IN THE CIRCUIT COURT, SEVENTH JUDICIAL CIRCUIT, IN AND FOR VOLUSIA COUNTY, FLORIDA

CASE NO. 2004-1378-CFAWS

STATE OF FLORIDA,

vs.

TROY VICTORINO,

Defendant.
_____/

FINAL ORDER DENYING AMENDED MOTION FOR POST CONVICTION RELIEF

THIS CAUSE came before the court upon the Defendant's Rule 3.851(a)(1) Initial Motion for Post Conviction Relief as well as the Defendant's Amended Rule 3.851(a)(1) Initial Motion for Post Conviction Relief filed by Troy Victorino in which the defendant seeks an order vacating the defendant's Judgment and Sentence of Death and remanding the case for a new trial in regard to the guilt-innocence and the penalty phase of his case.

HISTORY OF THE CASE

On August 27, 2004, Victorino was charged in a fourteen-count superseding indictment that included six counts of first-degree murder in the deaths of Erin Belanger, Roberto Gonzalez, Michelle Nathan, Anthony Vega, Jonathon Gleason, and Francisco "Flaco" Ayo–Roman. Victorino, with codefendants Jerone Hunter and Michael Salas, went to trial on July 5, 2006. (footnote omitted) Codefendant Robert Anthony Cannon previously pleaded guilty as charged...

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

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

The jury recommended life sentences for the murders of Michelle Nathan and Anthony Vega and death sentences for the murders of Erin Belanger (by a vote of ten to two), Francisco Ayo–Roman (by a vote of ten to two), Jonathan Gleason (by a vote of seven to five), and Roberto Gonzalez (by a vote of nine to three). At the subsequently held *Spencer* (footnote omitted) hearing, the State submitted an additional written victim impact statement. Victorino did not present any additional evidence...

On September 21, 2006, the trial court followed the jury's recommendations by imposing four death sentences.(footnote omitted) The trial court found the following five aggravating factors applicable to each of the four murders and accorded them the weight indicated: (1) the defendant had a prior felony

conviction and was on probation at the time of the murders (moderate weight); (2) the defendant had other capital felony convictions (very substantial weight); (3) the defendant committed the murders in the course of a burglary (moderate weight); (4) the murders were especially heinous, atrocious, or cruel (HAC) (very substantial weight); and (5) the murders were cold, calculated, and premeditated (CCP) (great weight). In addition, the court found a sixth aggravator in the murders of Gleason and Gonzalez—that the murders were committed to avoid arrest (substantial weight). The trial court found no statutory mitigation but did find the following nonstatutory mitigating factors: (1) Victorino had a history of mental illness (some weight); (2) he suffered childhood physical, sexual, and emotional abuse (moderate weight); (3) he was a devoted family member with family support (little weight); (4) he did some good deeds (very little weight); (5) he exhibited good behavior at trial (very little weight); (6) he was a good inmate (little weight); (7) he was a good student who earned awards (little weight); (8) he had an alcohol abuse problem (very little weight); and (9) he had a useful occupation (very little weight). The trial court determined that the aggravating factors far outweighed the mitigating circumstances and, in accord with the jury's recommendation, sentenced Victorino to death for each of the four murders." (Drawn from language of Victorino v. State, 23 So.3rd 87 (Fla. 2009))

This court conducted an evidentiary hearing on December 14, 2011, at which time each of the attorneys for the parties made their final summations to the court arguing for and opposing the grounds for the motion. This court has reviewed the defendant's Initial Motion for Post Conviction Relief, his Amended Motion for Post Conviction Relief along with the attachments thereto as well as the Answer to the Motion for Post Conviction Relief filed by the State of Florida. In addition the court has considered each of the submissions made by the parties and after being otherwise fully advised in the premises, the court makes the following findings of fact and conclusions of law in regard to the defendant's motions.

STANDARD FOR REVIEW

The defendant makes a series of claims of ineffective assistance of counsel which are reviewed under the two-prong standard established in Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, L.Ed. 2d 674 (1974). The Florida Supreme Court has reiterated that standard recently in Hoskins v. State, __ So.3rd ____, 2011 W.L. 5217091 (Fla. 2011)

In this proceeding first the burden calls upon the defendant to identify the specific acts or omissions that demonstrate counsel's performance was unreasonable under prevailing professional norms. Duest v. State, 12 So.3rd 734 (Fla. 2009). Counsel's errors must be "so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Strickland*, id. Second, the defendant must prove that the deficient performance resulted in prejudice. Id. Thus, the defendant must demonstrate that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id at 694.

In reviewing a claim that counsel's representation was ineffective based on a failure to investigate or present mitigating evidence, the court requires the defendant to demonstrate that the deficient performance deprived the defendant of a reliable penalty phase proceeding. Henry v. State, 937 So.2d 563 (Fla. 2006); Gaskin v. State, 737 So.2d 509 (Fla. 1999). ("Prejudice in the context of penalty phase evidence is shown where, absent the errors, there is a reasonable probability that the balance of aggravating and mitigating circumstances would have been different or the deficiency substantially impaired confidence in the outcome of the proceedings"), receded from in part on other grounds by Nelson v. State, 875 So.2d 579 (Fla. 2004).

Under *the Strickland* test, "unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable." Kilgore v. State, 55 So.3d 487 (Fla. 2010). "A court considering a claim of ineffectiveness of counsel

need not make a specific ruling on the performance component of the test when it is clear that the prejudice component cannot be satisfied." Quoting Maxwell v. Wainwright, 497 So.2d 927 (Fla. 1987).

ANALYSIS OF DEFENDANT'S CLAIM

The defendant's initial Motion for Post Conviction Relief made 17 separate claims to support the motion. The defendant's Amended Motion for Post Conviction Relief articulates those 17 claims by way of claims numbering 1 through 17. (Claim 14 is labeled by the letter "O") At the time of the evidentiary hearing, the defendant filed a notice in open court which amended the Initial Motion for Post Conviction Relief claims indicating that he had abandoned some of those claims. A portion of claim number 2 in which the defendant asserted, "Prosecutorial Misconduct" was abandoned. In addition, claim number 4 based on a claim of ineffective assistance of counsel in failing to hire and use a defense DNA and blood spatter expect was entirely abandoned. Claim 13 which asserts new evidence and Brady and Giglio violations regarding evidence of contamination at the FDLE crime lab was totally abandoned. Claim 14 asserting ineffective assistance of counsel in failing to investigate and present the mitigation testimony of Mindy L. Pouliot and Dorona Edwards was abandoned only as to the assertions regarding Mindy L. Pouliot.

CLAIM 1. INEFFECTIVENESS OF COUNSEL FOR NOT OBJECTING TO 911 CALL AUDIO REORDING

This claim alleges ineffectiveness of counsel for not objecting to the playback of a 911 call made by Christopher Carol. Apparently Christopher Carol arrived at the Telford house to pick up two employees for his construction company around 6:30 a.m. on Friday, August 6, 2004, the morning after the murders. Mr. Carol knocked on the door and the front door swung open. He then walked into the house and observed the chaos that had preceded him the night before indicating that there were bodies and blood and the house was in general disarray. The recitation of the language of the tape that was played and which is objected to is as follows:

> Caller: I think it is a murder. I went to pick up my guys today and I go over there, the door's kicked in, and everybody else is supposed to be at work, and my girlfriend works at Burger King and I come in and the door is kicked in and I see blood. That's all I see . . . No, its in the bedroom. I walk in - . . . No, I walked in . . . There's four or five people in there and they're just all laying on the floor and I yelled and yelled and yelled and no one answered, and I walked in and just looked in the bedroom and I see blood on the bed and I stopped and backed up.

It is clear that the defense counsel did not object to the playing of the tape which contained this language. However, there is no information in the communication that is inconsistent with the bulk of the evidence that was presented in regard to the State's efforts to prove the details of these murders. The defendant argues that the man who discovered the bodies was emotionally charged. It is hard to imagine how anyone discovering that murder scene could be anything but emotionally charged and concerned and distressed and sympathetic and engaged in a whole range of human emotions that most people never experience.

The standard, however, is the *Strickland* test. In Reese v. State, 14 So.3rd 913 (Fla. 2009), the *Strickland* test was restated by the court and indicated that the yardstick by which we measure ineffective assistance of counsel claims is the seminal decision of the Supreme Court in *Strickland*. First, the defendant must establish that counsel's performance was deficient. Second, the defendant must establish that counsel's deficient performance prejudices the defendant. To establish the deficiency prong under *Strickland*, the defendant must prove that counsel's performance was unreasonable under "prevailing professional norms." The *Strickland* standard requires proof that, "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is the probability sufficient to undermine confidence in the outcome." White v. State, 964 So.2d 1278 (Fla. 2007).

In this case there was no testimony to suggest that counsel's conduct in failing to object was deficient. The 911 call was clearly an excited utterance when

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

CLAIM 2. INEFFECTIVE ASSISTANCE OF COUNSEL IN FAILING TO TIMELY AND CORRECTLY OBJECT AND MOVE FOR MISTRIAL WHEN CANNON TESTIFIED FOR THE STATE AGAINST THIS DEFENDANT AND THEN REFUSED TO ALLOW HIMSELF TO BE CROSS-EXAMINED.

The defendant has removed from Claim 2 the allegation of "prosecutorial misconduct" in regard to the State calling Mr. Cannon to the stand. The defendant asserts that his attorney was ineffective in not making a motion for mistrial when Mr. Cannon, a co-defendant who had pled guilty to the murders, was reluctant to answer all the questions posed on cross examination. The focused testimony appears at pages 1913 through 1970 of the transcript. In essence Mr. Cannon, in an odd display of behavior, declined to answer some questions by Victorino's counsel. No questions were asked by counsel for Hunter or Salas.

There were numerous objections and apparently three motions for mistrial during the testimony of Mr. Cannon, the motions for mistrial having been made by Mr. Salas' counsel. Those motions were denied and his conviction was affirmed. Salas v. State, 972 So.2d 941 (Fla. 5th DCA 2008), pet. cert. denied, 34 So.3rd 2 (Fla. 2010) The defendant now claims his lawyer was ineffective by failing to raise a contemporaneous motion for mistrial at the time he declined to answer several questions during the cross examination. As the State points out in its answer, these issues were extensively briefed and argued on direct appeal in State v. Victorino, 23 So.3d 87 (Fla. 2009) and State v. Hunter, 8 So. 3d 1052 (Fla. 2008), pet. cert. denied 129 S.Ct. 2005, 173 L.Ed.2d 1101 (2009). No error was found by the Supreme Court which specifically dealt with the issue.

Mr. Nielsen, Mr. Victorino's attorney, was frustrated when Mr. Cannon chose not to answer many, but not all of his questions. The court declared Mr. Cannon to be an adverse party to facilitate a proper examination by all parties.

At the evidentiary hearing Mr. Nielsen and Mr. Dowdy indicated that they thought a contemporaneous motion for mistrial had been made but an examination of the record clearly shows that they did not make such a contemporaneous motion. The record clearly indicates that Mr. Salas' counsel made a motion for mistrial on three occasions which was denied by the court. Counsel for Mr. Victorino indicated they thought they had and thought they should have made such a motion.

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

In analyzing this claim, the State urges that the defendant is merely attempting to re-litigate a previously decided substantive claim by couching it as ineffectiveness of counsel hearing. The court agrees with that proposition and concludes that such approach is not permissible and cannot serve to allow a defendant to get a second opportunity to re-litigate the same issue. Rodriguez v. State/McNeil, 39 So.3rd 275 (Fla. 2010); Taylor v. State/McNeil, 3 So.3rd 986 (Fla. 2009); Overton v. State/McDonough, 976 So.2d 536 (Fla. 2007). The defendant has not alleged nor proven deficient performance and he has not alleged adequate grounds for the court to conclude that had an objection been made a mistrial would be granted. [1]

The granting of a mistrial is reserved for severe circumstances and should only be granted when premised on an error that is so serious as to vitiate the entire

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

trial. Miller v. State, 42 So.3rd 204 (Fla. 2010). The mistrial must be so severe as to essentially deprive the defendant of a fair proceeding. Wade v. State, 41 So.3d 857 (Fla. 2010).

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

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

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

Mr. Cannon did not present that damaging testimony in that he really provided no new information that wasn't otherwise available through multiple sources based on the comprehensive presentation made by the State. In essence what he said was corroborated and duplicated by the combination of other witnesses and unchallenged forensic evidence including the DNA.

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

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

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

CLAIM 3. INEFFECTIVE ASSISTANCE OF COUNSEL FOR FAILING TO RAISE "CALLS FOR SPECULATION" OR "CALLS FOR OPINION OF A LAY WITNESS" OBJECTIONS TO QUESTIONS ELICITING TESTIMONY ABOUT WHAT CO-DEFENDANTS WERE THINKING.

Claim 3 asserts ineffective assistance of counsel for failing to make objections to information concerning the interaction of the defendants and others several days prior to the date of the murders. Brandon Graham, who was not involved in the murders, evidently participated at the time the decision was made to go forward with the confrontation which ultimately resulted in the murders of six victims. Graham testified that on Sunday, August 2, 2004, four days before the murders, he, Salas and Hunter all had a verbal confrontation with the soon-to-be victims in the front yard or porch of the Telford house. Apparently Mr. Victorino waited behind in the vehicle. It was part of Graham's testimony that Salas was involved in the confrontation and was "apparently trying to impress defendant Victorino." The defendant's complaint is that there was not an objection raised to that testimony. Another individual by the name of Christopher Craddock testified that he and Graham did not do anything when they were made aware of the plan to murder because they did not believe that the other co-defendants would actually go through with it. Again, the defendant raises speculation.

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

It is important to note in this case, which may not be obvious in the record, that Mr. Victorino is a towering man. He stands in the neighborhood of 6 feet 4 inches, has a very substantial build and carries himself in such a way to appear to be quite muscular. In contrast the other defendants are quite small in size compared to the stature of Mr. Victorino and just the mere observation of these

people together with the information provided concerning their style suggests that he might be someone they should be afraid of.

Again the standard of proof for the evaluation of this set of claims is that the defendant must establish that counsel's performance was deficient. Had there been an objection to the thought process of one of the co-defendants or other young men, it is likely it would have been sustained. The next question is whether the defendant has established that counsel's deficient performance prejudices the defendant.

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

CLAIM 4. INEFFECTIVE ASSISTANCE OF COUNSEL IN FAILING TO HIRE AND USE DEFENSE DNA AND BLOOD-SPATTER EXPERTS.

Claim 4 has been totally abandoned.

CLAIM 5. INEFFECTIVE ASSISTANCE OF COUNSEL IN FAILING TO OBJECT TO A STATEMENT IN THE STATE'S DNA EXPERT'S COMPUTER IMAGE PRESENTATION PROGRAM THAT "DNA HAS BEEN USED AND EXONERATES PERSONS WRONGLY CONVICTED ON DEATH ROW"

At the evidentiary hearing the trial attorneys for Mr. Victorino testified. Those were Jeff Dowdy and Mike Nielson with Mr. Dowdy being the lead counsel. Both men are extremely well qualified trial lawyers with a substantial number of cases having been concluded and tried in the criminal courts of this state including a large number of cases in which the State has sought the death penalty.

In this particular case both Mr. Dowdy and Mr. Nielsen indicated that they did not object to the presentation by the State's expert which included language to the effect that "DNA has been used to exonerate persons wrongfully convicted on death row." Their general testimony indicated that they both thought it was helpful information to the extent that it allowed the jury to recognize that people on death row had been wrongfully convicted. Both thought the information was helpful.

In this proceeding the burden calls upon the defendant to identify the specific acts or omissions that demonstrate counsel's performance was unreasonable under prevailing professional norms. Duest v. State, 12 So.3rd 734 (Fla. 2009). There was no evidence at all to support the claim that counsel's performance was unreasonable under any standard. In fact both experienced counsel thought the information was helpful and for that reason did not object. Neither of the prongs of the *Strickland* test has been established. Claim 5 presents no information to support the proposition that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable. See Kilgore v. State, 55 So.3rd 487 (Fla. 2010).

In addition, well informed strategic decisions are governed by the additional requirement as set out in Pittman v State. ____ So.3d ___, WL 2566325 (Fla. 2011) as follows:

> Several additional criteria apply to such claims. First, there is a strong presumption that counsel's performance was not ineffective. *See Strickland*, 466

U.S. at 689, 104 S.Ct. 2052 ("Judicial scrutiny of counsel's performance must be highly deferential."). Second, "[a] fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Id.* Third, the defendant must "overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.' " *Id.* (quoting *Michel v. Louisiana*, 350 U.S. 91, 101, 76 S.Ct. 158, 100 L.Ed. 83(1955)). Specifically, "strategic decisions do not constitute ineffective assistance of counsel if alternative courses have been considered and rejected and counsel's decision was reasonable under the norms of professional conduct." *Occhicone v. State*, 768 So.2d 1037, 1048 (Fla.2000).

In this case the attorneys employed a sound and thoughtful trial strategy which cannot form the basis of an ineffective claim. Claim 5 therefore fails.

CLAIM 6. INEFFECTIVE ASSISTANCE OF COUNSEL IN FAILING TO OBJECT TO PROSECUTOR STATEMENTS WHICH EFFECTIVELY ASKED THE JURORS TO IMAGINE WHAT THE VICTIMS FELT.

The basis for Claim 6 is an assertion that the prosecutor began the guilt phase closing argument by saying, " On . . . August 5 and 6, when the six people (victims) went to sleep in their house on Telford Lane in Deltona, they could not have imagined in their worst nightmares that two years later, 100 miles away, twelve strangers would get to look at the photographs of their broken, sometimes naked, bodies. And of the 16 people that have looked at them, 12 would ultimately decide who the killers were and perhaps what to do with them."

The defendant asserts that language equals a "Golden Rule" argument which is prohibited under Pagan v. State, 837 So.2d 792 (Fla. 2002) and Barnes v. State, 58 so.2d 157 (Fla. 1951).

There was no evidence presented at the evidentiary hearing and this claim turns on an interpretation of the language that was used. The law has been quite insistent over time that "Golden Rule" arguments, both in criminal and in civil cases, are inappropriate on the theory that they ask the jurors to put themselves in the victims' positions rather than to act as objective persons sifting, trying and evaluating the facts of the case.

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

CLAIM 7. INEFFECTIVE ASSISTANCE OF COUNSEL IN NOT OBJECTING TO PROSECUTORIAL REMARKS THAT AROUSED FEAR IN THE JURORS.

The defendant next asserts that the prosecutor's guilt phase argument where the prosecutor used an example of vicarious culpability by saying, ". . . a wife hires a hit man, hit man goes up to New York and kills husband. Wife is not present. Is she responsible? You better believe it. It is a good thing, too. Or life might not be as safe as it is." The defendant asserts that this is an impermissible

statement intended to arouse fear in the jurors which the defense counsel did not object to.

The court has reviewed the arguments and statements by the defendant and cannot conclude that an objection would have had any merit because there is no suggestion that the argument was designed to or in fact aroused fear in the jurors. It appears that neither of the *Strickland* prongs have been met. It also appears that, at least for this claim, this is a mere sidebar to the very substantial and meaningful evidence that was presented, considered and evaluated by the jury and in no way, even if had been objected to, could have caused prejudice.

CLAIM 8. INEFFECTIVE ASSISTANCE OF COUNSEL IN FAILING TO REBUT THE STATE'S ARGUMENT THAT THE DEFENDANTS ENTERED THE TELFORD HOUSE TO COMMIT THE CRIME OF ARMED BURGLARY.

The defendant asserts that the prosecutor argued during the guilt-phase closing, in support of the felony murder rule theory, that the defendant and co-defendant entered the Telford house to commit armed burglary. The defendant asserts that trial counsel gave no rebuttal to this claim in their own guilt-phase closing argument.

The claim does not assert any meaningful violation of either prong of the *Strickland* test. The court is unable to understand why the defendant can even postulate a change in outcome because the purpose of Mr. Victorino's trip to the Telford house was different than that argued. If he was going to pick up his stolen property he nonetheless was found guilty of committing the six murders and the court is struck that it would be baseless to try to suggest that such a minor differential in the purpose for his being there would somehow change anyone's thinking on the case. Neither of the prongs of the *Strickland* case has been established and Claim 8 fails. In addition it is obviously sound trial strategy not to make such trivial arguments in such a serious case. Specifically, "strategic decisions do not constitute ineffective assistance of counsel if alternative courses have been considered and rejected and counsel's decision was reasonable under the

norms of professional conduct." Occhicone v. State, 768 So.2d 1037, 1048 (Fla.2000). It is difficult to fathom that a noble purpose for Mr. Victorino's visit to the Telford property could even be effectively argued without conceding his alibi defense was manufactured. Claim 8 must fail.

CLAIM 9. INEFFECTIVE ASSISTANCE OF COUNSEL FOR ADMITTING THAT THE "PROSECUTION HAS DONE A WONDERFUL JOB HERE" DURING GUILT-PHASE CLOSING ARGUMENT.

Similar to Claim 5 the only evidence presented came from Jeff Dowdy and Mike Nielsen who were Mr. Victorino's trial counsel. Neither indicated that they were troubled by the fact that a statement was made that "the prosecution has done a wonderful job here" during the guilt phase closing argument. Both indicated that is a normal practice and it admits nothing other than the obvious and allows them to use that as a platform and then branch out and show what the State has missed or overlooked. There was no contrary testimony on that point.

Again, in this proceeding the burden of proof calls on the defendant to identify the specific acts or omissions that demonstrate counsel's performance was unreasonable on a prevailing professional norm. *Duest,* id. There is no evidence to demonstrate that Claim 9 constitutes any unreasonable conduct on counsel's part. As a result neither prong of the *Strickland* test has been established and Claim 9 must fail. In addition, as stated in Claim 8, "strategic decisions do not constitute ineffective assistance of counsel if alternative courses have been considered and rejected and counsel's decision was reasonable under the norms of professional conduct." Occhicone v. State, 768 So.2d 1037, 1048 (Fla. 2000). Mr. Victorino's attorneys declined to object based on sound trial strategy so that an ineffective claim cannot be made.

CLAIM 10. INEFFECTIVE ASSISTANCE OF COUNSEL IN FAILING TO OBJECT TO IMPROPER VICTIM IMPACT EVIDENCE.

Claim 10 asserts ineffective assistance of counsel in failing to object to emotional "grief" and "mourning" testimony of the deceased victims' relatives and friends. The State takes the position that failure to make an objection to improper evidence "renders the claim procedurally barred absent fundamental error." McGirth v. State, 48 So.3d 777 (Fla. 2010). The court has reviewed the proposition asserted by the defendant and finds that none of that evidence is of the type of evidence that is impermissible under Payne v. Tennessee, 501 U.S. 808 (1991). Wheeler v. State, 47 So.3d 599 (Fla. 2009); Huggins v. State, 889 So.2d 743 (Fla. 2004); Forina v. State, 801 So.2d 44 (Fla. 2001). Since none of the evidence is improper, counsel cannot be faulted for "failing" to object. Neither of the *Strickland* prongs can be established by this claim.

The introduction of victim impact evidence is allowed both constitutionally and procedurally in capital cases. The evidence does not bear on the actual issues decided by the jury but is nonetheless allowed. In this particular case there were six young people who were victims of these violent murders. The testimony presented and allowed by the court was well constrained consistent with the court's responsibility. Any further objection would have been to no avail and, therefore, the *Strickland* test cannot be met and Claim 10 fails.

CLAIM 11. INEFFECTIVE ASSISTANCE OF COUNSEL IN FAILING TO EVALUATE ALIBI WITNESSES AND IN PRESENTING AN UNBELIEVABLE AND DAMAGING ALIBI DEFENSE.

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

Both of the attorneys indicated that the alibi witnesses were vetted by their team which included experienced private investigators and the alibi defense

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

"A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Strickland*, 466 U.S. at 689, 104 S.Ct. 2052. The defendant carries the burden to "overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.' " *Id.* (quoting Michel v. Louisiana, 350 U.S. 91, 101, 76 S.Ct. 158, 100 L.Ed. 83 (1955)). "Judicial scrutiny of counsel's performance must be highly deferential." *Id.* In Occhicone v. State, 768 So.2d 1037, 1048 (Fla.2000), this Court held that "strategic decisions do not constitute ineffective assistance of counsel if alternative courses have been considered and rejected and counsel's decision was reasonable under the norms of professional conduct."

It was only at the trial that the State was able to destroy the alibi witnesses and any remnant of the alibi defense associated with Mr. Victorino wearing the boots. A very interesting piece of evidence presented at the trial in this case involved a surveillance camera at the 7/Eleven convenience store shortly before the murders occurred. Mr. Victorino is seen standing in front of the counter of the 7/Eleven store. The surveillance tapes focused on the counter area so the transactions and activities involving the cash register can be captured. For some reason, peculiar to this case, Mr. Victorino is seen bending his leg so that the sole of his boot shows in the tape. That photograph with the sole of his shoe showing was blown up and made an exhibit by the State at the time of trial. The picture of the sole of the shoe with Mr. Victorino wearing them so close in time to the murders appears to be a very persuasive fact in attacking his alibi defense. That fact, along with the fact that Mr. Victorino cherished the shoes and kept the Lutz

boot shoe box as the container for his important papers suggested that Mr. Victorino would not easily part with the shoes that he was so fond of.

Again, the burden of demonstrating counsel's performance was unreasonable under prevailing norms has not been met. The defendant must show that counsel's errors must be "so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Strickland,* id. In this case the lawyers clearly did what they could do test the alibi defense. When confronted with a difficult fact scenario involving the DNA evidence, they confronted Mr. Victorino. He insisted that he did not commit the murders, was not present and wanted the alibi defense to move forward. There is no evidence that either prong of *Strickland* has been met and there is no showing as to this claim that there has been a breakdown in the adversary process that renders the result unreliable. Kilmore v. State, id. Therefore Claim 11 fails.

CLAIM 12. INEFFECTIVE ASSISTANCE OF COUNSEL IN FAILING TO OBJECT TO GRUESOME PHOTOGRAPHS.

The ineffective assistance claim involves an assertion that counsel failed to object to gruesome photographs. This court, having been required to spend half a day in a sealed room with all the exhibits in contemplation of the appropriate decision regarding the death penalty, has examined all of the photographs that were introduced at time of trial in great detail. The court has also examined a large number of very gruesome photographs that did not come into evidence.

In the context of this case, the State did not stipulate as to the cause or manner of death for the six people that were murdered at the Telford house. Mr. Victorino, Mr. Hunter, Mr. Salas and Mr. Cannon entered the Telford house and unmercifully beat the six young victims to death causing them horrifying injuries and ultimately death. The entire house was ravaged with bodies in different states of destruction and there was blood splatter on the floors, walls and ceilings of the home.

There were ten people in the home at the time of these murders. Six of them are dead and cannot speak. Three of the defendants were on trial for the

murders. Mr. Cannon had pled to the murders and was called to the witness stand by the State obviously to be the commentator on what happened within the four walls of that house while the murders were taking place. To the benefit of each of the defendants on trial, Mr. Cannon was reluctant in providing much of the detail that had been expected from him which left the jury only the forensic evidence and views of the scene to piece together who did what to whom. The State had a right to prove its case with as much detail as is necessary without exposing the defendant to unreasonably gruesome photographs that would have no other reasonable purpose. These were gruesome murders, which is a fact of life. It would be hard to conclude that any juror was surprised by what they saw.

This court, greatly concerned with this issue, entertained pretrial hearings on motions in limine and preliminary matters. The court only allowed a small number of photographs but carefully tried to avoid any unnecessary duplication for exactly the reasons that were raised. The defense attorneys were active participants in that enterprise where in fact they discharged their duty in limiting the photographic evidence the State otherwise wanted to have. If the evidence had been any more limited the State, which also had a right to a fair trial, would not have had an opportunity to adequately prove its case.

There has been absolutely no showing that counsel for the defendant could have raised any objections that would have been sustained in light of the history and details of this case. There is absolutely no showing that counsel's performance as unreasonable under prevailing professional norms. *Duest*, id. Neither prong of the *Strickland* case has been established and Claim 12 has not been established.

CLAIM 13. NEW EVIDENCE AND BRADY AND GIGLIO VIOLATIONS REGARDING EVIDENCE OF CONTAMINATION AT FDLE CRIME LAB.

This claim has been abandoned.

CLAIM 14. INEFFECTIVE ASSISTANCE OF COUNSEL IN FAILING TO INVESTIGATE AND PRESENT THE MITIGATION TESTIMONY OF MINDY L. POULIOT AND DORONA EDWARDS. (Labeled in Motion as letter "O")

This claim as to Mindy L. Pouliot has been abandoned. At the evidentiary hearing the defendant presented testimony from Dorona Edwards who is the defendant's cousin. Apparently she moved to Florida in 1984 and saw Mr. Victorino once or twice a month. She had very young children and testified that she had no hesitation with having her children around Mr. Victorino.

On cross examination she indicated that she never knew anything about his history as a multiple convicted felon other than the fact that he had been to prison. She seemed to have some knowledge that Mr. Victorino had an abusive father at one point in time but indicated that he was a perfect gentleman around she and her children. On that very limited evidence that Mr. Victorino asserts that calling Dorona Edwards would have changed the outcome of the case.

Trial counsel Jeff Dowdy and Mike Nielsen testified that they didn't have a direct memory of Mrs. Edwards. They did indicate that they interviewed a large number of people who they thought might be of assistance as witnesses in mitigation. After screening this large number of witnesses, they made some decisions to call only those that they interviewed and had conversations with. In that screening apparently Mrs. Edwards was not included in the list of witnesses to be used. When confronted with the nature of her testimony, trial counsel's conclusion was that her testimony would merely be cumulative.

"Penalty phase prejudice under the *Strickland* standard is measured by whether the error of trial counsel undermines this Court's confidence in the sentence of death when viewed in the context of the penalty phase evidence and the mitigators and aggravators found by the trial court." Stewart v. State, 37 So.3d 243, 253 (Fla.2010) (quoting Hurst v. State, 18 So.3d 975, 1013 (Fla.2009)). That standard does not "require a defendant to show 'that counsel's deficient conduct more likely than not altered the outcome' of his penalty proceeding, but rather that he establish 'a probability sufficient to undermine confidence in [that] outcome.' "

Porter v. McCollum, —— U.S. ——, 130 S.Ct. 447, 455–56, 175 L.Ed.2d 398 (2009) (alteration in original) (quoting *Strickland*, 466 U.S. at 693–94, 104 S.Ct. 2052). "To assess that probability, [the Court] consider[s] 'the totality of the available mitigation evidence ...' and 'reweigh[s] it against the evidence in aggravation.' " Id. at 453–54 (quoting Williams v. Taylor, 529 U.S. 362, 397–98, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000) This language is quoted from Hillwin v. State, ____ So.3rd ____, WL 2149987 (Fla. 2011)

Again, there has been no showing that in regard to remaining portion of claim 14 that demonstrates counsel's performance was unreasonable under prevailing professional norms. *Duest,* id. Based on the testimony that Dorona Edwards gave at the time of the hearing, she was certainly something less than persuasive. The idea that this woman would leave her young children with Mr. Victorino who had been convicted of multiple felonies and had been to prison is hard to imagine. The fact that this defendant was a gentleman to her children seems like such a petty suggestion to be used in an effort to mitigate the destruction and murder of six human beings. Neither the unreasonable performance prong nor the prejudice prong is met by the testimony of Dorona Edwards and, therefore, Claim No. 14 is without merit.

CLAIM 15. INEFFECTIVE ASSISTANCE OF COUNSEL DUE TO CUMULATIVE ERRORS OF COUNSEL.

In Claim 15 Mr. Victorino alleges that the cumulative effect of errors in this case warrants relief. Because each of the claims of error fail individually, however, he is entitled to no relief for cumulative error. Shoenwetter v. State, 46 So.3rd 545 (Fla. 2010).

CLAIM 16. INEFFECTIVE ASSISTANCE OF COUNSEL IN FAILING TO OBJECT TO STATE ARGUMENT INDICATING THAT THE STATE PRE-SCREENS CASES AND ONLY PROSECUTES PEOPLE WHO ARE TRULY GUILTY.

The defendant asserts that during the guilt-phase closing argument, the prosecutor told the jurors, ". . . I guess some people say we really threw the book at these guys and did everything we could to charge them with everything we could, and let me say this, that is the decision that we make, but we are very careful what we do." Later in the same argument the prosecutor argued that "As to Michelle and Nathan, we said by a baseball or blunt object and/or a knife or sharp instrument. It turns out that was true when you heard the rest of the story. So we are very careful about what we charge. We didn't charge . . ."

Apparently an objection was made by the attorney for the co-defendant Salas but no objection by the others. Again the information in this statement by the prosecutor does not strike the court as anything that would have required an objection to be sustained and that the argument made within the context of the massive amount of information and details in the case seems to be perfectly within the range of acceptable comment. In any case, even if improper, the argument would never reach the threshold of prejudice to the defendant. As a result neither prong of the *Strickland* test has been met as to Claim 16.

CLAIM 17. DEFENDANT'S DEATH SENTENCES ARE ILLEGAL UNDER RING V. ARIZONA.

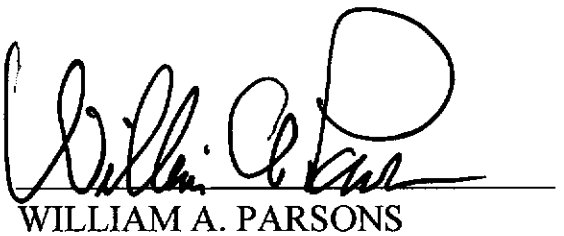
In Victorino v. State, 23 So.3rd 87 (Fla. 2009), the Supreme Court dealt with the claim that the death sentences are illegal under Ring v. Arizona. Likewise in Hunter v. State, 8 So.3rd 1052 (Fla. 2008), the Supreme Court ruled on the Ring v. Arizona claims. The Supreme Court indicated that Ring does not apply to cases that include the prior violent felony aggravator, the prior capital felony aggravator or the under-sentence-imprisonment aggravator, and Mr. Victorino's case includes all three. The court concluded in both Mr. Victorino's case and Mr. Hunter's case that they are not entitled to relief based on a Ring challenge and in this case the defendant is merely trying to re-litigate issues previously raised and resolved. Claim 17 fails.

CONCLUSION

Based on the foregoing factual findings and legal analysis the Court has concluded that the defendant has failed to carry the burden imposed by Strictland v. Washington, id. in regard to any of his claims. It is therefore.

ORDERED AND ADJUDGED that the defendant's Initial Motion for Post Conviction Relief as well as the Defendant's Amended Motion for Post Conviction Relief be and the same are hereby denied.

DONE AND ORDERED in Chambers at Daytona Beach, Volusia County, Florida, this 30th day of January, 2012.



WILLIAM A. PARSONS
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