Bolin, who was the investigator utilized by the trial attorneys, was also retained by post-conviction counsel to assist in Rigterink's challenge to his trial attorneys' effectiveness. Neither Hileman nor Carmichael recalled seeing a memo authored by Bolin purporting to list a large number of drugs used by Rigterink up to and including the day of the offenses. (V6/976). Nor, did Carmichael recall her making such an oral report. (V6/977-78).

young man who was helpful to his fellow prisoners and who had some issues with drugs, primarily marijuana. (V9/1530).

And the opposing theory of mitigation that Rigterink was involved with nefarious figures, using and abusing all sorts of drugs, a drug abuser who was seeking additional drugs and that's why he ended up killing Jarvis and an unfortunate woman who happened to witness the event. They wouldn't have presented some things, but they would have been brought out on cross-examination. (V9/1531). Hileman thought drug use at the time of the offense might have been mitigation but a long history would have been a negative factor. (V9/1532). In his experience, Hileman did not find that utilizing drug use, particularly methamphetamine as a mitigator, to be effective with juries unless there was substantial support that the person had suffered serious damage from long-term use. (V9/1539).

ii) The post-conviction evidence on abuse of more serious drugs was conflicting and the expert testimony presented by Rigterink was weak, invited strong rebuttal from the State and contradicted Rigterink's trial testimony.

Of course, as noted above, Defense counsel's tactical decision in this case has not been shown to be deficient given the strong deference provided to such decisions under Strickland. Bryan v. Dugger, 641 So. 2d 61, 64 (Fla. 1994)(finding counsel not ineffective for choosing a mitigation strategy of "humanization" and

not calling a mental health expert). Moreover, the evidence presented by post-conviction counsel was hardly compelling and the alternate course proposed by Rigterink's current counsel carried grave risks, including the fact it would contradict the story Rigterink had just provided to the jury under oath and would undermine both the credibility of Rigterink and his defense attorneys in the penalty phase. That inconsistent position alone, would certainly have alienated the jury. In addition, the expert testimony was neither credible or compelling and was countered by effective rebuttal from a state expert. Accordingly, there is no reason to believe that the outcome of Rigterink's penalty phase would have been any different had counsel chosen the path now urged by collateral counsel.

Dr. McClane acknowledged that Rigterink did not deny committing the murders, but, admitted that he had spotty recollections, like struggling with victim Jarvis, and, having the knife in his hand.[15] (V7/1298). Notably, Rigterink did not

[15] According to Dr. McClane's notes, Rigterink recalled waking up and calling Jarvis around noon to get marijuana. Jarvis called back around 2:00 or 2:30 to tell him to come over. (V7/1289). He left to go to Jarvis' place and recalled Jarvis opening and closing the door, but, had no recollection of their conversation. The next recollection Rigterink had was being on the floor with Jarvis on the top fighting. Then he recalled "having a knife in his hand, having Jeremy pinned in a corner of the – of the apartment, I guess, with - - he saw blood on his arm." He also had a vague recollection of being in unit one, and he thought he remembered Jeremy "with a metal gumball machine swinging it at him." (V7/1290). Rigterink also recalled was being in his truck about a mile away "covered in blood." Id. He saw a knife on the floor that was bloody, his backpack was in the truck, so he concluded he had to have retrieved it from unit five, but did not recall doing so.

claim he did not commit the murders or that he only told the police he had a sketchy memory of it in his confession because he was afraid for his life. (V7/1299). In fact, when called to testify during the post-conviction hearing, Dr. McClane was not even aware that Rigterink took the stand under oath at trial and told the jury he made up the idea of blackouts to fool the police and claimed he had nothing to do with the murders. (V7/1299-1300).

Additionally, if he was preparing to testify in this case Dr. McClane would have reviewed additional material and agreed that it would be important to have observations from family members who had contact with Rigterink on the day of the offenses. (V7/1306). Their observations at or near the time of the offense could "potentially [be] very helpful, yes." Id. It would be important to him if they observed Rigterink after the offenses talking and acting normally. (V7/1307).

Dr. Hartig also testified during the post-conviction hearing. Dr. Hartig acknowledged that Rigterink took steps following the offense to avoid detection by the police, and, therefore he was demonstrating a reason to avoid them. (V7/1248). Dr. Hartig did not recall the specifics of their conversations at the time of the post-conviction hearing, but, knew that Rigterink was not able to provide a detailed timeline of what happened and "was saying he was in a blackout state." (V7/1248-

(V7/1290-91). While driving the truck over a bridge he "tossed the knife out the window." Rigterink went home, "showered, cleaned up, took his dog, went to his parents' home, visited with parents." (V7/1291).

49). She recommended that Rigterink be examined by a neurologist and neuropsychologist based upon Rigterink's report of seizures, blackouts and history of head injury. (V7/1251).

Finally, neither the testimony of Dr. Krop or Pharmacologist Dr. Daniel Buffington [the post-conviction experts retained by Rigterink] establishes that trial 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.). First, as found by the trial court below, Dr. Buffington's testimony was not credible. His acceptance that Rigterink's confession could have been influenced by drug abuse was thoroughly impeached on cross-examination and rebutted by the more credible testimony of the State's expert, Dr. Suarez. While not expressly a credibility finding as to the penalty phase, this same credibility problem would certainly carry over to Dr. Buffington's testimony on the statutory mental mitigators.

Rigterink recounted the offense for Dr. Buffington. He stated that he was suffering from food poisoning the day before, went over to Jarvis's, and, then had "intermittent snapshot-like recollections of events or factual items that are consistent with being present at the scene." (V6/1115). At or near the time of the

offense, Rigterink reported to Dr. Buffington using cocaine, marijuana, and methamphetamine. (V6/1116). Dr. Buffington thought that this combination of drugs would impair Rigterink, regardless of the concentration of the drug at the specific time of the crimes. (V6/1116-17). Notably, however, Rigterink told Dr. Krop, collateral counsel's other post-conviction expert, that he did not recall the last time he used drugs in relation to the murders. (V7/1161). This is a rather glaring inconsistency among Rigterink's post-conviction experts.[16]

While Dr. Buffington agreed that it would typically be helpful to correlate his finding with collateral data or third party observations, he agreed that he had not been provided, nor had he considered such observations of Rigterink from September 24th, the date of the murders. (V7/1130). He was cross-examined with reports from Rigterink's father, mother, and girlfriend, from the afternoon and evening of the murders which reflected no unusual or bizarre behavior on Rigterink's part. (V7/1131-42). When asked about his mother's observations of Rigterink just two hours after the offense, Dr. Buffington testified that the offenses

[16] Dr. Buffington agreed that Rigterink's reported use of marijuana was consistent and its use was described as chronic. (V7/1158). Dr. Buffington also agreed that Rigterink's use of other drugs was more intermittent. Id. While Rigterink told Dr. Buffington he recalled using meth on the day of the offenses, he was not aware that Rigterink told the other post-conviction expert, Dr. Krop, that he did not recall using drugs on the actual day of the offenses. Rigterink made that statement to Dr. Krop in July of 2013, while Dr. Buffington's interview with Rigterink was on December 19, 2012. (V7/1160). Therefore, Dr. Buffington agreed that Rigterink gave a different account to him. (V7/1161).

may have "been related to a degree of intoxication or not at all." (V7/1141). This equivocal testimony hardly supports Dr. Buffington's conclusion that both statutory mental mitigators applied.[17] See Kokal v. Secretary, Dept. of Corrections, 623 F.3d 1331, 1349 (11th Cir. 2010)("Thus, as we have said before, "[a] psychological defense strategy at sentencing is unlikely to succeed where it is inconsistent with the defendant's own behavior and conduct.")(quoting Tompkins v. Moore, 193 F.3d 1327, 1338 (11th Cir. 1999))(additional cites omitted); Hedrick v. True, 443 F.3d 342, 356 (4th Cir. 2006)(rejecting claim that counsel was ineffective for failing to pursue an intoxication defense where "Hedrick's accounts of his own intake were vague and inconsistent" and where "Hedrick's conduct just before the murder was planned and purposeful.").

On its face, Dr. Buffington's testimony regarding the statutory mental mitigators was not credible and lacked a proper factual foundation. His opinion was also countered in some respects by Rigterink's other post-conviction expert, Dr. Krop, who candidly admitted that he did not find sufficient evidence to support

[17] Dr. Buffington was also examined on the number of statements that Rigterink provided as recounted in this Court's direct appeal opinion. (V7/1146-47). Dr. Buffington agreed that Rigterink did not tell him that I didn't do it, I came to the scene after the murders, and, saw some people who may or may not be associated with people I know, and fled the scene. (V7/1152).

a conclusion that the statutory mental mitigators applied in this case.[18] (V7/1221-22). Further, Dr. Krop acknowledged that Rigterink did not recall using drugs on the date of the offenses. (V7/1221). And, finally, Dr. Buffington's testimony was countered by the testimony of the State's expert, Dr. Enrique Suarez as discussed below.

Dr. Krop administered what he considered a standard neuropsychological battery of tests to Rigterink and concluded that he did not suffer from neurological impairment. (V7/1215). Personality testing Dr. Krop conducted on Rigterink revealed narcissistic personality traits. Id. He was also aware of personality testing from Dr. Hartig from a number of personality measures, including the MMPI-II, which reflected that Rigterink was "an anti-social individual who was impulsive, aggressive, and at time engaged in irrational behaviors." (V7/1218). Dr. Krop agreed that Rigterink has engaged in antisocial conduct: "Absolutely, yes." (V7/1220). However, he did not believe that Rigterink met the criteria for antisocial personality disorder. (V7/1238).

Dr. Krop did not find Rigterink suffered from any major mental disorders: "[J]ust the substance abuse disorder." (V7/1220). Dr. Krop acknowledged that he did not conclude that Rigterink satisfied the criteria of the two statutory mental

[18] Rather, Dr. Krop testified that he found non-statutory factors that Rigterink was impaired in his capacity and suffered from an emotional disturbance.

mitigators. He did not find sufficient evidence to support the statutory language. (V7/1221-22). Notably, Rigterink told Dr. Krop he did not recall taking drugs on the date of the offense, September 24, 2003. (V7/1222).

Dr. Krop was aware of the five different stories Rigterink has provided. (V7/1234-35). Ultimately, Rigterink told Dr. Krop about his claimed recollections of the crime, which appeared consistent with his final story to the police. When asked if Rigterink has shown an inclination to be less than honest when it is in his own interest, Dr. Krop answered: "Let's just say he has given different stories." (V7/1232). Dr. Krop agreed that it was not uncommon for a defendant who had committed a horrendous crime, to claim not to recall committing it. [19] (V7/1231).

Dr. Krop only talked to Rigterink's sister who had contact with Rigterink on the day of the murders and she "didn't see anything particularly abnormal" in his behavior that day. (V7/1233). Dr. Krop admitted he did not have the sworn statements of Rigterink's parents who had contact with Rigterink on the afternoon of the murders. (V7/1233). However, he was aware that they described "nothing particularly unusual about his behavior." The same was true for Courtney Sheil,

[19] Rigterink told Dr. Krop that he recalled being in a struggle with Jarvis. (V7/1226). And, Rigterink recalled looking down and seeing blood. (V7/1227). Rigterink recalled a bubble gum machine that was thrown, but, was not sure whether he threw it, or the victim did. (V7/1227-28). Rigterink remembered running back to Jarvis' unit, "and remembered grabbing his backpack and remembers leaving with that." (V7/1228). He recalled driving back to his parents' house where he left his Jeep. (V7/1228).

Rigterink's girlfriend at the time. (V7/1233-34).

From the foregoing, it is clear that Dr. Krop had very little favorable mitigating testimony to present. And, he, like all of the other experts, would establish that Rigterink completely abandoned his trial testimony, effectively acknowledging that it was a fabrication in an effort to allow him to avoid any responsibility for committing the murders.

In rebuttal, the State called Dr. Enrique Suarez who was a psychologist specializing in forensic and neuropsychology. (V9/1638).[20] Dr. Suarez was asked by the State to determine whether or not Rigterink qualified for either of Florida's statutory mental mitigating factors. (V9/1662). Based upon his review of records, and the various statements Rigterink has provided, Dr. Suarez was able to conclude that the statutory mental mitigators did not apply in this case. The inconsistencies in Rigterink's various stories alone, suggest malingering or feigning for secondary gain. (V9/1664). Dr. Suarez noted that Rigterink's claim of flashes of recollection or snapshots is "suspicious" for "many reasons." (V9/1666). Rigterink claims not to recall, then fills in memories "that he supposedly didn't have." Further, from the

[20] Dr. Suarez was retained initially by the State to address claims made by Rigterink relating to potential brain damage. (V9/1646). However, he was aware the testing conducted by Dr. Krop revealed that Rigterink was "neuropsychologically intact." (V9/1647). After reviewing those findings, Dr. Suarez concluded that no additional testing to assess brain damage was necessary. (V9/1648). Dr. Suarez did not interview Rigterink or conduct testing on him. (V10/1696).

PSI, Dr. Suarez noted that Rigterink acknowledged making up the story about blackouts. (V9/1667).

Dr. Suarez was asked what condition might account for blackouts or memory lapses at the time of the offense. Dr. Suarez noted delirium is specified in the DSM, it can be caused by high fever, illness, medications, and alcohol or drug abuse. (V9/1667). However, such a delirium diagnosis did not fit at all with Rigterink's own report and time frames. (V9/1668-69). If Rigterink smoked methamphetamine prior to the offenses, the reaction can be anywhere from mild to extreme. Many people take stimulants and function somewhat normally. However, if you do have delirium, this would be a "very infrequent side-effect of a drug like an amphetamine, and when that happens, it's not something that begins in one instant and then ceases an hour later. That just doesn't happen. A delirium is a very serious condition." (V9/1668-69). "Well, it rises to the level that he described, not having the ability to recall, snapshots, you know, spotty memory, literally not knowing that he just stabbed two people to death. That's delirium." (V9/1688).

From Rigterink's own description of his activities, he arranged for the sale, got his father's truck and was completely normal until the victim reached under a couch to get something, and then Rigterink claims, he blacked out. (V9/1669-70). The snapshot memories begin and we know between 4:00 and 4:30 he calls his

girlfriend, tells her that he would be seeing her around 6:00. Rigterink goes home, changes, then goes to his parents' house. His parents describe him as normal. (V9/1670).

Rigterink's conduct and statements suggest he knew what he was doing, going back to another unit to get his backpack and putting it in the car, realizing he was covered in blood, and on the way out, disposes of the backpack and knife. When asked why he did it, he said it was to get rid of evidence. "And at various times he said that he knew what had happened because he was covered in blood." (V9/1671). Rigterink also recalled checking a victim's pulse, and, he recalled checking not the wrist, but the female victim's neck. Dr. Suarez thought that was significant because he was checking to see if she was alive, if someone has a heartbeat. (V9/1671-72). You would not do that if you simply freaked out and were in a delirium. And, if that were the case, you would not go back and get property you had left. (V9/1672). "There's just so many inconsistencies, both within his taped confession, but, obviously they are replete when you put them all together." (V9/1672).

As to whether or not Rigterink was in a frenzy, Dr. Suarez stated that was not a term professionals used. If someone is having delusions, or, in a panic state, they lose touch with a lot of what is going on. Dr. Suarez explained:

> This wasn't a frenzy over a minor thing. We're talking about two people who have been murdered by hand. So you have got to be just totally incapacitated, in a delirium, that you are completely disoriented, detached you don't even know what you're doing, especially to have the kind of memory lapses where you wouldn't even know what had happened. You know, you would have to know how to drive. You would have to know where you are going. He makes many statements about even remembering going past the sheriff's office. That would have been an easy stop."

(V9/1673).

Dr. Suarez also thought that descriptions from family members of Rigterink from the day of the offense were important. Dr. Suarez reviewed the sworn statements from Rigterink's mother, father, and girlfriend reflecting their contact with Rigterink following the murders. (V9/1680-81). As a forensic psychologist, he is looking for "convergence." If you have a hypothesis that Rigterink was in a homicidal delirium taking place versus goal directed behavior, you would expect to see evidence of that impairment. Such a state, delirium, is as extreme as it gets, and you just don't turn it off "in a very short span of time." (V9/1680). So, Dr. Suarez thought it significant that no one saw it coming and an hour or so afterwards, "did anyone see that something might have been wrong? No. He appeared normal. He appeared okay. He appeared the way he always does." (V9/1680-81). "There's no sign at all that this individual was experiencing a delirious state, none." (V9/1681).

Dr. Suarez was aware of Rigterink's many statements concerning his drug

use preceding the offenses. He was aware that Rigterink allegedly told Ms. Bolin he had used drugs prior to the offense. However, Dr. Suarez noted that account was contradicted by what Rigterink told to the police and was also contradicted by people who were living with him. (V10/1699-1700). Dr. Suarez noted that Rigterink's account of drug usage, provided by his ex-wife, indicated substantial marijuana use, but, only limited or sporadic use of other drugs. "Her description, at least in her deposition, was of episodic. It wasn't anywhere near what he is telling the public defender or this other doctor." (V10/1704). Also, Dr. Suarez noted the lack of behavioral manifestation of more severe drug abuse and those two individuals, his wife and his girlfriend, acknowledged using illicit drugs with him. (V10/1707).

As the foregoing illustrates, Rigterink's post-conviction evidence was conflicting and invited strong rebuttal from the State. This is clearly not a case where powerful mitigating evidence was well within counsels' grasp and they simply failed to pursue or present it. See Wiggins v. Smith, 539 U.S. 510, 534-535 (2003)(where defense counsel had readily available and documented sources of information to establish the defendant's horrific childhood.).

In sum, counsel did not ignore potential mental health issues and began preparing for a penalty phase which included mental mitigation and drug abuse and

hired experts to explore those issues. Ultimately, trial counsel made a reasonable tactical decision, largely based upon Rigterink's own choice to testify and present testimony that, if believed, would completely clear him of the charged murders, to forego such expert testimony in the penalty phase. Rigterink has not carried his heavy burden of establishing counsel's tactical decision was unreasonable and unprofessional. Nor, did he establish any prejudice.

In this case, presentation of the defense mental health experts would, as counsel feared, destroy Rigterink's and defense counsel's credibility. In other words, such testimony, came with a cost. The cost of presenting such testimony is hard to calculate. However, it is a cost that would not be worth the benefit given the rather weak and contradictory support for the statutory and non-statutory mitigators offered by Doctors Krop and Buffington.

The fact the jury recommendations for death in this case were 7-5 for two heinous, atrocious and cruel murders is a testament to trial counsel's effectiveness.[21] The trial court found that, for the death of Jeremy Jarvis, the State

[21] Based upon the evidence presented, the court found one statutory [lack of significant criminal history] and eleven non-statutory mitigating circumstances. The non-statutory mitigating factors found by the court were, as follows: One, use of drugs – little weight; two, reputation with family and friends as a peaceful person – some weight; three, kindness and attention to grandmother – some weight; four, desire to help other inmates in prison – some weight; five, religious commitment in prison – some weight; six, helps turtles across the street – little weight; seven, Defendant has supportive family – moderate weight; eight, capable

had proved beyond a reasonable doubt conviction of a contemporaneous capital felony and that the crime was heinous, vicious and cruel. Great weight was assigned to each aggravator. (R 685, 687). In the death of Allison Sousa, the court found that the State had proved beyond a reasonable doubt that Rigterink was convicted of a contemporaneous capital felony, the murder was committed in order to avoid arrest or to escape custody, and that the murder was heinous, vicious and cruel. Each aggravator was given great weight. (R690, 692).

This Court has recognized the heavy burden a defendant bears in establishing that counsel's alleged deficiencies would alter the outcome of his penalty phase. In Butler v. State, 100 So. 3d 638, 667-68 (Fla. 2012), this Court specifically addressed the weighty aggravation of a **single** heinous, atrocious and cruel murder in assessing Strickland:

> While trial counsel's failure to present mitigating evidence may under some circumstances entitle a defendant to a new penalty phase, the evidence must be of such significance that its absence has resulted in the deprivation of a reliable sentencing proceeding. *See, e.g., Hildwin v. Dugger*, 654 So.2d 107, 109-10 (Fla. 1995)(finding both deficiency and prejudice under Strickland where trial counsel "failed to unearth a large amount of mitigating evidence," including two weighty statutory mitigating circumstances). By contrast, where the

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of kindness – some weight; nine, one class from completing bachelor of science, degree – little weight; ten, sympathy for the families of the victims – little weight; eleven, exhibited appropriate courtroom behavior – little weight. The court specifically found that the Defendant had established neither remorse and ability to recognize his mistakes, nor that there was a lack of evidence of premeditation. (T713-729).

additional mitigation is minor or cumulative and the aggravating circumstances substantial, we have held that confidence in the outcome of the penalty phase is not undermined. *See, e.g.*, *Breedlove v. State*, 692 So.2d 874, 877–78 (Fla. 1997) (finding no prejudice under *Strickland* where mitigating evidence presented in postconviction, particularly testimony concerning the defendant's drug addiction and beatings by his father, would not have changed the outcome in light of substantial aggravation in the record); *see also Asay*, 769 So.2d at 988 ("[T]his Court has reasoned that where the trial court found substantial and compelling aggravation,...there was no reasonable probability that the outcome would have been different had counsel presented mitigation evidence of the defendant's abused childhood, history of substance abuse, and brain damage.").

In this case, although the trial court found only a single aggravating circumstance—that the murder was especially heinous, atrocious, or cruel-that aggravator was particularly weighty. In concluding that the aggravator was entitled to great weight, the trial court summarized the evidence on which it relied as follows:

The evidence showed that Ms. Fleming was brutally stabbed, slashed, beaten, strangled, suffocated, and left for dead while her three little girls slept just down the hall. According to the medical examiner, she was stabbed or slashed with a sharp instrument 45 times on her neck, torso, and lower abdomen. Twenty-five of the wounds were deep stab wounds, and twenty of the wounds were wide, elongated incised wounds. There were so many wounds, in fact, that the medical examiner testified that "after a while describing them you run out of new words to describe them with." Some of the wounds were consistent with "torturous wounds" designed to torture or terrorize a victim. Ms. Fleming, the medical examiner testified, had such wounds on her neck, chest, and abdomen. Some of her wounds were "defensive wounds" inflicted when a victim tries to shield vital body parts from an attacker. A victim is, by definition, alive and conscious when such wounds are inflicted. Ms. Fleming had six of these wounds on her hands, and additional arguable defensive wounds on her arms. One stab wound went through her wrist. In addition to the stabbing and slashing, Ms. Fleming was beaten. The medical examiner testified that she had a fractured jaw, bruises in her mouth, swelling of her face and lips, and abrasions on her upper and lower lips. In addition to the

> stabbing and slashing and beating, Ms. Fleming was strangled. The medical examiner found petechiae in her left eye, a symptom consistent with pressure injury to the neck. Finally, a plastic bag was found on Ms. Fleming's face. A pillow was on the floor next to her face. The fatal wound, in the medical examiner's opinion, was a stab wound to the side of the neck which caused Ms. Fleming to bleed to death. The entire episode lasted ten minutes or more, the medical examiner estimated.
>
> As we have observed, HAC is considered one of the weightiest aggravators in the statutory scheme. *See Aguirre–Jarquin v. State*, 9 So.3d 593, 610 (Fla. 2009). Given the extreme and prolonged nature of the assault and murder in this case, we find that the HAC aggravator far eclipses the evidence concerning Butler's disadvantaged upbringing, intellectual deficits, and substance abuse.

The post-conviction evidence presented by collateral counsel was contested [mental health testimony], inconsistent and cumulative [Rigterink's reported drug usage] and carried the cost of alienating the jury [inconsistent theories devastating the defense credibility]. Confidence in the outcome of this heavily aggravated case has not been undermined.

II. [Claims D-I of Appellant's Brief]

DEFENSE COUNSEL WAS NOT INVEFFECTIVE IN INVESTIGATING OR PRESENTING GUILT OR PENALTY PHASE ISSUES AND NONE OF THE ALLEGATIONS MADE BY APPELLANT UNDERMINE CONFIDENCE IN THE OUTCOME OF THIS CASE.

Rigterink next raises a scatter shot of claims asserting ineffectiveness in both the guilt and penalty phases of Rigterink's trial. Rigterink's brief contains disjointed facts and misleading argument in which he attempts to conceal the rather glaring factual and legal deficiencies facing his claims. The quick answer to these claims is that Rigterink presented little or no evidence to support his claims during the post-conviction hearing below.

Failure To Pursue Intoxication Or Drug Use

i) Counsel was not ineffective for failing to move to suppress Rigterink's confession on the basis of drug use or otherwise pursue intoxication.

Rigterink faults counsel for failing to investigate Rigterink's mental state at the time of the crime and counsel's failure to attempt to suppress or minimize the confession on the basis of use of drug use or influence. (Appellant's Brief at 58). The trial court rejected this claim below, stating, in part:

> The Defendant also asserts his drug use and sleep and food deprivation as grounds for a suppression Motion. The testimony of Mr. Hileman and Mr. Carmichael at the evidentiary hearing shows that they investigated drug screen results from tests given to Mr. Rigterink after his arrest. Mr. Carmichael testified that he recalled the

results showing darvocet, xanax, and cannabis in the Defendant's system. Mr. Hileman also testified that he was aware of drug results from testing done by the Public Defender's office and State Attorney's Office. They retained Dr. Mark Montgomery, an independent toxicologist, and asked him to do a retroactive extrapolation of the values from the time the tests were taken back to the date of the interrogation. When Mr. Carmichael was asked about Dr. Montgomery's opinion he said, "Well, regarding my question as it would relate to a motion to suppress, that the —they were not consistent with somebody who had a high enough level for what he called a clinical dosage that would affect your thinking or reasoning or otherwise. And frankly, the canniboids [sic] were also not particularly high." V2, 156. Mr. Carmichael testified that Dr. Montgomery was of the opinion that the results were not consistent with a "clinical dosage that would affect your thinking or reasoning or otherwise," V2, 156. Mr. Carmichael noted that the Defendant was with his parents when he turned himself in and they drove Mr. Rigterink to the police station. He was asked what the parents told him about Mr. Rigterink's behavior at this time, and he said, "They indicated that he was, you know, agitated, but, otherwise, calm and somewhat distant, but did not appear to have any particularly striking abnormal behavior, which was one of the reasons that his mother, Nancy in particular, was so shocked when the police arrested him." V2, 158. He testified that they did not note anything unusual about the Defendant's behavior other than he was slightly agitated and somewhat distant. Mr. Carmichael testified that he did not see an indication in the police reports that he reviewed that Mr. Rigterink was exhibiting any behavior showing that he was under the influence of any drugs. Mr. Carmichael testified that he reviewed the taped confession in detail and could not discern any abnormal behavior or difficulty that Mr. Rigterink had in answering questions that might suggest he was under the influence of any drugs.

Dr. Buffington testified at the evidentiary hearing about Mr. Rigterink's statement of October 17, 2003 and whether or not substance abuse could have factored into Mr. Rigterink's ability to give a voluntary statement to law enforcement. He responded, "That it would have been something that should have been evaluated, given his clinical presentation prior to being arrested by the officers." V3,

306. Dr. Buffington agreed on cross-examination that he couldn't make a specific determination as to what the Defendant's level of impairment might have been at the time of his statement to the police. Dr. Buffington testified that he did not view the actual videotape of Mr. Rigterink's statement. Dr. Buffington was asked about Detective Connolly's testimony that the Defendant was alert and coherent, and he responded, "Yes, but I would not presume that he would he capable of determining his cognitive status." V3, 336.

Dr. Enrique Suarez testified at the evidentiary hearing. He was asked to consider whether or not Mr. Rigterink was impaired at the time he made his confession to police. Based on the videotape, he made the following conclusions: "Well, based on the review of the videotape, which, by the way, is 44 minutes plus, his ability to communicate, his responses to questions were always goal-oriented and directly appropriate to what was asked. If you notice, he — he is very completely engaged. He actually leans toward both detectives when he's answering them." V7, 839. Dr. Suarez was asked if he observed on the videotape any indication that Mr. Rigterink was impaired in any way by virtue of drug use in responding to the officers' questions. Dr. Suarez responded, "None whatsoever. In fact, he was very attentive, and again, verbally fluent. There wasn't a single mispronunciation, slurring, you know, abhorrent response to any question." V7, 842.

Mr. Rigterink's drug use would only support a basis for suppressing his confession if he was able to show that he was too intoxicated to make a knowing, intelligent, and voluntary waiver of his rights pursuant to Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). See Slade v. State, 129 So. 3d 461, 463-464 (Fla. 2d DCA 2014). The Defendant also asserts that testimony about the Defendant's drug use and physical condition at or near the time of his statement should have been presented to the jury to diminish the weight of the testimony against him. The Defendant has not presented sufficient evidence to indicate that his statement deserves any kind of diminished weight due to his drug use and physical condition at the time of his statement. The Court does not find that the evidence presented at the evidentiary hearing regarding the Defendant drug use and ability to give a voluntary statement sufficiently demonstrates that his statement to police was not given

freely, knowingly, and voluntarily.

> The Court does not find that counsel's performance fell below an objective standard of reasonableness in failing to file a comprehensive pretrial motion to suppress Defendant's out of court statements to police made on October 16, 2003. Even assuming counsel was somehow deficient in not seeking to suppress some of the non-recorded statements made by the Defendant to law enforcement, the Court notes that the final statement that the Defendant provided law enforcement was found to be admissible and properly Mirandized. Given the compelling physical and circumstantial evidence linking the Defendant to the crimes, discussed more fully under subclaim A of Claim I, the Court finds no reasonable probability of a different outcome in this matter based on such a deficiency by counsel. Subclaim B of Claim I of the Defendant's Amended Motion is denied.

(V15/2724-27). The court's denial of this claim is well supported by the record.

Hileman and Carmichael clearly investigated the possibility of moving to suppress Rigterink's statement on the basis of drug use, but, after exploring the possibility, determined that such a motion was not viable. See Maharaj v. State, 778 So. 2d 944, 959 (Fla. 2000)(the court "recognized that counsel cannot be ineffective for strategic decisions made during a trial.")(citing Medina v. State, 573 So. 2d 293, 297 (Fla. 1990)). This tactical decision has not been shown to be unreasonable, and, more importantly, Rigterink has fallen far short of showing that such a suppression motion would have been granted.

Appellant's assertion that the defense attorneys failed to investigate toxicology reports or otherwise consider potential drug use at the time of Rigterink's statement is refuted by the record. Hileman and Carmichael

investigated the possibility of moving to suppress Rigterink's confession based upon drug screen results from tests taken after Rigterink's arrest. Hileman and Carmichael deposed Dr. Bruce Goldberger, the state toxicology expert, and retained Dr. Mark Montgomery, an independent toxicologist for a consult. They asked Dr. Montgomery to do a retroactive extrapolation of the values from the tests back to the date of the interrogation. (V8/1335). Carmichael testified that Dr. Montgomery was of the opinion that those results were not consistent with a "clinical dosage that would affect your thinking or reasoning or otherwise." He further testified that "frankly, the cannabinoids were also not particularly high." (V6/970).

Carmichael also explained that all of the third party observations of Rigterink at the time of his statement, including his parents, did not note anything unusual in his demeanor. (V6/971-72). Further, none of the police reports indicated or suggested that Rigterink was under the influence when they had contact with him. And, Carmichael reviewed the taped confession in great detail and could not discern any abnormal behavior or difficulty in Rigterink responding to questions which would suggest he was under the influence of drugs. (V6/972-73).

Rigterink did not testify during the evidentiary hearing. The only evidence presented by Rigterink from an expert which touched upon drug abuse as possibly

affecting Rigterink's confession, was Dr. Buffington. However, Dr. Buffington did not opine that Rigterink's confession was involuntary due to drug use, and, indeed, he acknowledged he could not quantify any amount of drug in Rigterink's system at the time of statement. (V7/1128-29). Neither the drug screen from 10/17 or Dr. Goldberger's report allowed him to render any conclusion about whether or not Rigterink was under the influence at the time he made his statement. (V7/1124-25). Dr. Buffington simply stated that as to Rigterink's statement of October 17, 2003, he thought the question of whether or not substance abuse "could have factored into Rigterink's ability to give a voluntary statement to law enforcement" should have been "evaluated, given his clinical presentation prior to being arrested by officers." (V6/1120). This testimony hardly suffices to meet either the deficient performance or prejudice prongs of Strickland.

Collateral counsel is under the mistaken impression that a defendant may simply cast allegations of ineffective assistance for failure to investigate or present evidence, without actually presenting evidence during the evidentiary hearing. Allegations such as those Rigterink makes here, based upon little more than speculation, are clearly insufficient to carry his burden of establishing ineffective assistance of counsel. In the best light, Dr. Buffington's testimony simply suggests that there is some unquantifiable possibility, that Rigterink's Miranda rights waiver

could have been affected by consumption of drugs. This testimony alone, if accepted as true or reasonable, does not meet counsel's burden of establishing prejudice. And, Dr. Buffington's testimony was found less credible than that of the State expert, Dr. Suarez below. See V15 at 2745 ("The Court found Dr. Suarez's testimony regarding the possible effects of drug abuse on the statements made by the Defendant to law enforcement to be more persuasive than those of Dr. Buffington.") See State v. Fitzpatrick, 118 So. 3d 737, 748 (Fla. 2013)(noting that "[p]ostconviction courts hold a superior vantage point with respect to questions of fact, evidentiary weight, and observations of the demeanor and credibility of witnesses.")(citing Cox v. State, 966 So. 2d 337, 357–58 (Fla. 2007)). This credibility finding, which collateral counsel ignores, is well supported by the record.

First, although claiming that drug use should have been evaluated on the question of the voluntariness of Rigterink's confession, Dr. Buffington amazingly did not even view the actual videotape of Rigterink's statement. (V7/1144). Moreover, from the written transcript which he reviewed, Dr. Buffington asserted he could draw no conclusions from the fact Rigterink's responses appeared to be logical.[22] (V7/1154-55).

[22] Dr. Buffington admitted he had not reviewed Detective Connolly's trial testimony who was with Rigterink for extended periods of time. (V7/1143).

The officers who came into contact with Rigterink on the date of his October 16th statement did not notice any signs of drug or alcohol intoxication. Rigterink was described as alert and responsive. Contrary to Dr. Buffington's dismissive comments, the officers had real world experience dealing with drug and alcohol intoxicated individuals. See testimony from Detective Jerry Connolly (V11/2041); Sergeant Ken Raczynski (V11/2053); Sergeant Ivan Navarro (V11/2058-60).

Dr. Buffington's opinion was simply not credible based upon his failure to actually review the videotape and his failure to consider third party assessments of Rigterink's demeanor at the time of the statement. Moreover, his testimony was rebutted by the more credible testimony of Dr. Enrique Suarez below. See Wheeler v. State, 124 So. 3d 865, 876 (Fla. 2013)("Thus, based on Dr. Merikangas's unsubstantiated opinion, along with the lack of information regarding any effect of the medication, even if counsel had presented an expert like Dr. Merikangas to testify at trial about the voluntariness of Wheeler's statements to Officer Brown, Dr. Merikangas's testimony did not establish that Wheeler's statements were involuntarily given, and thus the trial court would not have suppressed the

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Although acknowledging he had not reviewed it, Dr. Buffington added that he would discount Detective Connolly's assessment because he did not know what "degree" he possessed. Id. The detective's lack of qualifications alone would cause Dr. Buffington to doubt his observation that Rigterink was alert and coherent, stating: "Yes, but I would not presume that he would be capable of determining his cognitive status." (V7/1150). See Rigterink, 66 So. 3d at 879 ("Detective Connolly testified that Rigterink was responsive and alert throughout this process.").

statements that Wheeler provided at the hospital."); Buzia v. State, 82 So. 3d 784, 794-95 (Fla. 2011)(rejecting similar claim, noting that one of the "interrogating officers familiar with the signs of drug use testified that he saw no indication that Buzia was under the influence and that Buzia expressly denied using drugs" and also that Buzia's own expert "testified that Buzia showed 'mild symptoms' of withdrawal, but he did not testify that Buzia was under the influence and could not understand his rights.").

Dr. Suarez believed it was important to actually view the videotape to observe, "behavior, the context, the demeanor, everything." "So, yes, it was very important. You can't get that from a document." (V9/1651). Based on his review of the videotape, Dr. Suarez could make the following conclusions:

> Well, based on the review of the videotape, which, by the way, is 44 minutes plus, his ability to communicate, his responses to questions were always goal-oriented and directly appropriate to what was asked.
>
> If you notice, he - - he is very completely engaged. He actually leans toward both detectives when he's answering them.

(V9/1653).

From the tape and written transcript it was apparent that Rigterink was not impaired in any manner. (V9/1656). If Rigterink was under the influence of drugs or alcohol Dr. Suarez would expect to see some behavioral manifestation of that.

(V9/1656-57). The trial court's credibility choice was clearly not a difficult one.[23]

In any case, a confession is not involuntary due to intoxication unless a defendant is so very intoxicated that it amounts to mania or obvious incoherence. Since the record, and, Rigterink's trial testimony refute any such suggestion of obvious incoherence, any such challenge to his confession would be frivolous.[24] See Walker v. State, 957 So. 2d 560, 575-576 (Fla. 2007)("Similarly, while there is some evidence that Walker was under the influence of drugs, likely methamphetamine and cocaine, at the time of his arrest, the officers who actually took Walker's statement testified that Walker appeared coherent and forthcoming in his responses."); Thomas v. State, 456 So. 2d 454, 458 (Fla. 1984)([]The rule of law seems to be well settled that the drunken condition of an accused when making a confession, unless such drunkenness goes to the extent of mania, does not affect the admissibility in evidence of such confession, but may affect its weight and credibility with the jury.[])(citations and quotation omitted); Grayson v. Thompson, 257 F.3d 1194, 1230 (11th Cir. 2001)(denial of defendant's motion to suppress confessions on intoxication grounds was not error where officer testified

[23] Dr. Suarez, unlike Dr. Buffington, reviewed more relevant material such as third party accounts of Rigterink's behavior at the time of his statement. (V9/1648-49).

[24] "It is settled that statements or confessions made during a time of mental incompetency or insanity are involuntary and, consequently, inadmissible.... Voluntariness is premised on the totality of the circumstances." Sullivan v. State of Ala., 666 F.2d 478, 482–83 (11th Cir. 1982)(citations omitted).

that defendant did not smell of alcohol, was not slurring his speech, and had a normal demeanor).[25]

While Rigterink also asserts that even if not subject to suppression, testimony should have been elicited to diminish the weight of the testimony, his post-conviction evidence falls far short of this goal. For all of the foregoing reasons, there is no credible evidence to suggest Rigterink's statement was unreliable or deserved diminished weight due to either sleep deprivation or drug consumption. Another glaring problem with pursuing the intoxication and/or lack of sleep/intoxicated involuntary confession theory is Rigterink's own trial testimony, where he notably, did not assert any such infirmity. See T3690-3699.[26]

Finally, Rigterink failed to present any evidence that would have been admissible in the guilt phase to negate either his intent or culpability. While he faults counsel for failing to further develop mental state evidence for the guilt

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[25] See also People v. Perez, 951 N.Y.S. 2d 335, 343 (N.Y. Sup. 2012)("Before a suspect's statements to the police can be held to be involuntarily made, based solely on the suspect's intoxication, the suspect must be intoxicated to the point of "mania")(citations omitted); State v. Clappes, 136 Wis. 2d 222, 242, 401 N.W. 2d 759, 768 (Wis. 1987)("Proof of physical pain and/or intoxication should not affect the admissibility of the evidence where there is no proof that the confessor was irrational, unable to understand the questions or his responses, otherwise incapable of giving a voluntary response, or reluctant to answer the questions posed by the authorities.").

[26] Rigterink's reference to an incomplete Miranda warning is incorrect. The warning, taken in its entirety, adequately conveyed his Miranda rights as found by this Court.

phase, Florida does not recognize either intoxication or diminished capacity. See Chestnut v. State, 538 So. 2d 820, 822 (Fla. 1989)(diminished capacity is not a valid defense under Florida law); Spencer v. State, 842 So. 2d 52, 63 (Fla. 2003)(concluding that expert's testimony concerning Spencer's "dissociative state" would not have been admissible during the guilt phase of the trial.); Buzia, 82 So. 3d at 796 ("As we stated previously, voluntary intoxication cannot provide a legal defense to a crime. See § 775.051, Fla. Stat."). Not a single witness testified in post-conviction that Rigterink was insane at the time of the offense. Notably, Dr. Krop, Rigterink's post-conviction expert, acknowledged that Rigterink did not suffer from any psychiatric disorder. (V7/1220). Moreover, such a mental state defense of admission and avoidance, was completely at odds with Rigterink's own trial testimony. See e.g. Brown v. State, 894 So. 2d 137, 146 (Fla. 2004)("Failure to present an intoxication defense cannot constitute ineffective assistance of counsel when the defendant asserts his innocence."). Accordingly, the trial court properly rejected this claim below.

D. Counsel Reasonably Concluded That A Motion To Suppress Rigterink's Earlier Non-Custodial And Largely Exculpatory Statements To Police Would Not Be Successful And Focused Instead On Litigating The Adequacy Of The *Miranda* Warning And Moving To Suppress His Final Incriminatory Statement To The Police.

In claim D, Rigterink faults counsel for failing to file a more comprehensive

motion to suppress Rigterink's statements to the police. The Court concluded that counsel's failure to file a more comprehensive motion to suppress did not fall below an "objective standard of reasonableness." (V15/2727). Nor, as the court found, did Rigterink establish prejudice as the final "statement that the Defendant provided law enforcement was found to be admissible and properly Mirandized." Moreover, given the "compelling physical and circumstantial evidence" linking Rigterink to the crimes, the court found no reasonable probability of a different outcome. Id. The trial court's rejection of this claim is well supported by the record.

This claim fails for two significant reasons. First, Rigterink presented no evidence during the evidentiary hearing below to suggest, much less establish that his earlier statements would have been suppressed had they been challenged. Neither Rigterink, nor any other witness testified to any underlying coercion or other improper police conduct that would lead to suppression of his earlier, largely exculpatory statements to the police. See Krawczuk v. State, 92 So. 3d 195, 206 (Fla. 2012)("Specifically, the lower court found that trial counsel completely and fully litigated the motion to suppress and that Krawczuk presented no additional evidence at his postconviction evidentiary hearing that would have changed the court's denial of the motion to suppress.").

Indeed, his claim necessarily rests entirely upon the trial record. On direct appeal, this Court appeared to agree that Rigterink was not in custody for Miranda purposes until he was confronted with the "match" of his bloody fingerprint. Only this last revelation was sufficient to render the questioning custodial and trigger the necessity of a Miranda warning. Accordingly, this claim should be barred as an issue which was decided adversely to him on direct appeal. See Lowe v. State, 2 So. 3d 21, 37-38 (Fla. 2008)("Counsel cannot be deemed ineffective when Lowe's claim that his confession should have been suppressed and certain portions should not have been admitted into evidence was found to lack merit on direct appeal.")(citing Moore v. State, 820 So. 2d 199 (Fla. 2002) and Hardwick v. Dugger, 648 So. 2d 100 (Fla. 1994)).

In any case, Rigterink's experienced trial attorneys thought that a motion to suppress Rigterink's earlier statements would not have been made in good-faith because there was no information leading them to believe the non-recorded statements were involuntary. (V8/1409). Rigterink submitted no evidence to suggest that his experienced attorneys' judgment on this matter fell below Strickland's deferential standard. Hileman and Carmichael in fact raised a much stronger claim regarding the form and language of the Miranda rights waiver form, a claim which, while ultimately unsuccessful, was litigated all the way to the

Supreme Court.

The only evidence offered at the hearing on the motion to suppress was the testimony of Detective Connolly, presented by the State, and two documents presented by Rigterink: a copy of the Miranda waiver form, and one page of transcript that included the oral Miranda warning given by Detective Connolly and Rigterink's acknowledgement of it. Based on Detective Connolly's testimony, the trial court found that Rigterink was not in custody when he made his statement; therefore, no Miranda warning was required. (R340-342). On appeal, this Court accepted that Rigterink was not in custody until the officers informed Rigterink that his fingerprints had been found at the scene.[27] Rigterink v. State, 2 So. 3d 221, 253 (Fla. 2009)("Based on the "'totality of circumstances,'" we hold that Rigterink was in custody immediately prior to and during his videotaped interrogation.").

Rigterink fails to argue at what exact point he was in custody and which, of Rigterink's several, largely exculpatory statements would have to be suppressed. Regardless, it is clear that an argument he was in custody earlier than held by this Court would be unavailing. Rigterink voluntarily agreed to come to the police station and was not transported to the station by the police. Rigterink agreed to go

[27] It was this information which turned the non-custodial interview into a custodial interrogation. Rigterink, 2 So. 3d at 252 ("Other than a murder weapon or DNA evidence tying the killer to the victims, it is difficult to imagine a more incriminating evidentiary item than one's bloody fingerprints being discovered at the scene of the murders.").

to the sheriff's station at that time so he could give his fingerprints, which was the only thing detectives requested. (R238-39). It was Rigterink who volunteered that he had additional pertinent information to give detectives. (R239). Rigterink asked his parents to drive him so that they would be able to drive him back from the sheriff's station when the interview was over. Rigterink's parents were asked to wait in the lobby while his fingerprints were processed.[28] (R240). Rigterink was never was told he could not leave. (R257). Rigterink never indicated he wanted to leave, and seemed intent on explaining things to the satisfaction of detectives. (R277-78). See Stansbury v. Cal., 511 U.S. 318, 325 (1994)("Even a clear statement from an officer that the person under interrogation is a prime suspect is not, in itself, dispositive of the custody issue, for some suspects are free to come and go until the police decide to make an arrest.").

Since this Court has already determined effectively that Rigterink was not subject to a custodial interrogation until the police informed him his prints matched those found at the murder scene, counsel cannot be considered ineffective for failing to file a motion challenging his earlier statements to the police. See Yarborough v. Alvarado, 541 U.S. 652, 666 (2004)(where the Court found the following factors militated against a custody finding: 1) "[t]he police did not

[28] Rigterink testified at trial that he was 31 years old at the time of the crime. (T3831). His parents drove him to the sheriff's station because his license was suspended. (T3638).

transport Alvarado to the station or require him to appear at a particular time"; 2) "they did not threaten him or suggest he would be placed under arrest"; and 3) "Alvarado's parents remained in the lobby during the interview, suggesting that the interview would be brief. [although the interview in fact lasted two hours]" (citation omitted).

In sum, the record establishes that Rigterink was not in custody when he gave his earlier various accounts and explanations--largely exculpatory, to detectives. This Court held that confrontation with the fingerprint results was the primary reason the questioning turned custodial. Accordingly, this issue has been resolved adversely to Rigterink and may not be relitigated here.

Finally, assuming for a moment, that one or more of his statements could have been suppressed, there is a complete failure to prove prejudice. As the trial court noted, Rigterink's final statement was admissible and properly Mirandized. It is this statement wherein Rigterink recalls pieces or snapshots of committing the murders. The earlier statements were largely exculpatory and even in the one prior to his warned statement, acknowledged touching bloody items at the scene. However, given the compelling and uncontradicted DNA and physical evidence, which included a bloody fingerprint at the murder scene and DNA evidence, suppression of this earlier statement cannot lead to a reasonable probability of a

different outcome in this case. See Simmons v. State, 105 So. 3d 475, 491 (Fla. 2012)(". . .Simmons' claim that trial counsel was ineffective for failing to move to suppress his incriminating statement on the grounds that it was coerced[]" was properly denied on the prejudice prong where other evidence, including blood, and DNA evidence linked the defendant to the murder).

The final statement would be admissible in this case even if one or more of his earlier statements had been suppressed. Rigterink makes no argument that the officers' earlier questioning of Rigterink somehow rendered his ultimate warned statement inadmissible. Any such argument would be meritless under the facts of this case.

In Oregon v. Elstad, 470 U.S. 298, 300 (1985) the Court held that a failure to provide Miranda warnings before an otherwise uncoerced confession does not necessarily render a second and warned statement subject to suppression. Admissibility of the second statement is governed by whether or not the subsequent waiver was knowing and voluntary. Elstad, 470 U.S. at 309. If a defendant is fully informed of and voluntarily waives his Miranda rights, as Rigterink was in this case, the statement after the Miranda warnings is admissible. See Davis v. State, 698 So. 2d 1182, 1189 (Fla. 1997)(The second warned statement was admissible where the Defendant was fully informed of and waived

his Miranda rights before the taped statement)(citing Elstad, 470 U.S. 298)). There is no evidence from either the trial or post-conviction record in this case which suggests, much less establishes that the detectives used the "two step" strategy condemned by the Court in Missouri v. Seibert, 542 U.S. 600, 604 (2004)[29]. The statement immediately preceding the warned, taped statement, was largely exculpatory [present but merely touching times after the murders had already occurred]. Thus, Seibert would does not provide any support for suppression of Rigterink's final statement.[30]

E. Counsel's Failure To Challenge Introduction Of A Knife And Shoe Tread Analysis Was Not Deficient And Certainly Did Not Render The Outcome Of Rigterink's Trial Unfair Or Unreliable Under *Strickland*

In claim E (Appellant's Brief at 62), Rigterink faults counsel for failing to challenge the knife introduced at trial or a footwear comparison presented by the State. Neither claim implicates a serious challenge to counsel's competency or the outcome of this trial.

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[29] In Seibert, 542 U.S. 600, 614–17 (plurality), the court held that Elstad does not apply if initial questioning carried "earmarks of coercion," and indicated a deliberate plan to undermine the defendant's Miranda rights.

[30] See also United States v. Mashburn, 406 F.3d 303, 309 (4th Cir. 2005)(Where the court held that "admissibility of postwarning statements is governed by Elstad unless the deliberate 'question-first' strategy is employed); Tengbergen v. State, 9 So. 3d 729, 735 (Fla. 4th DCA 2009)(Elstad controls and suppression not required unless officers deliberately withhold Miranda warnings); Jump v. State, 983 So. 2d 726, 729 (Fla. 1st DCA 2008)(Unless a deliberate two step strategy is employed the second warned statement is admissible under Elstad).

The trial court found neither deficient performance nor resulting prejudice from counsel's failure to move to suppress the knife recovered from Rigterink's home. The court stated, in relevant part:

> The Court does not find that counsels' performance fell below an objective standard of reasonableness in not trying to suppress the knife or object to its admission as evidence. As explained above, the Court finds that Ms. Sheil was a co-occupant of the residence with the ability and authority to enter the residence and remove the knife. Additionally, the Court finds that the knife would probably have qualified for admission anyway under the doctrine of inevitable discovery. In addition, counsel for the Defendant made a tactical decision to allow admission of the knife to show that the State was overreaching.
>
> The Court does not find the Counsel's performance fell below an objective standard of reasonableness with regard to this claim. However, should it be considered that counsel was deficient in some way, the Court finds no reasonable probability that, but for counsel's deficiency in not trying to suppress the knife or object to its admission as evidence, the result of the proceedings would have been different.

(V15/2720).

The State can add little to the trial court's thorough and well reasoned order in this case. There was no evidence presented below to establish that the knife was significant evidence, that it was subject to a viable motion to suppress, or, that the result of Rigterink's trial would have been different had a motion to suppress been filed. Accordingly, this claim was properly denied below.

As recognized by the trial court, neither Mr. Hileman nor Mr. Carmichael believed that the knife constituted important or significant evidence of Rigterink's

guilt. Nor, did either attorney believe that had sufficient grounds to exclude the knife. As Hileman explained, the knife was a non-issue. It was not shown to be the murder weapon, and, from a tactical point of view, thought it showed the state was overreaching. It was hanging on the wall. And, there was the issue of inevitable discovery because the police did get a search warrant and would probably have discovered it anyway. (V8/1401-02).

In this case, Rigterink's girlfriend entered the residence, from which Rigterink was absent, to let the dog out, and retrieved the knife, and turned it over to detectives.[31] Courtney Sheil testified during the evidentiary hearing that she had a key to Rigterink's condo, spent three to five nights a week there, and, could come and go as she pleased. Further, there were no restrictions on where she could or could not go in the house. (V10/1785; 1800-1802). Sheil was qualified as a co-occupant with both the ability and authority to enter the residence and bring the knife out.[32] See U.S. v. Matlock, 415 U.S. 164, 168 (1974)("These cases at least make clear that when the prosecution seeks to justify a warrantless search by proof of voluntary consent, it is not limited to proof that consent was given by the

[31] Courtney Sheil gave detectives a large knife she took from Rigterink's home on October 15, 2003. (T2582, 2585).

[32] The Supreme Court has consistently construed this protection as proscribing only governmental action; it is wholly inapplicable "to a search or seizure, even an unreasonable one, effected by a private individual not acting as an agent of the Government or with the participation or knowledge of any governmental official. See U.S. v. Jacobsen, 466 U.S. 109, 114 (1984).

defendant, but may show that permission to search was obtained from a third party who possessed common authority over or other sufficient relationship to the premises or effects sought to be inspected."); Ferguson v. State, 417 So. 2d 631, 634 (Fla. 1982)("The test for a valid third-party consent to a warrantless search is whether the third party has joint control of the premises.")(citations omitted). See Illinois v. Rodriguez, 497 U.S. 177, 188 (1990).

Rigterink failed to present any evidence to counter Mr. Hileman's testimony that the knife would probably qualify for admission under the doctrine of inevitable discovery. Moreover, Rigterink's claim completely fails to overcome the significant hurdle of Strickland's prejudice prong. There is no reasonable probability of a different outcome in this case assuming for a moment, that counsel had filed a motion to suppress the knife. The evidence against Rigterink was simply overwhelming and the seized knife was but a single inconsequential piece of the evidence establishing that Rigterink murdered the victims in this case.

Rigterink's suggestion that this evidence was prejudicial because it showed the jury he "was the type of person to own dangerous and deadly weapons" (Appellant's Brief at 69), is absurd in light of the record. With or without the knife, testimony was properly introduced to establish that Rigterink owned a large knife at the time of the murders. Katherine Rigterink told detectives that throughout their

marriage, Rigterink kept a military knife between their mattress and box spring. She described it as a double-edged blade eleven inches long, that turned up at the tip. When she returned to the home they had shared in October, after Rigterink's arrest, the knife was not in the house. (T3050-3051). Moreover, on cross-examination, Rigterink admitted that he had owned a knife with an 11-inch-long black blade. (T3965). Thus, actual production of a knife was an insignificant detail which pales in comparison with the other properly admitted evidence of Rigterink's guilt.

Assuming for a moment counsel can be faulted, Rigterink falls far short of establishing any resulting prejudice. In addition to Rigterink's confession, the State presented considerable physical and circumstantial evidence linking him to the murders. Just 30 minutes before the murders, Rigterink called victim Jarvis to confirm that he had just acquired a new supply of marijuana for sale. (T2547-48, 2550, 3328, 3353, 3385). Rigterink was out of work and had no money to support his acknowledged drug habit. (T2712, 3049, 4185-86, 4257). Two witnesses driving near the storage area described Jarvis's attacker in a way that matched the physical description of the defendant. (T1833-34, 2378, 2390, 2411, 2437-38). The victims' blood was found in the truck that Rigterink was driving the day of the

murders.[33] (T3128, 3133, 3194). DNA consistent with Rigterink's was found under the fingernails of victim Jarvis who suffered the brunt of the attack. (T3140-41, 3194). **Rigterink's bloody finger/palm prints** were found at the scene. (R249, T2985, 3362-65). Rigterink owned a knife which was similar to the one which caused the fatal injuries. Rigterink made changes to his appearance shortly after the crime. (T3372-73). He avoided giving fingerprint samples to detectives and hid from questioning. (T3335-36, 3338, 3343). When ultimately questioned by detectives, Rigterink gave inconsistent explanations of his behavior on the day of, and on the days after the crime, before ultimately providing a confession to the murders. (T3353-62). In light of the foregoing, counsel's failure to move to suppress the knife does not undermine confidence in the outcome of Rigterink's trial.

Rigterink next challenges defense counsel's failure to object to admission of a pair of Nike shoes into evidence. In rejecting this claim below, the trial court stated:

> At the evidentiary hearing, Mr. Hileman testified that he vaguely remembered the police finding something in the Defendant's closet. He admitted it might have been a Nike shoebox. The State introduced a pair of the same brand and size of shoe. The pattern was similar to the pattern of dried blood inside of Ms. Sousa's workplace. Although the relevance of the evidence was subject to some argument,

[33] The DNA from blood found in Rigterink's truck [owned by his father] was matched to victim Jarvis.

> Mr. Hileman testified that he believed there was a circumstantial connection.
>
> The cross-examination by defense counsel at the trial brought out the limitations of the testimony regarding the shoes. The defense brought out that the analyst had simply presented a new pair of shoes, and the expert acknowledged he could not link the shoes to any particular person. The analyst admitted that the Mr. Rigterink turned over a pair of Nike Shoes that did not match the shoe tread marks found at the scene. The Court does not find that counsels' performance fell below an objective standard of reasonableness in not objecting to the introduction of the shoes. However, even if counsel was deficient in this regard, there is no reasonable probability that the results of the proceedings would have been different but for such a deficiency. As more fully explained in Subclaim A of Claim 1 above, the State's presented compelling evidence that the Defendant was guilty of the crimes that he was charged with. Subclaim J of Claim 1 of the Defendant's Amended Motion is denied.

(V15/2733-34).

As an initial matter, Rigterink does not explain why an objection to this testimony would have succeeded at trial. Indeed, Rigterink fails to cite a single case suggesting, much less establishing that such shoe tread comparison evidence was improperly admitted. See Johnson v. State, 903 So. 2d 888, 899 (Fla. 2005)(counsel cannot be deemed ineffective for failing to raise a non-meritorious issue). The State sufficiently linked Rigterink to a pair of shoes of the same class which left visible prints at the crime scene. Such tread mark comparisons are not a new or novel concept in criminal trials. See Hurrelbrink v. State, 46 S.W. 3d 350, 353 (Tex. App.-Amarillo 2001)(observing that "[f]ootprint comparisons based on scientific principles, such as principles of anatomy and biomechanics, are widely

recognized by other experts in forensic pathology.").

Hileman vaguely recalled the police finding an empty Nike shoebox in Rigterink's closet. (V9/1545). The State had bought a pair of the same brand style and size of shoe. Although it could not be specifically identified, the pattern was similar to the pattern of dried blood inside of Ms. Sousa's workplace. Hileman believed that there was a circumstantial connection; the inference being that Rigterink had gotten rid of the shoes that were once inside the box that was found in his closet. (V9/1546).

Defense counsel's cross-examination certainly brought out the limitations of such testimony at trial. See State v. Riechmann, 777 So. 2d 342, 354 (Fla. 2000)(a reviewing court must consider "whether cross-examination of the State's expert brings out the expert's weaknesses."); Belcher v. State, 961 So. 2d 239, 250 (Fla. 2007)(same). Cross-examination brought out the fact the analyst had simply been shown a new pair of shoes and the expert acknowledged he could not link the shoes to any particular person. (T3037-39). The analyst admitted on cross-examination that Rigterink had turned over a pair of Nike shoes which did not match the shoe tread marks found at the scene. (T3038-39).

The evidence at issue certainly meets the minimum threshold of relevancy.[34]

[34] The relevancy standard is not exacting. See Bryant v. State, 235 So. 2d 721 (Fla. 1970).

In addition, assuming for a moment such evidence was excludable on proper objection, there is no reasonable probability of a different result. The physical and forensic evidence alone was more than sufficient to establish Rigterink's guilt. When coupled with Rigterink's confession, it is clear that Rigterink's claim regarding the shoe tread analysis is insignificant, and, did not warrant post-conviction relief.

F. Rigterink's Claim That Trial Counsel Failed To Conduct Adequate Client Interviews Or Specifically Prepare Rigterink For Cross-Examination Is Meritless.

i) Failure to object to cross-examination

The court below held that counsel's performance did not fall below an objective standard of reasonableness in failing to object to testimony that Rigterink misused his employer's credit card to purchase necessities. The court cited trial counsel's testimony that such misconduct was probably admissible over an objection to show motive. The court also held that if a deficiency can be discerned, Rigterink failed to establish any resulting prejudice, i.e, no reasonable probability of a different outcome absent this testimony. The record supports the trial court's ruling. (V15/2729-30)

As an initial matter, this is simply an inconsequential issue in this case wherein Rigterink's guilt was established by an overwhelming amount of evidence as noted above. Nonetheless, defense counsel fails to establish that such evidence

was even objectionable.

Carmichael thought that Rigterink's theft from an employer might have been relevant. At the time, Rigterink was using the credit card for personal expenses. Rigterink had been fired and he was separated from Kate who was the only one employed in the household. (V6/1000). The State had filed a motion indicating that this information would be used for impeachment and rebuttal. (V6/1001-02). Carmichael knew that the state attorney's office believed such information was relevant to show Rigterink's financial situation at the time the crimes occurred and motive. (V6/1002-03). The failure to object was not a matter of neglect, it was a matter of professional judgment.

In addition, this information would clearly become relevant and admissible in cross-examination of the mental health experts, such as Dr. Krop, in exploring Rigterink's motive for the crimes.[35] See V7 at 1236. Assuming counsel was in any way defective in failing to object to this testimony, Rigterink falls far short of establishing a reasonable probability of a different result. See Jones v. State, 998 So. 2d 573, 584 (Fla. 2008)("A mere conclusory allegation that the outcome would have been different is insufficient to state a claim of prejudice under *Strickland*; the defendant must demonstrate how, if counsel had acted otherwise, a reasonable

[35] Rigterink did not tell Dr. Krop how he intended to pay for the drugs. (V7/1226). Dr. Krop was aware that Rigterink was not working and that Rigterink had been fired for using his employer's credit card. Id.

probability exists that the outcome would have been different.").

The sum total of Rigterink's admission on cross-examination was that he had mis-used his company credit card to purchase personal items instead of gas. (T3794). This was hardly prejudicial testimony in a case in which Rigterink committed the heinous, atrocious and cruel murder of two people. Indeed, Rigterink readily admitted on direct examination that he had previously grown marijuana and discussed setting up a grow house with victim Jarvis and that Rigterink had also sold drugs. Confidence in the outcome of Rigterink's guilt or penalty phases was not undermined by introduction of this insignificant misconduct. (T3627-28). See Walton v. State, 847 So. 2d 438, 457 (Fla. 2003)("Certainly, the introduction of evidence showing that Walton had been involved in drug sales and thefts prior to the night of the murder was harmless, and when evaluated in the context of a trial which revolved entirely around Walton's attempt to forcibly obtain drugs, did not "so affect the fairness and reliability of the proceeding that confidence in the outcome is undermined.")(citation omitted).

ii) Alleged failure to conduct adequate attorney-client interviews and prepare Rigterink for cross-examination

The trial court found that Rigterink had neither established deficient performance or resulting prejudice based upon Rigterink's allegation that counsel failed to conduct adequate interviews or otherwise more thoroughly prepare him

for cross-examination. (V15/2730). Once again, Rigterink's post-conviction evidence in support of this claim is either thin or non-existent. The claim was properly denied below.

Rigterink generally asserts that trial counsel inadequately prepared him for testifying at trial and failed to have sufficient consultations with him at the jail. However, Rigterink did not testify during the post-conviction hearing below. Rigterink asks this Court to speculate that the outcome of his trial would have been different if only he had been prepared more thoroughly. However, without actual post-conviction evidence to support this theory, he has not come close to meeting his burden of establishing either deficient performance or resulting prejudice. See Reynolds v. State, 99 So. 3d 459, 482 (Fla. 2012)(finding summary denial of a similar claim was appropriate, noting that "Reynolds does not specifically address the manner in which counsel failed to prepare him to testify—rather, he just states a conclusion that counsel was ineffective.").

As Rigterink has essentially repudiated his trial testimony, it seems particularly unfair to hold trial counsel accountable for the alleged failure to better prepare him to present what is essentially perjurious testimony. Hileman advised Rigterink not to testify, number one, because it would not provide them with a successful defense and, number two, it would tarnish his credibility and their

defense in penalty phase. Rigterink was nevertheless determined to present his case. Rigterink ultimately testified in the guilt phase contrary to Hileman's advice.[36] (V8/1431; V9/1533). Rigterink should not get a second bite at the apple to pursue a different theory, particularly when he was advised against taking the stand and warned of its attendant risks and detrimental impact upon the penalty phase. And, since Rigterink failed to testify during the post-conviction hearing, there is no evidentiary foundation upon which to find counsel to be ineffective, much less find resulting prejudice.

The evidence of Rigterink's guilt is overwhelming. The forensic evidence alone linking Rigterink to the murders makes any claim under Strickland practically insurmountable on the prejudice prong. When coupled with other compelling circumstances linking him to the murders and his confession, it is clear that nothing Rigterink said, or, could have said on the stand would alter the outcome of this trial. The prosecutor's mention of Rigterink being fired and his obvious lack of money at the time he committed the murders was relevant. Obviously, it made Rigterink's story less plausible and was clearly relevant:

[36] They did prepare Rigterink to testify. Hileman went through Rigterink's story and how they would elicit his testimony. He didn't remember doing a mock cross examination, but did recall pointing out specific cross examination questions that he thought would be asked and warned him about the pitfalls. (V8/1435-36). Rigterink never expressed to Hileman any dissatisfaction with the number of times Hileman visited him. (V11/1998).

Rigterink called Jarvis and arranged a drug deal without any means to pay for the drugs. In any case, the jury did not return a guilty verdict because Rigterink was fired from his employer for misusing the company credit card. There is no reasonable possibility that the jury would have found Rigterink not guilty absent counsel's failure to more adequately prepare Rigterink for direct or cross-examination.

iii) Failure to object to evidence that diminished the lack of significant criminal history mitigator

Rigterink again parses the claim made above about his misuse of an employer credit card and contends that it diminished the weight of the lack of significant criminal history mitigator. However, again, the jury's penalty phase recommendation was not based upon his relatively minor theft from his former employer. No. It was gained because Rigterink brutally ended the lives of Jarvis and Sousa in a prolonged, heinous and cruel manner. This claim fails to meet either the deficiency or prejudice prongs of Strickland. The fact Rigterink's license was suspended was relevant to explain why Rigterink drove his father's truck on the day of the murders and why his parents drove him to the police station to provide elimination prints. Similarly, mis-use of Rigterink's employer's credit card, as noted above, was also relevant and constituted an insignificant act of misconduct

which could not have resulted in any prejudice to the outcome of the penalty phase in this case.

G. Counsel's Alleged Failure To Object To Inappropriate Prosecutorial Comments

The trial court rejected the claim that counsel was ineffective for failing to object to improper prosecutorial comments below, stating, in part the following:

> . . .The Court finds that the prosecutor was addressing evidence of aggravators introduced by the State at the penalty phase and mitigation offered by the defense. The Court does not find that the State was introducing nonstatutory aggravation to the jury. The defense has not shown that the prosecutor's comments were improper or were designed to inflame the passions of the jury. The Court does not find that counsel's performance fell below an objective standard of reasonableness in not objecting to the comments from the prosecutor. However, even should it be considered that counsels' performance fell below an objective standard of reasonableness in not objecting to some of the prosecutor's comments this does not undermine confidence in the jury's recommendation. The State proved two of the most weighty aggravators, prior or contemporaneous violent felony, and the murders were each Heinous, Attrocious, [sic] and Cruel, and the failure of defense counsel to object to the prosecutor's comments cannot reasonably be viewed as so affecting the fairness of the proceedings that confidence in the outcome was undermined. Subclaim C of Claim 2 of the Defendant's Amended Motion is denied.

(V15/2753-54). The trial court's order should be affirmed as this claim meets neither the deficiency nor prejudice prongs of Strickland.

As an initial matter, these comments appear in the trial record and therefore could have been raised on direct appeal. See Schoenwetter v. State, 46 So. 3d 535,

561 (Fla. 2010)("[I]issues that could have been raised on direct appeal, but were not, are not cognizable through collateral attack.")(citing Torres-Arboleda v. Dugger, 636 So. 2d 1321, 1323 (Fla. 1994)(citation omitted); Kelley v. State, 569 So. 2d 754, 756 (Fla. 1990)(prosecutorial comments are reflected in the record and therefore must be challenged on direct appeal). Moreover, Rigterink's claim is conclusory with mere reference to argument presented without elaboration on how the comments were improper or how they prejudiced Rigterink. See Franqui v. State, 59 So. 3d 82, 96-97 (Fla. 2011).

The prosecutor addressed evidence introduced in the penalty phase in aggravation and the mitigation offered by the defense. The prosecutor did not ask the jury to consider non-statutory aggravation. Indeed, the defense introduced evidence of Rigterink cheating on his first wife and his irresponsibility with finances and jobs as circumstances related to his downward spiral from abusing drugs. (T14930-33). The prosecutor cannot be faulted for commenting upon evidence introduced by the defense.

In sum, none of the comments either alone or in combination denied Rigterink the right to a fair penalty phase trial. Rigterink's crimes established the most weighty of aggravators--two murders that were each, heinous, atrocious and cruel. See Maxwell v. State, 603 So. 2d 490, 493 (Fla. 1992); Larkins v. State, 739

So. 2d 90, 95 (Fla. 1999). The jury's recommendation was not gained by sleight of hand or prosecutorial misconduct. Defense counsel's failure to object to the prosecutor's closing argument does not undermine confidence in the result. Franqui, 59 So. 3d at 98 (holding that counsel's failure to object "cannot reasonably be viewed as so affecting the fairness and reliability of the proceeding that confidence in the outcome is undermined.")(citations omitted). Accordingly, this claim should be denied.

H. Trial Counsel's Concession In Penalty Phase Argument To The Applicability Of The Prior Violent Felony And HAC Aggravators Which Were Unquestionably Proven In This Case

Rigterink next faults defense counsel for conceding the application of two aggravating factors, [HAC and prior violent felony] in closing argument. However, trial counsel cannot be deemed ineffective for conceding application of aggravators which the evidence at trial and the penalty phase overwhelmingly established. The lower court found that trial counsel made a "reasonable tactical decision" to concede on those aggravators to "gain some credibility with the jury and the Court." (V15/2751). The court also found that absent the concession, Rigterink failed to establish any prejudice as a result. (V15/2752).

As the trial court found, this was an objectively reasonable tactical decision

on the basis of this record. Rigterink agreed with counsel's strategy.[37] Nonetheless, Rigterink's acquiescence to such a strategy was not necessary. See Taylor v. Illinois, 484 U.S. 400, 417-418 (1988)(an attorney has discretion to manage most aspects of the defense without obtaining his client's approval).

Further, fatal to this claim is Rigterink's complete failure to suggest what argument or evidence was available for counsel to counter application of the HAC and prior violent felony aggravators.[38] The prior violent felony aggravator was established by the contemporaneous conviction of another murder for the murders of Mr. Jarvis and Ms. Sousa. Since the jury had just convicted Rigterink of committing these murders, Rigterink had no legal or factual grounds to contest this aggravator. See Schwab v. State, 814 So. 2d 402 (Fla. 2002)(holding that defense counsel is not ineffective for conceding an aggravating circumstance in a penalty phase trial when the facts of the aggravating circumstance were proven in the guilt phase trial.). Moreover, the evidence supporting the HAC aggravator for both

[37] Carmichael testified that he discussed with Rigterink his belief that conceding two aggravators, HAC, and prior violent felony was the best strategy. Carmichael felt that these aggravators had been proven by the State and he did not want to argue against something that was inevitable. (V6/950, 1007-08). Rigterink agreed with that strategy during a face to face interview at the jail. (V6/950).

[38] Rigterink for the first time mentions that counsel could have argued that Rigterink was in a "drug induced" frenzy. (Appellant's Brief at 94). However, no such evidence was introduced during the penalty phase and would have been entirely counter to Rigterink's trial testimony. Moreover, aside from the complete lack of evidence supporting that theory, a frenzy state does not provide a defense to the application of either the HAC or prior violent felony aggravators.

victims in this case was simply overwhelming. Defense counsel's realistic argument and assessment of the facts cannot have resulted in prejudice to Rigterink. See Reed v. State, 875 So. 2d 415, 434 n.11 (Fla. 2004)(finding neither deficient performance nor prejudice based upon defense counsel's realistic comments that "given the facts of this case, we cannot find that, in the absence of this comment, the HAC aggravator would not have been found by the judge or jury."); Schwab, 814 So. 2d 402 (trial counsel not ineffective for stipulating to the aggravator of a murder during a commission of an enumerated felony where the jury had just convicted defendant of qualifying felonies). Accordingly, denial of this claim should be affirmed.

I. Counsel's Alleged Failure To Investigate Or Develop Alternate Suspects

Rigterink next asserts that his defense attorneys were ineffective for failing to investigate Mark Mullins and William Farmer as alternative suspects. This claim is patently devoid of merit.

In denying this claim, the trial court noted that Rigterink presented no evidence to support it and that it was merely "speculation" to conclude that some favorable evidence would have been uncovered from additional investigation. (V15/2731). The court credited counsel's testimony that counsel thought "that this line of investigation was fruitless." Id. And, so it was.

As the trial court noted, Rigterink presented no evidence to support his

alternate suspect theory during the post-conviction hearing. Indeed, none of the cryptic assertions of counsel's deficiencies in failing to investigate other suspects or interview other witnesses are supported by actual evidence. For example, while Rigterink faults trial counsel for failing to develop photographs of Mullins and Farmer to show eyewitnesses to the murder, there was no evidence presented during the hearing to show that collateral counsel has done so. This Court is simply asked to speculate that some favorable evidence would have been developed had trial counsel undertaken this course of action. This is plainly insufficient to meet his burden of establishing ineffective assistance of counsel. See Spencer, 842 So. 2d at 63; Valle v. State, 70 So. 3d 530, 550 (Fla. 2011)(noting that postconviction relief cannot be based on speculation or possibility).

In any case, Hileman made efforts to investigate more fully the Jarvis-Mullins and Mullins-Farmer connection. By then, Mark Mullins had died. (V8/1418). Hileman gave Bolin directions to contact the people whose names they were given; Farmer, Bohannon, others. Mullins was dead. (V8/1421). Hileman investigated those witnesses. However, Farmer was the only plausible witness that Hileman felt might be helpful. It turned out it wasn't helpful at all. (V8/1430). Hileman concluded that this line of investigation (Mullins, Farmer, Bohannon) was fruitless and they had exhausted it. (V8/1465).

Since Rigterink presented no evidence to support his theory that Mullins committed or was responsible for the murders, and, in fact, has essentially conceded his trial testimony attempting to blame Mullins and others was false [admissions to Dr. Buffington and Krop], this claim is frivolous, if not disingenuous and does not warrant post-conviction relief.[39]

CONCLUSION

WHEREFORE, the State respectfully requests that this Honorable Court AFFIRM the denial of post-conviction relief.

[39] Moreover, at the time of trial, the State put on the testimony of Mark Mullins' boss at the time of the murders, Randy Pilkington, owner of R&R Heating and Cooling. (T1632). Mr. Pilkington testified that Mark Mullins was with him all day the day of the murders, working. (T1634-35). The customer for whom they were installing an air conditioner, Richard Champion, also testified and confirmed the presence of Mullins. (T1659-1715).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 5th day of February, 2015, I electronically filed the foregoing with the Clerk of the Florida Supreme Court by using the e-portal filing system which will send a notice of electronic filing to the following: Ann E. Finnell, Esquire, Finnell, McGuinness, Nezami & Andux, P.A., 2114 Oak St., Jacksonville, Florida 32204-4411 (**afinnell@fmnlawyers.com**).

CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this brief is 14-point Times New Roman, in compliance with Fla. R. App. P. 9.210(a)(2).

Respectfully submitted,

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