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APPENDIX A

FLORIDA SUPREME COURT AND CIRCUIT COURT OF APPEALS OPINIONS

APPENDIX 1

525 So.2d 833, 13 Fla. L. Weekly 349
(Cite as: 525 So.2d 833)

Supreme Court of Florida.
Martin GROSSMAN, Appellant,
v.
STATE of Florida, Appellee.
No. 68096.

Feb. 18, 1988.
Rehearing Denied May 25, 1988.

Defendant was convicted in the Circuit Court, Pinellas County, Crockett Farnell, J., of first-degree murder and was sentenced to death, and he appealed. The Supreme Court held that: (1) admission of codefendant's statement with instructions that it could be used only against codefendant was harmless error; (2) judge was sentencing authority and jury's sentencing role was not unconstitutionally denigrated by State; (3) while sentence would not be overturned because trial judge did not enter his written findings until three months after oral sentencing of defendant, new procedural rule would be adopted that all written orders imposing death sentence be prepared prior to oral pronouncement of sentence for filing concurrent with pronouncement; and (4) provisions of statute were invalid insofar as they permitted introduction of victim impact evidence as aggravating factor in death sentencing.

Affirmed.

Shaw, J., concurred specially with opinion.

Kogan, J., concurred in result only.

Barkett, J., concurred in part and dissented in part with opinion.

West Headnotes

[1] Criminal Law 110 ⚿605

110 Criminal Law
110XIX Continuance
110k602 Application and Affidavits for Continuance
110k605 k. Time for Making. Most Cited Cases

Criminal Law 110 ⚿614(1)

110 Criminal Law
110XIX Continuance
110k614 Second or Further Continuance
110k614(1) k. In General. Most Cited Cases
Trial court could deny first-degree murder defendant's request for continuance, filed four days prior to trial, where defendant had been granted two prior continuances and cocounsel had been appointed to assist counsel in trial preparation.

[2] Criminal Law 110 ⚿1166.6

110 Criminal Law
110XXIV Review
110XXIV(Q) Harmless and Reversible Error
110k1166.5 Conduct of Trial in General
110k1166.6 k. In General. Most Cited Cases
(Formerly 110k1166.11(1))
Release of evidentiary videotape during course of trial was not prejudicial, absent evidence that jury violated its oath and court instructions not to watch or read news coverage of trial; such violations would not be assumed.

[3] Privileged Communications and Confidentiality 311H ⚿366

311H Privileged Communications and Confidentiality
311HVI Public Officers and Records
311Hk366 k. Personnel Files. Most Cited Cases
(Formerly 410k16)
Subpoena duces tecum for slain officer's personnel file was properly denied; file was public record, and defendant refused to particularize request as to specific information desired despite court's invitation to do so.

[4] Homicide 203 ⚿954

203 Homicide
203IX Evidence

203IX(D) Admissibility in General
203k953 Circumstances Preceding Act
203k954 k. In General. Most Cited Cases
(Formerly 203k169(1))
Evidence of slain officer's movements and conduct in issuing citation to uninvolved person minutes before officer was murdered was relevant and admissible in murder prosecution.

[5] Criminal Law 110 ⚿371(12)

110 Criminal Law
110XVII Evidence
110XVII(F) Other Offenses
110k371 Acts Showing Intent or Malice or Motive
110k371(12) k. Motive. Most Cited Cases
Evidence of defendant's prior burglary during which he obtained handgun and of other crimes for which defendant was on probation was admissible in prosecution for first-degree murder of officer; that evidence was relevant to defendant's motive in killing officer when she apprehended him and seized weapon.

[6] Criminal Law 110 ⚿369.2(4)

110 Criminal Law
110XVII Evidence
110XVII(F) Other Offenses
110k369 Other Offenses as Evidence of Offense Charged in General
110k369.2 Evidence Relevant to Offense, Also Relating to Other Offenses in General
110k369.2(3) Particular Offenses, Prosecutions for
110k369.2(4) k. Assault, Homicide, Abortion and Kidnapping. Most Cited Cases
Evidence of defendant's threats to kill his housemate was admissible in prosecution for officer's murder; threat was relevant to housemate's motivation in notifying police after defendant recounted story of killing to him.

[7] Homicide 203 ⚿1016

203 Homicide
203IX Evidence
203IX(D) Admissibility in General
203k1012 Subsequent Incriminating or Exculpatory Circumstances
203k1016 k. Statements by Accused. Most Cited Cases
(Formerly 203k174(8))

Homicide 203 ⚿1029

203 Homicide
203IX Evidence
203IX(D) Admissibility in General
203k1012 Subsequent Incriminating or Exculpatory Circumstances
203k1029 k. Suppression or Destruction of Evidence. Most Cited Cases
(Formerly 203k174(8))
Evidence of defendant's orders to his housemate to bury handguns was admissible in prosecution for murder of officer with one of those guns; orders indicated defendant's consciousness of guilt and enabled jury to follow path of weapons from murder scene to courtroom.

[8] Criminal Law 110 ⚿438(6)

110 Criminal Law
110XVII Evidence
110XVII(P) Documentary Evidence
110k431 Private Writings and Publications
110k438 Photographs and Other Pictures
110k438(5) Depiction of Injuries or Dead Bodies
110k438(6) k. Purpose of Admission. Most Cited Cases
Photographs of murder victim at crime scene and of victim's head at autopsy were relevant evidence of method and cause of death and, given nature of subject, were not unnecessarily gruesome.

[9] Homicide 203 ⚿1413

203 Homicide
203XII Instructions
203XII(B) Sufficiency
203k1408 Killing in Commission of or with Intent to Commit Other Unlawful Act
203k1413 k. Burglary or Trespass. Most Cited Cases
(Formerly 203k289)

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Homicide 203 ⚿1416

203 Homicide
203XII Instructions
203XII(B) Sufficiency
203k1408 Killing in Commission of or with Intent to Commit Other Unlawful Act
203k1416 k. Escape. Most Cited Cases
(Formerly 203k289)

Homicide 203 ⚿1421

203 Homicide
203XII Instructions
203XII(B) Sufficiency
203k1408 Killing in Commission of or with Intent to Commit Other Unlawful Act
203k1421 k. Robbery. Most Cited Cases
(Formerly 203k289)
Felony-murder instructions based on burglary, robbery, and escape were supported by evidence that defendant charged with murder of officer was committing probation violation with handgun taken during burglary of home when he was apprehended by victim and that victim had taken possession of defendant's handgun and driver's license.

[10] Homicide 203 ⚿1143

203 Homicide
203IX Evidence
203IX(G) Weight and Sufficiency
203k1138 First Degree, Capital, or Aggravated Murder
203k1143 k. Deliberation and Premeditation. Most Cited Cases
(Formerly 203k253(3))
First-degree murder conviction was supported by evidence that defendant fired officer's weapon into back of her head during struggle after being apprehended while committing probation violation; jury could believe that murder was premeditated, as mere assault on officer and repossession of items she had taken from him would not have satisfied defendant's fear of going back to prison for probation violation and would only have worsened his situation.

[11] Criminal Law 110 ⚿528

110 Criminal Law
110XVII Evidence
110XVII(T) Confessions
110k528 k. Codefendants and Accomplices. Most Cited Cases
Admission during joint murder trial of codefendant's interlocking confession with instruction that it could not be used against defendant was error. U.S.C.A. Const.Amend. 6.

[12] Criminal Law 110 ⚿1169.7

110 Criminal Law
110XXIV Review
110XXIV(Q) Harmless and Reversible Error
110k1169 Admission of Evidence
110k1169.7 k. Acts, Declarations, and Admissions of Accomplices and Codefendants. Most Cited Cases
Error from admission during joint murder trial of codefendant's interlocking confession with instruction that it not be considered against defendant was harmless under facts and circumstances; that statement interlocked with and was fully consistent in all significant aspects with other statements made by defendant that were directly admissible against him and bore sufficient indicia of reliability. U.S.C.A. Const.Amend. 6.

[13] Criminal Law 110 ⚿749

110 Criminal Law
110XX Trial
110XX(F) Province of Court and Jury in General
110k733 Questions of Law or of Fact
110k749 k. Extent of Punishment. Most Cited Cases
In Florida, judge is the sentencing authority and jury's role is merely advisory.

[14] Sentencing and Punishment 350H ⚿1780(3)

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(G) Proceedings
350HVIII(G)3 Hearing
350Hk1780 Conduct of Hearing
350Hk1780(3) k. Instructions. Most

Cited Cases
(Formerly 203k311)
Failure to instruct jury as to great weight that would be given its advisory recommendation on life imprisonment or death penalty in murder prosecution was not so misleading as to amount to unconstitutional denigration; judge was required to make independent determination of sentence based on aggravating and mitigating factors notwithstanding jury's recommendation.

[15] Sentencing and Punishment 350H 1681

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(D) Factors Related to Offense
350Hk1681 k. Killing While Committing Other Offense or in Course of Criminal Conduct. Most Cited Cases
(Formerly 203k357(8), 203k354)

Sentencing and Punishment 350H 1682

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(D) Factors Related to Offense
350Hk1682 k. Escape or Other Obstruction of Justice. Most Cited Cases
(Formerly 203k357(8), 203k354)

Sentencing and Punishment 350H 1684

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(D) Factors Related to Offense
350Hk1684 k. Vileness, Heinousness, or Atrocity. Most Cited Cases
(Formerly 203k357(8), 203k354)
Death sentence for first-degree murder of wildlife officer, based on finding of aggravating circumstances that murder was committed while engaged in commission of or attempt to commit or flight after committing or attempting to commit crime of robbery or burglary, was committed for purpose of avoiding or preventing lawful arrest, was committed to disrupt or hinder lawful exercise of government function or enforcement of laws, and was especially wicked, evil, atrocious, or cruel, was supported by evidence that defendant struck officer, who apprehended him during commission of probation violation, 20 to 30 times with heavy duty flashlight before shooting her with her own weapon.

[16] Sentencing and Punishment 350H 1787

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(G) Proceedings
350HVIII(G)4 Determination and Disposition
350Hk1787 k. Decision, and Order or Judgment. Most Cited Cases
(Formerly 110k1208.1(6))
While death sentence in first-degree murder prosecution would not be overturned because trial judge did not enter written findings until three months after oral sentencing, procedural rule would become effective 30 days after finality of decision, requiring all written orders imposing death sentence to be prepared prior to oral pronouncement of sentence for filing concurrent with that pronouncement. West's F.S.A. Const. Art. 5, § 2(a).

[17] Sentencing and Punishment 350H 1626

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(A) In General
350Hk1622 Validity of Statute or Regulatory Provision
350Hk1626 k. Procedure. Most Cited Cases
(Formerly 203k351)
Provisions of statute permitting next of kin of homicide victim to either appear before court or to submit written statement under oath for consideration of sentencing court prior to sentencing of defendant convicted of homicide are invalid, insofar as they permit introduction of victim impact evidence as aggravating factor in death sentencing. West's F.S.A. §§ 921.141, 921.143(2).

[18] Criminal Law 110 1036.1(1)

110 Criminal Law
110XXIV Review
110XXIV(E) Presentation and Reservation in Lower Court of Grounds of Review
110XXIV(E)1 In General
110k1036 Evidence

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110k1036.1 In General
110k1036.1(1) k. Objections to Evidence in General. Most Cited Cases
(Formerly 203k325)
Defendant convicted of homicide was procedurally barred from seeking relief from admission of victim impact evidence by his failure to object to introduction thereof. West's F.S.A. § 921.141.

[19] **Criminal Law 110 ⚿1177.3(2)**

110 Criminal Law
110XXIV Review
110XXIV(Q) Harmless and Reversible Error
110k1177.3 Sentencing and Punishment
110k1177.3(2) k. Sentencing Proceedings in General. Most Cited Cases
(Formerly 110k1177)
Erroneous introduction of victim impact evidence is subject to harmless error analysis on case-by-case basis.

[20] **Sentencing and Punishment 350H ⚿1789(9)**

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(G) Proceedings
350HVIII(G)4 Determination and Disposition
350Hk1789 Review of Proceedings to Impose Death Sentence
350Hk1789(9) k. Harmless and Reversible Error. Most Cited Cases
(Formerly 203k343)
Erroneous receipt of victim impact evidence in capital murder case was harmless, as death penalty would have been imposed in absence of that evidence; sentencing judge's written findings showed no reliance on that evidence, and jury recommended death by twelve to zero vote based on evidence of statutory aggravating circumstances only. West's F.S.A. § 921.141.

[21] **Sentencing and Punishment 350H ⚿1784(2)**

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(G) Proceedings
350HVIII(G)4 Determination and Disposition
350Hk1784 Verdict or Recommendation of Jury
350Hk1784(2) k. Effect of Recommendation. Most Cited Cases
(Formerly 110k992)
Jury recommendation of death, reflecting conscience of the community, is entitled to great weight.

***835** Elizabeth G. Mansfield of the Law Office of Gary A. Carnal, St. Petersburg, for appellant.

Robert A. Butterworth, Atty. Gen. and Lauren Hafner Sewell, Asst. Atty. Gen., Tampa, for appellee.

PER CURIAM.

Appellant Martin Grossman appeals his conviction for first-degree murder and his sentence of death. We have jurisdiction. Art. V, § 3(b)(1), Fla. Const. We affirm the conviction and sentence.

The facts surrounding the case are as follows. Appellant and a companion, Taylor, drove to a wooded area of Pinellas County on the night of December 13, 1984, to shoot a handgun which appellant had recently obtained by burglarizing a home. Appellant lived in neighboring Pasco County at his mother's home and was on probation following a recent prison term. Wildlife Officer Margaret Park, patrolling the area in her vehicle, came upon the two men and became suspicious. She left her vehicle with the motor, lights, and flashers on, and took possession of appellant's weapon and driver's license. Appellant pleaded with her not to turn him in as having a weapon in his possession and being outside of Pasco County would cause him to return to prison for violation of probation. Officer Park refused the plea, opened the driver's door to her vehicle and picked up the radio microphone to call the sheriff's office. Appellant then grabbed the officer's large flashlight and struck her repeatedly on the head and shoulders, forcing her upper body into the vehicle. Officer Park reported "I'm hit" over the radio and screamed. Appellant continued the attack, and called for help from Taylor, who joined in the assault. Officer Park managed to draw her weapon, a .357 magnum, and fired a wild shot within the vehicle. Simultaneously, she temporarily disabled Taylor by kicking him in the groin. Appellant, who is a large man, wrestled the officer's weapon away and fired a fatal shot into the back of her head. The spent slug exited her head in front and fell into a drinking cup

inside the vehicle. Blood stains, high velocity splatters, the location of the spent slug, and the entry and exit wounds show that the victim's upper body was inside the vehicle with her face turned inward or downward at the moment she was killed. Appellant and Taylor took back the seized handgun and driver's license, and fled with the officer's weapon. They returned to the Grossman home, where they told the story of the killing, individually and collectively, to a friend who lived with the Grossmans. The friend, Brian Hancock, and Taylor buried the two weapons nearby. Appellant, who was covered with blood, attempted unsuccessfully to burn his clothes and shoes which Taylor later disposed of in a nearby lake. Approximately a week later appellant and Taylor, individually and collectively, recounted the story of the murder to another friend, Brian Allan. Approximately eleven days after the murder, Hancock told his story to the police and appellant and Taylor were arrested. Taylor, upon his arrest, recounted the story of the murder to a policeman and, later, appellant told the story to a jailmate, Charles Brewer. Appellant and Taylor were tried jointly over appellant's objection. At trial, the state introduced the ***836** testimony of Hancock, Allan, and Brewer against appellant. The state also introduced Taylor's statement to the policeman against Taylor only. In addition, the state introduced the charred shoes, the two weapons, prints taken from the victim's vehicle, testimony from a neighbor who observed the attempted burning of the clothes, appellant's efforts to clean the Grossman van, and the changing of the van tires. Expert testimony as to the cause of death and the significance of blood splatter evidence was also introduced by the state. The jury was instructed that Taylor's admissions to the policeman could only be used against him, not appellant. The jury was instructed on premeditation and felony murder based on robbery, burglary, and escape. A general verdict of first-degree murder was returned against the appellant and Taylor was found guilty of third-degree murder. The judge followed the jury's twelve-to-zero recommendation that the appellant be sentenced to death.

Appellant raises eighteen issues for our consideration: (1) did the trial court err in permitting the introduction of codefendant Taylor's statement in a joint trial with instructions that the statement could only be used against Taylor, not appellant; (2) did the court err in refusing to suppress items found in a warrantless search of the Grossman residence and cars in the residence garage; (3) did the state and court violate *Caldwell v. Mississippi*, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985), by denigrating the importance of the jury recommendation of life or death and by failing to give a requested instruction on the weight to be given to the jury recommendation; (4) did the court err in denying a request for a continuance; (5) did the court err in failing to exclude television cameras from the courtroom and in releasing an evidentiary videotape during the course of the trial; (6) did the court err in denying a subpoena duces tecum for Officer Park's personnel file and in permitting evidence at trial of Officer Park's demeanor and conduct just prior to the murder; (7) did the court err in permitting evidence of appellant's prior burglary during which he obtained a handgun, of other crimes for which appellant was on probation, of appellant's threats to kill Hancock, and of appellant's orders to Hancock to bury the two handguns; (8) did the court err in permitting introduction of a photograph of the victim at the crime scene and of photographs of the victim's head at the autopsy; (9) did the court err in permitting introduction of the shoes and T-shirt recovered from the lake; (10) did the court err in permitting expert testimony on blood splatter evidence; (11) did the court err in instructing the jury on burglary, robbery, and escape as underlying felonies to felony murder; (12) was the evidence sufficient to support the conviction; (13) did the court err in refusing to give a jury instruction that an accomplice's testimony should be received with great caution; (14) did the court err in refusing to give requested penalty phase instructions; (15) did the court err in finding four aggravating factors and no mitigating factors; (16) did the court commit reversible error by failing to enter written findings on the death sentence before the notice of appeal had been filed; (17) is Florida's death penalty unconstitutional on its face and as applied; and (18) was reversible error committed in permitting family members to testify before the sentencing judge on the impact of the murder on the next-of-kin.

[1][2][3][4][5][6][7][8][9][10] We address first those issues which merit only brief comment. On Issue 2, the search in question was conducted with the permission of the homeowner, Mrs. Grossman. Moreover, none of the items seized were introduced into evidence. On Issue 4, appellant had been granted two prior continuances and co-counsel had been appointed to assist counsel in trial preparation. We see no abuse of discretion in denying the third request for a continuance which was filed four days prior to trial. On Issue 5, there is no evidence that the cameras affected

the trial and we see no abuse of discretion in denying the motion to exclude the cameras. *Maxwell v. State*, 443 So.2d 967 (Fla.1983); *State v. Green*, 395 So.2d 532 (Fla.1981); *In Re Post-Newsweek Stations, Florida, Inc.*, 370 So.2d 764 (Fla.1979). Similarly, the release of the evidentiary videotape could only be prejudicial*837 if we assume that the jury violated its oath and the court instructions not to watch or read news coverage of the trial. We decline to indulge in such an assumption. *In Re Post-Newsweek*, 370 So.2d at 777. On Issue 6, the personnel record in question was a public record available to appellant and the court invited appellant to submit a more limited subpoena addressed to the specific information desired. Appellant refused to particularize his request. We find no error. As to the evidence of Officer Park's demeanor and the conduct just prior to the murder, Officer Park's movements and conduct in issuing a citation to an uninvolved person minutes before the officer was murdered was relevant evidence which the jury was entitled to hear. On Issue 7, the fact that appellant was on probation for previous crimes and that the theft of a gun violated his probation was relevant to his motive in killing Officer Park when she apprehended him and seized the weapon. The threat to Hancock's life was relevant to Hancock's motivation in notifying the police. The orders to bury the guns indicated a consciousness of guilt and enabled the jury to follow the path of the weapons from the murder scene to the courtroom. On Issue 8, the photographs of the crime scene and the victim's head were relevant evidence of the method and cause of death. Given the nature of the subject, they are not unnecessarily gruesome; relevancy is the test. *Foster v. State*, 369 So.2d 928, 930 (Fla.), *cert. denied*,444 U.S. 885, 100 S.Ct. 178, 62 L.Ed.2d 116 (1979). On Issue 9, the T-shirt was not admitted in evidence. On the question of whether the sneakers admitted into evidence belonged to appellant, the sneakers were partially burned and the jury was presented evidence of their attempted destruction, disposition, and recovery. Whether they belonged to appellant was a jury question. On Issue 10, the expert witness was qualified as a blood splatter expert. We are satisfied that he was qualified and performed sufficient analysis to opine that the splatters were from a high velocity weapon, and that the victim's mortal wound was inflicted inside the vehicle. On Issue 11, there was evidence to support felony murder instructions based on burglary, robbery, and escape. The jury could have believed that the murder was motivated by a desire to escape from custody and to take back from the officer by force the handgun and driver's license. Moreover, the evidence suggests that the victim was beaten or wrestled into the vehicle. On Issue 12, appellant asserts there was insufficient evidence to prove first-degree murder on either a felony murder or premeditation theory. We disagree. There was sufficient evidence to support either or both theories. On premeditation, appellant's fear of going back to prison for violation of probation would not have been satisfied by beating the officer into submission and taking back the handgun and driver's license. Indeed, the assault on the officer only worsened his situation as she could have identified him as her assailant and his vehicle. On the evidence, the jury was entitled to believe that the murder was premeditated. *Roberts v. State*, 510 So.2d 885 (Fla.1987); *Wilson v. State*, 493 So.2d 1019, 1021 (Fla.1986); *Preston v. State*, 444 So.2d 939, 944 (Fla.1984). The argument that appellant makes here, that he merely panicked and killed the officer out of fear, is the same argument he made to the jury and which it rejected. We are satisfied that the evidence was legally sufficient to support the convictions. *Tibbs v. State*, 397 So.2d 1120 (Fla.1981), *aff'd*, 457 U.S. 31, 102 S.Ct. 502, 70 L.Ed.2d 378 (1982). On Issue 13, appellant urges that the jury should have been instructed that witness Hancock was an accomplice and that his testimony should be received with great caution. Hancock was not an accomplice to the murder for which appellant was being tried. The standard jury instructions on witness credibility and the jury's prerogative to believe or disbelieve witnesses adequately covers Hancock's status. On Issue 14, appellant challenges the refusal of the court to give the jury a series of special instructions requested by appellant. The standard jury instructions adequately address appellant's concerns. On Issue 17, appellant argues that seven motions to dismiss should have been granted because Florida's death penalty statute is unconstitutional*838 on its face and as applied. All of appellant's arguments have been previously resolved contrary to his position and merit no comment.

Appellant and his codefendant were tried jointly, and neither testified at trial. Codefendant Taylor's statement to the police was introduced into evidence against Taylor only and the jury was instructed that this statement could not be used against appellant. This was done on the rationale that Taylor's statement interlocked with the three statements that appellant made to witnesses Hancock, Allan, and Brewer. At the time of trial this appeared to be permissible under *Parker v. Randolph*, 442 U.S. 62, 99 S.Ct. 2132, 60

L.Ed.2d 713 (1979), where a plurality of the court held that interlocking confessions of codefendants could be introduced in a joint trial as an exception to *Bruton v. United States*, 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968), without violating the confrontation clause of the sixth amendment, provided the jury was instructed that the codefendant's statement could only be used against the codefendant. The plurality view of *Parker* has since been rejected and we must examine this issue in light of *Cruz v. New York*, 481 U.S. 186, 107 S.Ct. 1714, 95 L.Ed.2d 162 (1987).

Parker was decided on the theory that introduction of the confession of a non-testifying codefendant against the codefendant only, which interlocked with a confession of the defendant, was permissible in a joint trial because it presented nothing of evidentiary value against the defendant which was not already properly before the jury. Consequently, the theory went, the jury could reasonably be expected to follow an instruction that it should not use the non-testifying codefendant's confession against the defendant and, even if it did not, the error would be harmless. In rejecting this theory, the majority in *Cruz* reasoned:

> Quite obviously, what the "interlocking" nature of the codefendant's confession pertains to is not its *harmfulness* but rather its *reliability:* If it confirms essentially the same facts as the defendant's own confession it is more likely to be true. Its reliability, however, may be relevant to whether the confession should (despite the lack of opportunity for cross-examination) be *admitted as evidence* against the defendant, see *Lee v. Illinois*, 476 U.S. 530 [106 S.Ct. 2056, 90 L.Ed.2d 514] (1986), but cannot conceivably be relevant to whether, assuming it cannot be admitted, the jury is likely to obey the instruction to disregard it, or the jury's failure to obey is likely to be inconsequential.

107 S.Ct. at 1718-19 (emphasis in original). The Court then went on to make three holdings, all of which are applicable here. First, it is error to admit a non-testifying codefendant's confession incriminating the defendant notwithstanding an instruction not to consider it against the defendant. This is so even if the defendant's own interlocking confession is admitted. Second, the defendant's confession may be considered as an indica of reliability in determining whether the codefendant's confession may be directly admissible against the defendant. Third, in recognition that its ruling would impact on trials already conducted under the *Parker* theory, the Court held that the defendant's confession could be considered on appeal in determining whether admission of the codefendant's confession was harmless.

[11][12] It is clear from *Cruz* that admission of Taylor's statement with instructions that it not be used against appellant was error. It is also clear from the record that this error was harmless. Taylor's statement interlocks with and is fully consistent in all significant aspects with all three statements that appellant made to Hancock, Allan, and Brewer and which were directly admissible against appellant. The indicia of reliability are sufficient to have permitted introduction of Taylor's statement as evidence against appellant. Appellant makes two arguments that this is not so, both of which are contrary to the record. First, he argues that it is only Taylor's statement which emphasizes appellant's primary role in the murder. This is contrary to the record which shows that appellant told Hancock, Allan, and Brewer ***839** that it was he who first attacked and battered the officer and that it was he who wrestled her weapon away and fired the single shot which killed her. In all three statements, Taylor's role is clearly subordinate while appellant's role as the initiator and triggerman is dominant. Second, appellant argues, he and Taylor jointly recounted the story of the murder to Hancock and Allan and neither witness was able to identify for the court which defendant said what. This is contrary to the record which shows that the witnesses were able for the most part to identify appellant as the person who narrated the critical elements of the story. Moreover, even if this were not true, the joint statements of appellant and Taylor given in each other's presence would be admissible against both as admissions against penal interest. We hold that it was error to admit Taylor's statement in the joint trial as evidence against Taylor only, but that this error was harmless under the facts and circumstances of the case. *Cruz; Harrington v. California*, 395 U.S. 250, 89 S.Ct. 1726, 23 L.Ed.2d 284 (1969).

[13] In a two-pronged argument, appellant argues that the sentencing role of the jury was unconstitutionally denigrated by the state and that the jury was not properly instructed on the great weight which would be given to its advisory recommendation on life imprisonment or the death penalty. *Caldwell; Tedder v. State*, 322 So.2d 908 (Fla.1975). During the jury voir dire, several potential jurors indicated misgivings

about their ability to impose the death penalty. Instead of attempting to challenge the jurors for cause as permitted by *Wainwright v. Witt*, 469 U.S. 412, 105 S.Ct. 844, 88 L.Ed.2d 841 (1985), the state sought to reassure the jurors that the jury role was to make an advisory recommendation to the judge and that the judge had the ultimate responsibility for sentencing to death. Florida's death penalty statute, section 921.141, Florida Statutes (1983), provides that the jury shall hear the evidence on aggravation and mitigation and render an *advisory sentence* based on whether there are sufficient aggravating circumstances to warrant a death sentence, and, if so, whether there are sufficient mitigating circumstances to outweigh the aggravating circumstances. The statute goes on to provide that, *notwithstanding* the recommendation of the jury, the judge shall weigh the aggravating and mitigating circumstances and enter a sentence of life imprisonment or death based on the judge's weighing process. In the event the death sentence is imposed, the judge is required to set forth in writing the findings on which the death sentence is based. It is these written findings of fact and the trial record which furnish the basis for this Court's review of the death sentences. It is clear then, that the prosecutor correctly stated the law in Florida: the judge is the sentencing authority and the jury's role is merely advisory. Thus, *Caldwell*, which addressed the denigration of the jury acting as a *sentencer* is clearly distinguishable. *Combs v. State*, 525 So.2d 853 (Fla.1988); *Aldridge v. State*, 503 So.2d 1257, 1259 (Fla.1987); *Pope v. Wainwright*, 496 So.2d 798, 804 (Fla.1986), *cert. denied*, 480 U.S. 951, 107 S.Ct. 1617, 94 L.Ed.2d 801 (1987); *Darden v. State*, 475 So.2d 217, 221 (Fla.1985).

[14] In the second prong to this argument, appellant urges that the failure of the court to instruct the jury that its recommended sentence would be given great weight so misled the jury as to violate *Caldwell*. In *Tedder*, we held "[a] jury recommendation under our trifurcated death penalty statute should be given great weight" and, in order to sustain an override by the trial judge of a jury recommendation of life [FN1] "the facts suggesting a sentence of death should be so clear and convincing that virtually no reasonable person could differ." *Tedder*, 322 So.2d at 910. The jury here recommended death but appellant argues that the deference paid to the jury recommendation under *Tedder* is so great that the jury becomes the de facto, ***840** if not de jure, sentencer and our standard jury instructions do not adequately inform the jury of the overwhelming power it possesses to determine the sentence. Thus, appellant urges, had the jury understood the very nearly conclusive impact of its recommendation under *Tedder*, it might have recommended life imprisonment. We are not persuaded that the weight given to the jury's advisory recommendation is so heavy as to make it the de facto sentence. Our case law contains many instances where a trial judge's override of a jury recommendation of life has been upheld. *See Craig v. State*, 510 So.2d 857 (Fla.1987), *cert. denied*, 484 U.S. 1020, 108 S.Ct. 732, 98 L.Ed.2d 680 (1988), and cases cited therein. Notwithstanding the jury recommendation, whether it be for life imprisonment or death, the judge is required to make an independent determination, based on the aggravating and mitigating factors. *Randolph v. State*, 463 So.2d 186, 192 (Fla.1984), *cert. denied*, 473 U.S. 907, 105 S.Ct. 3533, 87 L.Ed.2d 656 (1985); *Engle v. State*, 438 So.2d 803, 813 (Fla.1983), *cert. denied*, 465 U.S. 1074, 104 S.Ct. 1430, 79 L.Ed.2d 753 (1984); *Ross v. State*, 386 So.2d 1191, 1197 (Fla.1980). Moreover, this procedure has been previously upheld against constitutional challenge. *Spaziano v. Florida*, 468 U.S. 447, 466, 104 S.Ct. 3154, 3165, 82 L.Ed.2d 340 (1984); *Proffitt v. Florida*, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976). In the penalty phase of a capital proceeding, the jury is instructed, in pertinent part, that although the final responsibility for sentencing is with the judge, that it should not act hastily or without due regard to the gravity of the proceedings, that it should carefully weigh, sift, and consider evidence of mitigation and statutory aggravation, realizing that human life is at stake, and bring to bear its best judgment in reaching the advisory sentence. We are satisfied that these instructions fully advise the jury of the importance of its role and correctly state the law.

> FN1. We have also held that a jury recommendation of death should be given great weight. *Ross v. State*, 386 So.2d 1191, 1197 (Fla.1980); *LeDuc v. State*, 365 So.2d 149, 151 (Fla.1978), *cert. denied*, 444 U.S. 885, 100 S.Ct. 175, 62 L.Ed.2d 114 (1979).

[15] The sentencing order found four aggravating circumstances: (1) the murder was committed while engaged in the commission of or an attempt to commit, or flight after committing or attempting to commit, the crime of robbery or burglary; (2) the murder was committed for the purpose of avoiding or preventing a lawful arrest; (3) the murder was committed

to disrupt or hinder the lawful exercise of a government function or the enforcement of laws; and (4) the murder was especially wicked, evil, atrocious, or cruel. Numbers two and three were treated as one circumstance by the trial judge. Appellant argues that none of these aggravating circumstances are present. We disagree. Concerning number one, it is clear from the evidence that appellant's handgun and driver's license and the victim's handgun were forcibly taken and that the struggle occurred at least in part inside the victim's vehicle. Thus, both a burglary and a robbery occurred. Concerning aggravating factors two and three, it is clear from the evidence that appellant advised the officer that he was in violation of his probation and that he committed the murder to escape from, avoid, or prevent, an arrest and to disrupt or hinder the enforcement of the probation laws. Moreover, the evidence also shows that the handgun in his possession was obtained illegally, which fact would have been revealed had he not escaped and taken back the weapon. As to aggravating factor four, appellant argues that death occurred almost instantaneously and that there were no additional acts to set the crime apart from the norm. This argument overlooks the fact that the murder was preceded by a brutal beating. Appellant's statements indicate that he struck the officer twenty to thirty times with a heavy-duty flashlight but was unable to beat her into unconsciousness or to subdue her despite his large size and the assistance of Taylor.[FN2] The ferocity of the attack and the ferocity with which the officer defended herself, coupled with her knowledge that appellant was attacking to prevent a return to prison, lead inevitably to the conclusion***841** that she knew she was fighting for her life and knew that if she was subdued or her weapon taken, her life would be forfeited.[FN3] Under these circumstances, we are satisfied that the trial judge did not abuse his discretion in finding that the murder was heinous, atrocious, and cruel. *Wilson v. State*, 436 So.2d 908, 912 (Fla.1983). Appellant also argues that there was substantial evidence that he had no prior history of violence, he had a deprived and difficult adolescence, he was only nineteen, he expressed remorse for the crime, and he had been a well-behaved and cooperative prisoner. Neither the jury nor the judge was sufficiently impressed by this evidence to find that it outweighed the aggravating circumstances. We see no error. *Roberts* and cases cited therein; *Tedder*.

FN2. Appellant, who is 6'3" and 225 pounds, was approximately a foot taller and 100 pounds heavier than the officer.

FN3. The ferocity of the attack is partially explained by appellant's contemptuous statement to Brewer that he was not going to be arrested by a woman.

[16] Appellant's next point is that the sentence should be overturned because the trial judge did not enter his written findings until three months after orally sentencing him to death. Appellant argues that the circumstances here are virtually identical to those in *Van Royal v. State*, 497 So.2d 625 (Fla.1986). We disagree. The judge's written findings were made prior to the certification of the record to this Court. It is not determinative that these written findings were made after the notice of appeal was filed seven days after the oral pronouncement of sentence. Under our death penalty statute, appeal is automatic and under Florida Rule of Appellate Procedure 9.140(b)(4), governing capital appeals, the trial court retains concurrent jurisdiction for preparation of the complete trial record for filing in this Court. *Muehleman v. State*, 503 So.2d 310 (Fla.), *cert. denied*, 484 U.S. 882, 108 S.Ct. 39, 98 L.Ed.2d 170 (1987).

Since *Van Royal* issued we have been presented with a number of cases in which the timeliness of the trial judge's sentencing order filed after oral pronouncement of sentence has been at issue. In *Van Royal* and its progeny, we have held on substantive grounds that preparation of the written sentencing order prior to the certification of the trial record to this Court was adequate. At the same time, however, we have stated a strong desire that written sentencing orders and oral pronouncements be concurrent. *Patterson v. State*, 513 So.2d 1257 (Fla.1987); *Muehleman*. We recognize that the trial court here, and the trial court in other cases which have reached us or will reach us in the near future, have not had the benefit of *Van Royal* and its progeny. Nevertheless, we consider it desirable to establish a procedural rule that all written orders imposing a death sentence be prepared prior to the oral pronouncement of sentence for filing concurrent with the pronouncement. Accordingly, pursuant to our authority under article V, section 2(a), of the Florida Constitution, effective thirty days after this decision becomes final, we so order.

Since the briefs and arguments on this case were presented to the Court, the United States Supreme

Court has issued *Booth v. Maryland*, 482 U.S. 496, 107 S.Ct. 2529, 96 L.Ed.2d 440 (1987), holding that introduction of victim impact evidence to a capital punishment sentencing jury violated the eighth amendment to the United States Constitution. Because our record review revealed that such victim impact evidence was presented to the sentencing judge, but not to the jury, we ordered that supplemental briefs be submitted on the impact of *Booth* on the case at hand.

In *Booth*, the defendant chose to be sentenced by a jury. In accordance with Maryland law, a mandatory victim impact statement was prepared and submitted to the jury. The thrust of this evidence was twofold. First, that the two victims were exceptionally kind and gentle persons and the bereavement of the family was severe. Second, and following from the first, there was no conceivable excuse for murdering such persons and execution was the appropriate penalty. The *Booth* court concluded that such evidence of victim impact was irrelevant to any legitimate sentencing consideration in capital punishment cases and ***842** that introduction of such evidence created a constitutionally unacceptable risk that the jury may impose the death penalty in an arbitrary and capricious manner. Consequently, the Maryland statute was held to be invalid insofar as it required victim impact information to be considered in capital punishment cases.[FN4]

> FN4. The Court was careful to state that its decision implied no opinion as to the use of victim impact statements in non-capital cases.

[17] Florida's death penalty statute, section 921.141, limits the aggravating circumstances on which a sentence of death may be imposed to the circumstances listed in the statute. § 921.141(5). The impact of the murder on family members and friends is not one of these aggravating circumstances. Thus, victim impact is a non-statutory aggravating circumstance which would not be an appropriate circumstance on which to base a death sentence. *Blair v. State*, 406 So.2d 1103 (Fla.1981); *Miller v. State*, 373 So.2d 882 (Fla.1979); *Riley v. State*, 366 So.2d 19 (Fla.1978). Florida law provides, however, that prior to sentencing any defendant convicted of a homicide, the next-of-kin of the homicide victim will be permitted to either appear before the court or to submit a written statement under oath for the consideration of the sentencing court. These statements shall be limited solely "to the facts of the case and the extent of any harm, including social, psychological, or physical harm, financial losses, and loss of earnings directly or indirectly resulting from the crime for which the defendant is being sentenced." § 921.143(2), Fla.Stat. (1985). Thus, it is clear that the Florida Legislature, like Congress and the legislature of at least thirty-five other states, has made the judgment "that the effect of the crime on the victims should have a place in the criminal justice system." *Booth*, 107 S.Ct. at 2536 n. 12. It is also clear, however, from the *Booth* decision, that the legislature may not make this judgment in capital punishment cases. Accordingly, we hold that the provisions of section 921.143 are invalid insofar as they permit the introduction of victim impact evidence as an aggravating factor in death sentencing.[FN5]

> FN5. Like the *Booth* court, we limit our holding to death penalty cases.

[18] The first question is whether appellant's failure to object to the introduction of the victim impact evidence is a procedural bar to raising the issue on appeal. Victim impact is not one of the aggravating factors enumerated in section 921.141. We have previously held that "[t]he aggravating circumstances specified in the statute are exclusive, and no others may be used for that purpose." *Miller*, 373 So.2d at 885. Thus, appellant was entitled to object to the introduction of the evidence. The state correctly points out that appellant made no objection, whereas in *Booth* there was an objection to such evidence. There is nothing in the *Booth* opinion which suggests that it should be retroactively applied to the cases in which victim impact evidence has been received without objection. Except for fundamental error, an appellate court will not consider an issue unless it was presented to the lower court. *Steinhorst v. State*, 412 So.2d 332 (Fla.1982). Therefore, we hold that by his failure to make a timely objection, appellant is procedurally barred from claiming relief under *Booth*.

[19] While our consideration of the *Booth* issue could stop at this point, for the benefit of the bench and the bar we choose to also discuss whether, had an objection been made, the error could be deemed harmless.

Appellant does not argue that harmless error analysis may not be applied to *Booth* errors, but we consider it necessary to consider the question in view of its importance.[FN6] We begin our consideration by not-

ing*843 that the *Booth* court did not specifically state whether harmless error analysis was permitted, presumably because the issue was not raised. However, its disposition of the case does not rule out application of harmless error and, normally, the Court finds it desirable to leave the determination of harmless error, in the first instance, to the lower court. *Rose v. Clark*, 478 S.Ct. 570, 106 S.Ct. 3101, 3109, 92 L.Ed.2d 460 (1986); *Delaware v. Van Arsdall*, 475 U.S. 673, 684, 106 S.Ct. 1431, 1438, 89 L.Ed.2d 674 (1986); *United States v. Hasting*, 461 U.S. 499, 510, 103 S.Ct. 1974, 1981, 76 L.Ed.2d 96 (1983).

> FN6. Prior to 1984, only the victim of a crime could testify during the sentencing proceeding as to its impact. Since § 921.143 was amended by ch. 84-363, Laws of Fla., the next-of-kin of homicide victims are permitted to testify on the impact of the homicide. Presentence investigation (PSI) reports may also include information on victim impact. Here, for example, the PSI included the following:
>
> > James Park, the victim's father, states "I think he's shattered our family. This girl was kind of the center of our family. It's like taking my heart out. It will hurt me the rest of my life. We have all seen a psychiatrist or psychologist at least twice including my other two children. My personal feeling is that he should receive the death penalty."
> >
> > It is not unusual in Florida for the PSI reports to contain statements from the victim's family relating the hurt wrought upon them by the crime. If the mere fact that the trial judge (the sentencer in Florida) is exposed to such a report is sufficient to render the error per se reversible, all death penalties in Florida are potentially subject to automatic reversal.

In *Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967), the Court held that the determination of whether violation of a federal constitutional right could be held harmless was the responsibility of the United States Supreme Court, in the absence of appropriate Congressional action, and could not be left to the states themselves. Further, the Court held, not all violations of the federal constitution mandate reversal of a conviction and that only three constitutional rights had been identified as "so basic to a fair trial that their infraction can never be treated as harmless error." *Id.* at 23, 87 S.Ct. at 827-828 (footnote omitted).[FN7] Since *Chapman* issued, "the Court has consistently made clear that it is the duty of a reviewing court to consider the trial record as a whole and to ignore errors that are harmless, including most constitutional violations." *Hasting*, 461 U.S. at 509, 103 S.Ct. at 1980 (citations omitted). In *Van Arsdall*, the Court emphasized again the application and rationale of the *Chapman* rule.

> FN7. Those three rights or violations were identified as a coerced confession, the right to counsel and an impartial judge. The Court has since held that an involuntary confession erroneously admitted into evidence may be held harmless beyond a reasonable doubt. *Milton v. Wainwright*, 407 U.S. 371, 92 S.Ct. 2174, 33 L.Ed.2d 1 (1972). In *Milton*, the involuntary confession contained essentially the same information as that in three other confessions which were properly admitted. Recently, in *Van Arsdall*, the Court omitted a coerced confession from the list of constitutional violations which mandate automatic reversal, but *see Rose*, another 1986 case in which the Court cites *Chapman* with approval and remands for application of the *Chapman* standard.

As we have stressed on more than one occasion, the Constitution entitles a criminal defendant to a fair trial, not a perfect one. *E.g.*, *United States v. Hasting*, 461 U.S. 499, 508-509, 103 S.Ct. 1974, 1980, 76 L.Ed.2d 96 (1983); *Bruton v. United States*, 391 U.S. 123, 135, 88 S.Ct. 1620, 1627, 20 L.Ed.2d 476 (1968). In *Chapman*, this Court rejected the argument that all federal constitutional errors, regardless of their nature or the circumstances of the case, require reversal of a judgment of conviction. The Court reasoned that in the context of a particular case, certain constitutional errors, no less than other errors, may have been "harmless" in terms of their effect on the factfinding process at trial. Since *Chapman*, we have repeatedly reaffirmed the principle that an otherwise valid conviction should not be set aside if the reviewing court may confidently say, on the whole record, that the constitutional er-

ror was harmless beyond a reasonable doubt. *Van Arsdall*, 475 U.S. at 681, 106 S.Ct. at 1436. In *Rose*, the Court stressed again the limited number of exceptions to the harmless error rule.

> We have emphasized, however, that while there are some errors to which *Chapman* does not apply, they are the exception and not the rule. *United States v. Hasting*, 461 U.S., at 509, 103 S.Ct., at 1980. *Accordingly, if the defendant had counsel and was tried by an impartial adjudicator, there is a* ***844** strong presumption that any other errors that may have occurred are subject to harmless error analysis.* The thrust of the many constitutional rules governing the conduct of criminal trials is to ensure that those trials lead to fair and correct judgments. Where a reviewing court can find that the record developed at trial establishes guilt beyond a reasonable doubt, the interest in fairness has been satisfied and the judgment should be affirmed. As we have repeatedly stated, "the Constitution entitles a criminal defendant to a fair trial, not a perfect one." *Delaware v. Van Arsdall*, 475 U.S., at 679-681, 106 S.Ct., at 1436; *United States v. Hasting, supra*, at 508-509, 103 S.Ct., at 1980.
>
> *Rose v. Clark*, 106 S.Ct. at 3106-07 (emphasis added). It is clear then, that with the exceptions noted, there is a strong presumption that constitutional errors are subject to harmless error analysis.

We turn then to the general question of whether harmless error analysis may be applied to the sentencing phase of capital punishment cases and the more specific question of whether a *Booth* error may ever be held harmless. On the general question, it is clear that harmless error analysis is applicable to capital sentences. This Court routinely applies harmless error analysis to, and affirms, death sentences where the judge has improperly found invalid aggravating factors provided one or more valid aggravating factors exist which are not overridden by one or more mitigating factors. *White v. State*, 446 So.2d 1031 (Fla.1984); *Sims v. State*, 444 So.2d 922 (Fla.1983) *cert. denied*, 467 U.S. 1246, 104 S.Ct. 3525, 82 L.Ed.2d 832 (1984); *Alford v. State*, 307 So.2d 433 (Fla.1975), *cert. denied*, 428 U.S. 912, 96 S.Ct. 3227, 49 L.Ed.2d 1221 (1976). Even more significantly, in *Barclay v. Florida*, 463 U.S. 939, 103 S.Ct. 3418, 77 L.Ed.2d 1134 (1983), the Court specifically approved the application of harmless error analysis to death sentences and held that consideration by the trial judge of an invalid aggravating circumstance does not, per se, render the imposition of a death sentence unconstitutional.

We turn now to the specific question of whether *Booth* errors are one of those rare exceptions to *Chapman* where the violation is so basic and pervasive that the infraction can never be treated as harmless error. The *Booth* court summarized the impact evidence and its finding as follows.

> The VIS [Victim Impact Statement] in this case provided the jury with two types of information. First, it described the personal characteristics of the victims and the emotional impact of the crimes on the family. Second, it set forth the family members' opinions and characterizations of the crimes and the defendant. For the reasons stated below, we find that this information is irrelevant to a capital sentencing decision, and that its admission creates a constitutionally unacceptable risk that the jury *may* impose the death penalty in an arbitrary and capricious manner.

Booth, 107 S.Ct. at 2533 (emphasis added). The Court's first finding, that such evidence is irrelevant, poses no problem for harmless error analysis. Conceptually, this is the easiest type of error to analyze because the impermissible evidence can be easily isolated from the permissible evidence. If the reviewing court can say beyond a reasonable doubt that the death sentence would have been imposed had the irrelevant evidence not been introduced, the error is harmless; if the court cannot say this beyond a reasonable doubt, the error is harmful. The second finding, that the evidence *may* cause juries to impose the death penalty in an arbitrary and capricious manner, is more difficult to analyze, but by no means intractable. The use of the word "may" and the internal analysis of the *Booth* court show that some victim impact statements will differ in impact from others. This is consistent with common sense and experience. Indeed, the very logic of the Court suggests that some *Booth* errors are harmless. In illustrating why the impact on family members was impermissible aggravation, the court made the following revealing statement of its reasoning.

> As evidenced by the full text of the VIS in this case, see Appendix to this opinion, the family members were articulate**845** and persuasive in expressing

> their grief and the extent of their loss. But in some cases the victim will not leave behind a family, or the family members may be less articulate in describing their feelings even though their sense of loss is equally severe. The fact that the imposition of the death sentence may turn on such distinctions illustrates the danger of allowing juries to consider this information. Certainly the degree to which a family is willing and able to express its grief is irrelevant to the decision whether a defendant, who may merit the death penalty, should live or die. See [*Booth v. State*] 306 Md., [172] at 223, 507 A.2d, [1098] at 1129 (Cole, J., concurring in part and dissenting in part) (concluding that it is arbitrary to make capital sentencing decisions based on a VIS, "which vary greatly from case to case depending upon the ability of the family member to express his grief").

Booth, 107 S.Ct. at 2534. Similarly, the Court also noted that the character and reputation of the victim would vary widely, some would be sterling members of the community, others would be of questionable character. Thus, the Court, in large part, grounded its decision that systematically imposing the death penalty based on such evidence would be arbitrary and capricious in violation of the eighth amendment on the rationale that such irrelevant evidence would sometimes impel the sentencer to impose death, i.e., would be harmful in those cases, but, in other cases, would not so impel the sentencer, i.e., would be harmless. This would result in a capital punishment *system* which arbitrarily and capriciously imposed death sentences. In short, *because* some *Booth* errors will be harmful and some will not, the system will be arbitrary and capricious, i.e., lack uniformity. It can be seen, then, that the rationale of *Booth* permits harmless error analysis. We hold that the erroneous introduction of victim impact evidence is subject to harmless error analysis on a case-by-case basis.

[20][21] We turn now to application of harmless error analysis using *State v. DiGuilio,* 491 So.2d 1129 (Fla.1986). We begin by noting the salient distinction between *Booth* and the case here. In *Booth,* the sentencing authority which heard the victim impact evidence was a jury; here the sentencing authority which heard the evidence was a judge mandated by case law to give great weight to the jury's recommendation of death. *Ross; LeDuc; Tedder.* For the following reasons we conclude beyond a reasonable doubt that the sentencing judge would have imposed the death penalty in the absence of the victim impact evidence. First, under section 921.141, the sentencing judge's consideration of aggravating circumstances on which a death penalty may be based is limited to those enumerated in the statute. The statute does not include impact of the murder on the family as an aggravating circumstance. The judge is required to set out in writing for appellate review the findings on which the death sentence is based. The written findings here show that there was no reliance, or even a hint of reliance,[FN8] on the ***846** evidence introduced regarding the impact of the murder on the next of kin.[FN9] Second, the trial judge found four aggravating circumstances, all of which are valid, and no mitigating circumstances. The balance in favor of imposing the death sentence is overwhelming. In view of this balance and the fact that the jury recommended death, the trial judge's actual discretion here was relatively narrow. Third, for the purposes of appellate review, the case is analogous to those cases where we affirm death sentences based on valid aggravating circumstances and no mitigation even though the sentence judge has found and relied on invalid aggravating circumstances. Finally, the record shows that the jury did not receive the improper evidence of victim impact, but recommended death by a twelve-to-zero vote based on the evidence of statutory aggravating circumstances only. A jury recommendation of death, reflecting the conscience of the community, is entitled to great weight. *Ross; LeDuc.* More significantly, from the viewpoint of harmless error analysis, it shows that all twelve members of the jury, who were not exposed to the irrelevant evidence, were persuaded that death was the appropriate penalty based on the permissible evidence. We are persuaded beyond a reasonable doubt that the death penalty would have been imposed absent the impermissible evidence. We hold (1) that appellant is procedurally barred from contesting the receipt of victim impact evidence and (2) that the receipt of such evidence in this case was harmless error.

FN8. The findings are as follows:

> The Defendant, MARTIN GROSSMAN, was found guilty of the crime of Murder in the First Degree of Peggy Park, the verdict being returned on October 29, 1985. On October 31, 1985, this Court conducted the penalty phase of the trial and both the State

and the defendant presented evidence as to aggravating and mitigating circumstances. After approximately one (1) hour and fifteen (15) minutes of deliberation, the jury returned a recommendation to the Court that it impose a sentence of death upon Martin Grossman, by a vote of twelve (12) to zero (0). The Court ordered a Presentence Investigation in an effort to gain additional insight into the Defendant's background, and the matter came on for sentencing on December 13, 1985.

The Court imposed a sentence of death after having found as aggravating circumstances, the following:

1. The crime for which the Defendant is to be sentenced was committed while he was engaged in the commission of or an attempt to commit or flight after committing or attempting to commit the crime of Robbery or Burglary.

2. The crime for which the Defendant is to be sentenced was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody; or,

The crime for which the Defendant is to be sentenced was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws; these aggravating circumstances to be treated only as one (1).

3. The crime for which the Defendant is to be sentenced was especially wicked, evil, atrocious or cruel, in that Peggy Parks, the deceased victim, was much smaller than the Defendant, Martin Grossman, and was held down by him in the front seat of her police vehicle and repeatedly struck on or about her head with her metal flashlight, causing innumerable deep lacerations on her head, resulting in extreme pain, but according to the medical examiner, not causing her to be rendered unconscious; then, with the deceased victim, Peggy Parks, in this helpless position, taking her gun, all of which she realized as was reflected by the evidence presented during trial, and using her weapon to end her life.

The only mitigating circumstance which would have been found as a result of the testimony presented in behalf of the Defendant and the Presentence Investigation, was that the Defendant was nineteen (19) years old at the time the crime was committed. However, this Court does not feel that this constituted a mitigating circumstance in this case.

The Court does not find any other aspect of the Defendant's character or record, or any other circumstances of the offense as reflected in the testimony presented at trial and in the penalty phase to be mitigating factor.

The Court hereby finds that the aggravating circumstances far outweigh the mitigating circumstances and that the death penalty is the appropriate sentence in this case.

FN9. This is not surprising in that judges are routinely exposed to inadmissible or irrelevant evidence but are disciplined by the demands of the office to block out information which is not relevant to the matter at hand.

We affirm appellant's conviction and sentence.

It is so ordered.

McDONALD, C.J., and OVERTON, EHRLICH and GRIMES, JJ., concur.
SHAW, J., concurs specially with an opinion.
KOGAN, J., concurs in result only.
BARKETT, J., concurs in part and dissents in part with an opinion.SHAW, Justice, specially concurring.
I agree fully with the majority's disposition of the issues presented. However, concerning Issue 3, I believe that *Wainwright v. Witt*, 469 U.S. 412, 105 S.Ct. 844, 83 L.Ed.2d 841 (1985), and *Caldwell v. Mississippi*, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985), call for a reexamination of the *Tedder*[FN1] rule concerning the weight to be assigned to the jury's

advisory recommendation on sentencing.

FN1. *Tedder v. State*, 322 So.2d 908 (Fla.1975).

In *Tedder*, a young husband kidnapped his estranged wife and infant son from the home of his mother-in-law and, in the course of doing so, murdered the mother-***847** in-law. The jury recommended life imprisonment. The judge, however, sentenced Tedder to death on the basis of three aggravating and no mitigating circumstances: (1) the murderer knowingly created a great risk of death to many persons; (2) the murder was especially heinous, atrocious, and cruel; and, (3) the murder was committed in the course of a kidnapping. We reversed the death sentence on the basis that the "jury recommendation under our trifurcated death penalty statute should be given great weight" and "[i]n order to sustain a sentence of death following a jury recommendation of life, the facts suggesting a sentence of death should be so clear and convincing that virtually no reasonable person could differ." *Tedder* at 910. It is readily apparent from the facts of *Tedder* that aggravating factors one and two were invalid. Moreover, even the aggravating factor of kidnapping, although valid, carried less weight than normal because the murder and kidnapping occurred in the context of a domestic quarrel. *Wilson v. State*, 493 So.2d 1019 (Fla.1986); *Ross v. State*, 474 So.2d 1170 (Fla.1985). On the facts of the case, this was simply not a case in which the death penalty was warranted. *Even if the jury had recommended death*, we would have been constrained under a proportionality review to reverse because this was clearly not one of the more aggravated and indefensible crimes for which the death penalty is appropriate. *State v. Dixon*, 283 So.2d 1, 8 (Fla.1973), *cert. denied*, 416 U.S. 943, 94 S.Ct. 1950, 40 L.Ed.2d 295 (1974). Thus, *Tedder* itself does not rely on or test the *Tedder* rule.

In *Tedder* we gave no reasoned explanation of why a jury recommendation was entitled to great weight, we merely concluded that it was and cited Florida's death penalty statute as authority. Section 921.141, Florida Statutes (1973 and thereafter) provides that "notwithstanding" the jury recommendation the trial court will weigh the evidence of aggravation and mitigation and "shall" enter a sentence based on that weighing. The Florida death statute thus makes the judge the sentencer subject to a weighing of the aggravating and mitigating circumstances and assures sufficient basis for appellate review by requiring that in instances where the judge imposes a sentence of death, he shall set forth in writing the findings upon which the sentence is based. The statute simply cannot be read to require that a judge follow the jury's recommendation of life unless "the facts suggesting a sentence of death [are] so clear and convincing that virtually no reasonable person could differ." *Tedder* 322 So.2d at 910. Under *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972), and its progeny, the sentencer is not at liberty to ignore the factual balance between the aggravating and mitigating evidence.

> Under Florida law, the sentencing judge is *required* to impose the death penalty on all first-degree murderers as to whom the statutory aggravating factors outweigh the mitigating factors. There is good reason to anticipate, then, that as to certain categories of murderers, the penalty will not be imposed freakishly or rarely but will be imposed with regularity; and consequently it cannot be said that the death penalty in Florida as to those categories had ceased "to be a credible deterrent or measurably to contribute to any other end of punishment in the criminal justice system." *Furman v. Georgia*, 408 U.S. 238, 311, [92 S.Ct. 2726, 33 L.Ed.2d 346] (1972) (White, J., concurring). Accordingly, the Florida statutory scheme for imposing the death penalty does not run afoul of this Court's holding in *Furman v. Georgia*.

Proffitt v. Florida, 428 U.S. 242, 260-61, 96 S.Ct. 2960, 2970, 49 L.Ed.2d 913 (1976) (White, J., concurring) (emphasis in original). It would appear, therefore, that Florida's scheme for imposing the death penalty would pass constitutional muster without the benefit of *Tedder* in that it designates the sentencer and spells out an easily reviewable criteria which must be set forth in writing when the death penalty is imposed. While there is nothing constitutionally wrong with death penalty systems which place the sentencing responsibility upon the jury and require a factual finding ***848** on which to base appellate review, and many prefer that system, our legislature in its wisdom has decided otherwise. We must defer to that legislative decision.

The *Tedder* rule injected confusion into the Florida scheme by making the jury, by its recommendation, the virtual sentencer without requiring that the jury articulate any factual findings upon which it based its recommendation and making the jury's recommenda-

tion binding upon the trial judge unless "the facts suggesting a sentence of death are so clear and convincing that virtually no reasonable person could differ." We thus end up with the very evil that *Furman* found objectionable.[FN2] Moreover, the facts of *Tedder* do not support or test the rule because the judge's sentencing order, standing alone and notwithstanding the jury recommendation, did not support a sentence of death. A true test of the validity of the *Tedder* rule requires a factual situation where the sentencing order of death, notwithstanding the jury recommendation, is valid and would be affirmed except for the *Tedder* rule of deference to the jury's recommendation of life. To follow *Tedder* under those circumstances in the face of our statute clearly violates *Furman* by imposing, or not imposing, the death penalty in an arbitrary and capricious manner. We recognized this in rejecting a double jeopardy challenge in *Spaziano v. State*, 433 So.2d 508, 512 (Fla.1983).

> FN2. Justice White, in his dissent to *Lockett v. Ohio*, 438 U.S. 586, 621, 98 S.Ct. 2954, 2981, 57 L.Ed.2d 973, 1000 (1978) (White, J., dissenting), expressed a similar concern about the return of unbridled jury discretion. *Id.* at 623, 98 S.Ct. at 2982-83.

First, the jury's function under the Florida death penalty statute is advisory only. *See Proffitt v. Florida*, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976). Second, allowing the jury's recommendation to be binding would violate *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972).

See also Spaziano v. Florida, 468 U.S. 447, 453-54, 104 S.Ct. 3154, 3158-3159, 82 L.Ed.2d 340 (1984), where the Court affirmed our denial of the double jeopardy challenge and noted our "understanding that allowing the jury's recommendation to be binding would violate the requirements of *Furman*...." This understanding is correct in light of our particular statute which places no requirement upon the jury to justify or give a reason for its recommendation. In short, where a judge overrides the advisory recommendation of a jury, we should only defer to the jury's advisory recommendation if we find that the judge's sentencing order, standing alone, does not support the imposition of death.

The above conclusion is also supported by an analysis of *Witherspoon v. Illinois*, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968), and *Wainwright v. Witt*, 469 U.S. 412, 105 S.Ct. 844, 83 L.Ed.2d 841 (1985). In *Witherspoon*, the Court was concerned with the automatic exclusion from capital punishment juries of persons who opposed the death penalty or who had conscientious scruples against capital punishment. The Court held that opponents of capital punishment could not be excluded from such juries unless they expressed the view that they could not make an impartial decision on guilt or could never vote to impose the death penalty. *Tedder* is actually grounded on the *Witherspoon* principle that juries reflect the conscience of the community and it is this conscience which should determine whether death is the appropriate penalty.[FN3] This *Witherspoon* concept of the jury as a cockpit in which the jurors argue out their religious, ideological, and political views of capital punishment was at tension with the concept of the jury as an impartial, non-emotional, fact-finding body following the law as given to it by the court. One year prior to *Furman*, the Court upheld, against due process and equal protection challenges, the imposition of the death penalty by juries acting, without standards ***849** or substantive instructions, as the conscience of the community. *McGautha v. California*, 402 U.S. 183, 91 S.Ct. 1454, 28 L.Ed.2d 711 (1987). This holding was contingent on the selection of the jury in accordance with the precepts of *Witherspoon*. *Id.* at 185 n. 1,91 S.Ct. at 1456 n. 1.[FN4] *Furman* did not explicitly override *McGautha* and *Witherspoon*, but implicitly found that imposition of the death penalty based on the conscience of the community principle was cruel and unusual punishment because it resulted in the arbitrary and capricious imposition of the death penalty. Although it did not override *McGautha* and *Witherspoon*, *Furman* did restore the jury to its traditional role as a finder-of-fact whose discretion was strictly limited and whose findings of fact on the imposition of the death penalty would be subject to judicial review. The substantial tension, if not outright conflict, between the *Witherspoon* and *Furman* concepts of the jury role in capital sentencing was not resolved until *Witt* issued in 1985.

> FN3. See *Richardson v. State*, 437 So.2d 1091 (Fla.1983), and *Odom v. State*, 403 So.2d 936 (Fla.1981), *cert. denied*,456 U.S. 925, 102 S.Ct. 1970, 72 L.Ed.2d 440 (1982), which attribute the great weight given to the jury's recommendation to its reflection of the conscience or judgment of the community.

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> FN4. The mandate of the Court in *McGautha* was later withheld and the judgment vacated and remanded for further proceedings consistent with *Furman*.403 U.S. 951, 91 S.Ct. 2273, 29 L.Ed.2d 862; [*Crampton v. Ohio*], 408 U.S. 941, 92 S.Ct. 2873, 33 L.Ed.2d 765 (1972).

In *Witt* the Court revisited and clarified *Witherspoon*. In doing so, the Court recognized the inherent incompatibility of *Witherspoon* and *Furman*.

> There is good reason why the *Adams* [448 U.S. 38, 100 S.Ct. 2521, 65 L.Ed.2d 581 (1980)] test is preferable for determining juror exclusion. First, although given *Witherspoon's* facts a court applying the general principles of *Adams* could have arrived at the "automatically" language of *Witherspoon's* footnote 21, *we do not believe that language can be squared with the duties of present-day capital sentencing juries* (emphasis supplied). In *Witherspoon* the jury was vested with unlimited discretion in choice of sentence. Given this discretion, a juror willing to *consider* the death penalty arguably was able to "follow the law and abide by his oath" in choosing the "proper" sentence. Nothing more was required. Under this understanding the only veniremen who could be deemed excludable were those who would never vote for the death sentence or who could not impartially judge guilt.
>
> *After our decisions in Furman v. Georgia,* 408 U.S. 238, [92 S.Ct. 2726, 33 L.Ed.2d 346] (1972), and *Gregg v. Georgia,* 428 U.S. 153, [96 S.Ct. 2909, 49 L.Ed.2d 859] (1976), *however, sentencing juries could no longer be invested with such discretion* (emphasis supplied). As in the State of Texas, many capital sentencing juries are now asked specific questions, often factual, the answers to which will determine whether death is the appropriate penalty. In such circumstances it does not make sense to require simply that a juror not "automatically" vote against the death penalty; whether or not a veniremen *might* vote for death under certain *personal* standards, the State still may properly challenge that veniremen if he refuses to follow the statutory scheme and truthfully answer the questions put by the trial judge. To hold that *Witherspoon* requires anything more would be to hold, in the name of the Sixth Amendment right to an impartial jury, that a State must allow a veniremen to sit despite the fact that he will be unable to view the case impartially.

Witt, 469 U.S. at 421-22, 105 S.Ct. at 851 (footnote omitted).

Witt has two effects on our *Tedder* decision. First, *Witt* makes clear that *Witherspoon,* as applied, permitted jurors who were personally biased to participate in the decision to recommend life or death. Under *Witherspoon,* the state was not permitted to challenge jurors for cause unless they made it unmistakably clear that they would automatically vote against the death penalty regardless of the evidence developed at trial. This meant that the trial court had no way of ensuring that the jurors' discretion would be guided by aggravating and mitigating circumstances and not by their personal beliefs. From a *Furman* viewpoint, this decreased the reliability of the jury recommendation because ***850** it increased the likelihood that juries would act arbitrarily and capriciously based on personal biases. *Witt,* by spelling out standards for determining when prospective jurors may be excluded for cause because of their views on capital punishment, increased the likelihood that jurors will impartially follow the law as announced by the trial judge and not their personal views on the death penalty. *Witt* should reduce the *Witherspoon* gap between the views of the judge and jury and the number of occasions where they disagree on the sentence. It should also reduce the likelihood that the death penalty will be arbitrarily and capriciously imposed.

A second impact of *Witt* is to take the constitutional ground, *Witherspoon,* out from under *Tedder.* Arguably, as long as *Witherspoon* stood unamended, it could be said that there was some constitutional basis for great deference to the jury recommendation as the conscience of the community. However, as *Witt* makes clear, the role of the jury under *Witherspoon* cannot be squared with the role of the jury under *Furman* and it is *Furman* which controls. This point is reinforced by the structure of the Florida death penalty system. Under our statute, the trial judge is the sentencer and renders the written findings on which we base our constitutionally required review. When we apply *Tedder,* we have no factual findings from the jury to review and can only speculate as to the reasons underlying the jury recommendation. In effect, from a cold record, we attempt to find the facts supporting the jury's recommendation. Skene, *Review of Capital*

Cases: Does The Florida Supreme Court Know What It's Doing?, 15 Stetson L.Rev. 263, 298-306 (Spring 1986). While it is constitutionally permissible for either the jury or the judge to act as sentencer, *Tedder* tends to transform our system into a hybrid. Contrast *Tedder* with *Jurek v. Texas,* 428 U.S. 262, 96 S.Ct. 2950, 49 L.Ed.2d 929 (1976) and *Gregg v. Georgia,* 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976), where the jury is the sentencer and is required to make specific findings of fact to support a death sentence and the jury's findings furnish a basis for appellate review.

There are two pertinent and controlling propositions of law to be drawn from *Furman* and its progeny. First, it is cruel and unusual punishment to impose the death penalty on a particular defendant if the penalty is disproportionate to the facts surrounding the particular murder. The penalty should be reserved for the most aggravated and unmitigated crimes. *State v. Dixon,* 283 So.2d 1, 7 (Fla.1973). Second, from a systemic viewpoint, the system must impose the penalty with regularity, not arbitrarily or capriciously. This is done by "rationally distinguish[ing] between the individuals for whom death is an appropriate sanction and those for whom it is not." *Spaziano,* 468 U.S. at 460, 104 S.Ct. at 3162. Undifferentiated deference, by either this Court or sentencing courts, to unsupported and unreviewable jury recommendations does not meet either of the two propositions.

Caldwell also impacts on the viability of the *Tedder* rule. In *Caldwell,* the error consisted of denigrating the role of the sentencing jury by suggesting that the responsibility for the sentence rested elsewhere; and, the Court held, it was constitutionally impermissible to rest a death sentence on a determination made by a sentencer who had been led to believe that the responsibility for the sentence rested elsewhere. I am not persuaded that our application of *Tedder* violates *Caldwell. Combs v. State,* 525 So.2d 853 (Fla.1988). However, I do suggest that the *Tedder* rule unnecessarily obscures and confuses the identity of the sentencer in Florida. Our statute unquestionably makes the judge the sentencer, but *Tedder* in its practical application has reversed the roles by mandating that the judge must defer to jury recommendation unless "the facts suggesting a sentence of death [are] so clear and convincing that virtually no reasonable person could differ." 322 So.2d at 910. The practical import of *Tedder* is to place the trial judge in the unenviable position of either following the statute and basing his sentence upon a weighing of the aggravating and mitigating factors or following ***851** *Tedder.* During 1984-85, we affirmed on direct appeal trial judge overrides in eleven of fifteen cases, seventy-three percent. By contrast, during 1986 and 1987, we have affirmed overrides in only two of eleven cases, less than twenty percent. This current reversal rate of over eighty percent is a strong indicator to judges that they should place less reliance on their independent weighing of aggravation and mitigation and more reliance on the indecipherable recommendation of the jury. If we continue to follow *Tedder* the independent sentencing judgment of trial courts becomes more and more debatable. This brings into question the constitutionality of our death penalty statute as applied.[FN5] *Caldwell.*

> FN5. In this connection, see *Adams v. Wainwright,* 804 F.2d 1526 (11th Cir.1986), modified by *Adams v. Dugger,* 816 F.2d 1493 (11th Cir.1987), and *Mann v. Dugger,* 817 F.2d 1471 (11th Cir.1987), vacated and rehearing granted en banc by *Mann v. Dugger,* 828 F.2d 1498 (11th Cir.1987), where the courts held that instructing the jury that the judge was the ultimate sentencer denigrated the jury role contrary to *Tedder* and in violation of *Caldwell.* It should be noted under Florida law that *all* capital punishment juries are instructed that the judge is the ultimate sentencer. The practical effect of *Adams* and *Mann* is to hold Florida's death penalty statute unconstitutional as applied.

For the reasons set forth above, I feel that the only forthright position is to recede from *Tedder* and announce to one and all that the only useful purpose of the advisory recommendation of the jury under our death penalty statute is to apprise the trial judge and appellate court of the jury's reaction to the evidence of aggravation and mitigation as a matter of information. Short of a revision of section 921.141 to place the sentencing responsibility upon the jury and to require factual findings on which to base appellate review, the jury recommendation does not carry the great weight assigned to it by *Tedder.* It is as its designation indicates, advisory only, nothing more, nothing less.

BARKETT, Justice, concurring in part, dissenting in part.

I concur in affirming the conviction in this case. As to

the sentence, I agree that the majority's *Caldwell* analysis is compelled by this Court's prior rulings. However, I adhere to my view that *Caldwell* indeed is applicable to the Florida advisory jury as well as the judge, since both exercise sentencing discretion. *See* Combs v. State, 525 So.2d 853 (Fla.1988) (Barkett, J., specially concurring); Foster v. State, 518 So.2d 901 (Fla.1987) (Barkett, J., specially concurring); Phillips v. Dugger, 515 So.2d 227 (Fla.1987) (Barkett, J., specially concurring).

As to the *Van Royal* issue, I agree with the decision to promulgate a new procedural rule requiring the entry of a written order prior to the oral pronouncement of a sentence of death. However, unlike the majority, I cannot agree that the procedure followed in this instance met the *statutory* requirements already existing in this state. Specifically, I do not believe a trial judge may support the death sentence with written "findings" made three months after sentencing when he failed to enter *specific* oral findings at the time death was imposed. In the proceedings below, the trial judge made the following "findings" at sentencing:

> The Court has considered the aggravating and mitigating circumstances presented in evidence in this case and has considered the recommendation of the jury and the recommendation included in the presentence investigation and determined that sufficient aggravating circumstances exist and that there are insufficient mitigating circumstances to outweigh the aggravating circumstances.

Section 921.141(3), Florida Statutes (1983), requires that a death sentence be based upon *specific* circumstances. The plain import of the statute is that death may not be imposed if the trial judge does not have specific reasons for doing so; and I cannot agree that it is permissible to formulate those reasons after the fact. Moreover, I fail to see how the judge had jurisdiction to enter findings of fact after the matter had been appealed to this Court. I cannot subscribe to the majority's suggestion that *Muehleman* stands for the proposition that ***852** in retaining concurrent jurisdiction for purposes of transmitting the record, the trial court also retains jurisdiction for preparing a document statutorily crucial to this Court's appellate review.

I also write separately to address the views in Justice Shaw's special concurrence. Although these views are inapplicable to this case because this jury recommended death, I cannot leave unchallenged the suggestion that the *Tedder* standard may be unconstitutional. To the contrary, the United States Supreme Court has expressly upheld the validity of *Tedder* and has suggested that the Florida death penalty statute is constitutional at least partially because of it:

> This crucial protection [the *Tedder* standard] demonstrates that the new statute affords significantly more safeguards to the defendant than did the old. Death is not automatic, absent a jury recommendation of mercy, as it was under the old procedure. A jury recommendation of life may be overridden by the trial judge only under the exacting standards of *Tedder*. Hence, defendants are not significantly disadvantaged vis-a-vis the recommendation of life by the jury....

Dobbert v. Florida, 432 U.S. 282, 295-96, 97 S.Ct. 2290, 2299-2300, 53 L.Ed.2d 344 (1977) (footnote omitted). *Accord* Spaziano v. Florida, 468 U.S. 447, 465, 104 S.Ct. 3154, 3165, 82 L.Ed.2d 340 (1984) (*Tedder* standard expressly upheld as constitutional); Barclay v. Florida, 463 U.S. 939, 955-56, 103 S.Ct. 3418, 3427-3428, 77 L.Ed.2d 1134 (1983) (*Tedder* standard cited as a factor contributing to individualized sentencing); Proffitt v. Florida, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976) (discussing *Tedder* in upholding Florida statute).

Moreover, in his discussion of *Spaziano*, Justice Shaw fails to note that the Supreme Court in that case sustained *Tedder* against the precise criticism he now levels. Instead of finding that *Tedder* resulted in unequal treatment between some defendants who received a life recommendation and some who did not, the *Spaziano* Court found that

> [w]e see nothing that suggests that the application of the jury-override procedure has resulted in arbitrary or discriminatory application of the death penalty, either in general or in this particular case.

468 U.S. at 466, 104 S.Ct. at 3165. I also cannot agree that *Tedder* rested on the rationale contained in Witherspoon v. Illinois, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968), and thus does not comport with Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972). *Tedder* does not cite or even allude to *Witherspoon*, and was decided some three

years after *Furman* at a time when this Court was acutely aware of *Furman* 's dictates. In any event, this issue already has been settled in favor of the *Tedder* standard. *Dobbert*, 432 U.S. at 295-96, 97 S.Ct. at 2299-2300.

In the same vein, I cannot agree that *Wainwright v. Witt*, 469 U.S. 412, 105 S.Ct. 844, 83 L.Ed.2d 841 (1985), which clarified *Witherspoon* in light of *Furman*, has any applicability to the issue raised by Justice Shaw. *Witt* is concerned not with specific sentencing and appellate procedures to be followed in ensuring reliability of the death penalty, but with the reasons for which jurors can be excluded from a capital panel. It is the former, not the latter, that is primarily the concern of the *Furman* line of cases. *See Proffitt*, 428 U.S. at 253, 96 S.Ct. at 2967 (*Furman* requires procedures that establish a meaningful basis for distinguishing death cases from non-death cases). The United States Supreme Court authoritatively has ruled that reliability is advanced in Florida at least partly because of *Tedder*. *Dobbert*, 432 U.S. at 295-96, 97 S.Ct. at 2299-2300.

Furthermore, I cannot agree with Justice Shaw's implication that *Caldwell v. Mississippi*, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985), may be violated by *Tedder*. First, over my own objection, this Court repeatedly has ruled that *Caldwell* has no application in Florida. *Combs; Foster; Phillips*. If this is true, then it necessarily follows that *Tedder* does not violate *Caldwell*. Second, I do not agree that *Tedder* somehow obscures the identity of the sentencer. This assumes that only the judge ***853** or jury can be the sentencer, but not both. I can find no federal case law advancing this assumption, and the Supreme Court in fact has held that no specific method of sentencing is required if the procedures employed promote reliability, *Spaziano*, 468 U.S. at 464, 104 S.Ct. at 3164, as Florida's manifestly does. *Id.; Barclay; Dobbert; Proffitt*. Since *Caldwell* focuses on the exercise of sentencing discretion, the *Tedder* standard necessarily means that both judge and jury constitute the sentencer for *Caldwell* purposes because both exercise this discretion. [FN1]

> FN1. In the same vein, I cannot agree with Justice Shaw's interpretation of *Adams v. Wainwright*, 804 F.2d 1526 (11th Cir.1986), *modified*, 816 F.2d 1493 (1987). *Adams* clearly was grounded on the fact that the trial judge made several erroneous statements *not* contained in the standard jury instructions. These statements included observations that the jury recommendation could be disregarded and that jurors were not to trouble their consciences with it. 804 F.2d at 1528, 1532-33 & n. 8; 816 F.2d at 1501 n. 9. There is nothing in *Adams* suggesting that the standard jury instructions themselves were the source of the error.

Finally, any controversy over who actually is the sentencer in Florida is not the kind of concern properly characterized as a *Caldwell* problem. Under Justice O'Connor's concurring opinion,[FN2] *Caldwell* addresses only erroneous statements made to the jury that minimize their sense of responsibility. 472 U.S. at 341-43, 105 S.Ct. at 2646-2647. It does not concern a procedure mandated by the law of Florida as interpreted by this Court in *Tedder*. As Justice O'Connor noted,

> FN2. This concurrence is the ground upon which a majority of the *Caldwell* court agreed.

> *a misleading picture of the jury's role is not sanctioned* [under federal case law].... But neither does [this case law] suggest that the Federal Constitution prohibits the giving of accurate instructions regarding postsentencing procedures.

472 U.S. at 342, 105 S.Ct. at 2646 (emphasis added). I fail to see how a standard required by Florida law and expressly approved by the United States Supreme Court runs afoul of Justice O'Connor's *Caldwell* analysis, since it hardly paints "a misleading picture of the jury's role."

For these reasons, I conclude that *Tedder* is valid under the Constitution and should remain a part of the law of Florida. As the nation's highest court has noted, *Tedder* affords defendants "a crucial protection," *Dobbert*, 432 U.S. at 295, 97 S.Ct. at 2299, and is a "significant safeguard." *Spaziano*, 468 U.S. at 465, 104 S.Ct. at 3165. Moreover, in the dozen years since *Tedder* issued, the legislature has never voted to overrule this Court. A rule so firmly established in twelve years of voluminous jurisprudence should not be overruled for reasons that have been rejected by the United States Supreme Court and our own legislature.

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APPENDIX 2

708 So.2d 249, 23 Fla. L. Weekly S16
(Cite as: 708 So.2d 249)

Supreme Court of Florida.
Martin GROSSMAN, Petitioner,
v.
Richard L. DUGGER, etc., et al., Respondents.
Martin GROSSMAN, Appellant,
v.
STATE of Florida, Appellee.
Nos. 75738, 87121.

Dec. 18, 1997.
Rehearing Denied Feb. 26, 1998.

Following affirmance of conviction for first-degree murder, 525 So.2d 833, defendant filed motion for postconviction relief, which was denied by the Circuit Court, Pinellas County, Crockett Farnell, J. Defendant appealed denial and also sought writ of habeas corpus. The Supreme Court held that defendant failed to show ineffective assistance by trial or appellate counsel.

Denial of motion affirmed, and habeas petition denied.

Anstead, J., concurred in result only.

West Headnotes

[1] Criminal Law 110 1955

110 Criminal Law
110XXXI Counsel
110XXXI(C) Adequacy of Representation
110XXXI(C)2 Particular Cases and Issues
110k1952 Sentencing in General
110k1955 k. Presentation of Evidence Regarding Sentencing. Most Cited Cases
(Formerly 110k641.13(7))
Competent substantial evidence supported postconviction court's finding that murder defendant was not denied effective assistance of counsel, though counsel determined not to use 33 mitigation witnesses that defendant provided, as counsel did not want to use witnesses who had not seen defendant in years and would say that he was into stealing and heavy drug use, but did call three mitigation witnesses, in addition to defendant's mother, who had had close contact with him in recent years. U.S.C.A. Const.Amend. 6.

[2] Criminal Law 110 1618(8)

110 Criminal Law
110XXX Post-Conviction Relief
110XXX(C) Proceedings
110XXX(C)2 Affidavits and Evidence
110k1616 Sufficiency
110k1618 Particular Issues
110k1618(8) k. Conduct of Trial. Most Cited Cases
(Formerly 110k998(17))
Competent substantial evidence supported postconviction court's finding that murder defendant's fellow inmate who testified for state was not acting as state agent when he procured incriminating information from defendant, in light of evidence that inmate had contacted law officials himself after hearing defendant discussing case, spoke to detectives only once and did not make any deals in exchange for statement.

[3] Criminal Law 110 1968

110 Criminal Law
110XXXI Counsel
110XXXI(C) Adequacy of Representation
110XXXI(C)2 Particular Cases and Issues
110k1966 Appeal
110k1968 k. Preservation of Error for Appeal. Most Cited Cases
(Formerly 110k641.13(7))
Appellate counsel's failure to raise prosecutorial misconduct claim was not ineffective assistance, since claim was not preserved for review. U.S.C.A. Const.Amend. 6.

[4] Habeas Corpus 197 897

197 Habeas Corpus
197IV Operation and Effect of Determination; Res Judicata; Successive Proceedings
197k894 Refusal to Discharge; Subsequent Applications; Prejudice
197k897 k. Claims Presented Earlier. Most Cited Cases
Murder defendant's habeas corpus assertions that appellate counsel should have argued more convin-

cingly that capital sentencing statute was unconstitutional, that death penalty is imposed in an arbitrary fashion, and that severance should have been granted were procedurally barred, as each was raised on direct appeal.

[5] Criminal Law 110 ⚿1038.3

110 Criminal Law
110XXIV Review
110XXIV(E) Presentation and Reservation in Lower Court of Grounds of Review
110XXIV(E)1 In General
110k1038 Instructions
110k1038.3 k. Necessity of Requests. Most Cited Cases

Criminal Law 110 ⚿1043(3)

110 Criminal Law
110XXIV Review
110XXIV(E) Presentation and Reservation in Lower Court of Grounds of Review
110XXIV(E)1 In General
110k1043 Scope and Effect of Objection
110k1043(3) k. Adding to or Changing Grounds of Objection. Most Cited Cases
Claim that instruction on heinous, atrocious or cruel (HAC) aggravating factor was vague was not preserved for review, even though trial counsel objected on vagueness grounds during pretrial, as he did not object to proposed instruction at trial except on ground that evidence did not support it; nor did he propose alternative instruction.

***250** Robert L. Parks of Haggard, Parks & Stone, P.A., Coral Gables; Gail E. Anderson, Assistant CCR, Office of CCRC-Northern Region, Tallahassee; and Terri L. Backhus and John W. Moser, CCRC-Middle Region, Tampa, for Petitioner/Appellant.

Robert A. Butterworth, Attorney General, and Carol M. Dittmar, Assistant Attorney General, Tampa, for Respondent/Appellee.

PER CURIAM.

Martin Grossman appeals an order of the trial court denying relief under Florida Rule of Criminal Procedure 3.850 and petitions this Court for a writ of habeas corpus. We have jurisdiction. Art. V, § 3(b)(1, 9), Fla. Const. We affirm the denial of rule 3.850 relief and deny the writ.

The facts of this case are set out fully in our opinion on direct appeal. See *Grossman v. State*, 525 So.2d 833 (Fla.1988). Martin Grossman and a friend were firing a stolen handgun in a wooded area of Pinellas County during the night of December 13, 1984, when wildlife officer Peggy Park happened on the scene. Although Grossman begged her not to report him because he was on probation and would be sent back to prison, Park nevertheless began to call in a report. Grossman then struggled with her, beat her with her flashlight, and shot her in the back of the head with her gun. Grossman was arrested, was charged with first-degree murder, gave numerous incriminating statements, was convicted, and was sentenced to death pursuant to the jury's unanimous recommendation. The court imposed a sentence of death based on four aggravating circumstances [FN1] and no mitigating circumstances. We affirmed.

> FN1. The court found that the murder was committed: pursuant to a robbery or burglary; to avoid arrest; to hinder enforcement of the laws; and in a heinous, atrocious, or cruel (HAC) manner. The court counted the second and third circumstances as one.

Before Grossman filed any postconviction motions, Governor Martinez signed a death warrant in March 1990, and Grossman filed a petition for a writ of habeas corpus in this Court. We granted a stay of execution to allow Grossman an opportunity to seek postconviction relief. He filed a rule 3.850 motion in the trial court in August 1990 and at the same time filed an amended habeas petition in this Court. The trial court denied the rule 3.850 motion following an evidentiary hearing, and Grossman now appeals that denial. [FN2] He also seeks relief under his pending habeas petition.[FN3]

> FN2. Grossman raises ten issues, claiming error on the following points: (1) ineffective assistance of counsel at the penalty phase; (2) *Brady* violations; (3) witness Brewer was a State agent; (4) ineffective assistance of counsel at the guilt phase; (5) ineffective assistance of counsel in procuring a mental health exam; (6) faulty HAC instruction; (7) trial counsel had a conflict of interest; (8) the

defendant was not present at all critical stages; (9) prosecutorial misconduct; and (10) improper weighing of aggravating and mitigating circumstances.

FN3. Grossman raises three issues, claiming error on the following points: (1) ineffective assistance of appellate counsel; (2) *Caldwell* error; and (3) recent decisions of this Court.

I. RULE 3.850 MOTION

[1] Grossman first claims that trial counsel provided ineffective representation during the penalty phase of the trial. We disagree. This Court set out the standard for reviewing such claims following an evidentiary hearing in *Blanco v. State*, 702 So.2d 1250 (Fla.1997):

> In reviewing a trial court's application of the [relevant] law to a rule 3.850 motion following an evidentiary hearing, this Court applies the following standard of review: As long as the trial court's findings are supported by competent substantial evidence, "this Court will not 'substitute its judgment for that of the trial court on questions of fact, likewise of the credibility of the witnesses as well as the weight to be given to the evidence by the trial court.' "

***251** Id. at 1252 (quoting *Demps v. State*, 462 So.2d 1074, 1075 (Fla.1984)). In the present case, the trial court addressed this first claim at length and concluded:

> The Court has weighed all the above matters in light of *Strickland v. Washington*, 466 U.S. 668 [104 S.Ct. 2052, 80 L.Ed.2d 674] (1984). The Defendant has failed to make the required showing of either deficient performance or sufficient prejudice to support his ineffectiveness claim.
>
> The Court has evaluated the conduct of the Defendant's counsel from counsel's perspective at the time of the trial. Defendant introduced thirty-three affidavits that were represented as possible mitigation witnesses that were available a the time of trial but were not used by the defense. Several of the possible witnesses represented by the affidavits were known to the defense, and the defense had determined not to use them.
>
> Defense counsel, Mr. McCoun, at the time of trial recognized that while trying to present a favorable picture of the Defendant, equally negative things would also be presented. Mr. McCoun did not want to use witnesses who would say that the Defendant was into stealing and heavy drug use. Moreover, defense counsel called three mitigating witnesses in addition to the Defendant's mother. The mitigating witnesses that were called had close contact with the defendant near the time that he committed the crime; whereas, many of the potential witnesses that were represented by the affidavits had not seen the Defendant in years.
>
> The Court finds that Mr. McCoun did a competent, effective job of representing the Defendant at all phases of the trial. Even if counsel were deemed ineffective for the reasons stated by the Defendant, such alleged ineffectiveness did not come close to being so prejudicial to the Defendant that it affected the outcome of the case. The facts of this case showed the Defendant's conduct to be so egregious that proof of mitigating circumstances was extremely difficult.

The trial court applied the right rule of law governing ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984),[FN4] and competent substantial evidence supports its finding. We find no error.

FN4. *See, e.g., Kennedy v. State*, 547 So.2d 912 (Fla.1989).

Grossman next claims that the State withheld material exculpatory evidence in violation of *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). We disagree. In addressing this claim, the trial court noted:

> Defendant says that the state withheld material, exculpatory evidence in violation of due process under *Brady v. Maryland*, 373 U.S. 83 [83 S.Ct. 1194, 10 L.Ed.2d 215] (1963), and the Eighth Amendment to the United States Constitution. This claim relates to information that Defendant says the State failed to disclose with respect to three of the witnesses at Defendant's trial: Charles Brewer, Brian Hancock, and Brian Allan. The greater weight of the evidence refutes this claim.

The court then addressed each aspect of this claim at length and concluded: "For the foregoing reason, there is no basis to the Defendant's allegations that the State withheld material, exculpatory evidence from the defense; therefore, [this] ground has no merit." The trial court applied the right rule of law governing the withholding of evidence under Brady,[FN5] and competent substantial evidence supports its findings. We find no error.

FN5. *See, e.g., Hegwood v. State*, 575 So.2d 170 (Fla.1991).

[2] Grossman claims that inmate Charles Brewer, who testified for the State, was acting as a State agent when he procured incriminating information from Grossman. The trial court addressed this claim:

> Defendant states that Charles Brewer, a trusty at the Pinellas County jail while Defendant was being held there awaiting trial, was a state agent, and the State withheld this fact along with an agreement that Mr. Brewer had reached with prosecutors regarding charges that were pending***252** against Mr. Brewer. Mr. Brewer testified that he had his brother contact law enforcement after he heard Defendant discussing the case. Mr. Brewer said that he talked to the homicide detectives only one time and that was when they took his taped statement.
>
> Detective Robert Rhodes testified that he taped Mr. Brewer's statement on July 25, 1985, and that was the only time he ever met with Mr. Brewer. The State did not make any deals with Mr. Brewer in exchange for the statement, and Detective Rhodes did not suggest questions for Mr. Brewer to ask the Defendant or ask Mr. Brewer to be an agent for the State.
>
> The State Attorney, Bernie McCabe, testified that he interviewed Mr. Brewer at the State Attorney's Office prior to the trial and that he emphasized to Mr. Brewer that there were no deals in exchange for Mr. brewer's testimony. Defendant's claim that Mr. Brewer was a state agent at the time that he discussed the Peggy Park murder with Defendant and that the State struck a deal with Mr. Brewer in exchange for his testimony is without merit.

Competent substantial evidence in the record supports the trial court's finding that Brewer was not a State agent. We find no error.

Grossman claims that trial counsel provided ineffective representation during the guilt phase of the trial. We disagree. The trial court stated:

> [T]he Defendant claims that he was denied the effective assistance of counsel at the guilt phase of his trial by the failure of his counsel to move for change of venue or for individual and sequestered voir dire, by the failure to adequately cross examine crucial state witnesses, and by the failure to move for severance pursuant to Rule 3.152(b)(2), Florida Rules of Criminal Procedure.

The court then addressed each aspect of this claim at length, concluding: "Defendant's claim that he had ineffective assistance of counsel during the guilt phase of his trial is without merit." The record shows that the trial court's conclusion is supported by competent substantial evidence. We find no error.

Grossman claimed in his 3.850 motion before the trial court that trial counsel failed to investigate Grossman's history of mental problems and thus did not provide sufficient background information to the defense mental health expert, Dr. Merin. Grossman now claims that the trial court erred in failing to address this issue during the evidentiary hearing. We disagree. In its order granting an evidentiary hearing on certain issues (but denying it on this issue), the trial court addressed this issue at length, concluding:

> Defendant's claim is without merit as it fails the second prong of Strickland, as there has been no showing that but for such claimed ineffectiveness, the outcome probably would have been different. Furthermore, this Court concludes the jury would not have been persuaded to arrive at a different result, nor would this Court have been persuaded to reach a different result, assuming the substance of Defendant's allegations had been introduced into evidence.

Competent substantial evidence supports the trial court's finding. We find no error. We find the remainder of Grossman's rule 3.850 claims to be procedurally barred.[FN6]

FN6. Issues 6-10 are procedurally barred.

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(Cite as: 708 So.2d 249)

II. HABEAS CORPUS

[3][4][5] Grossman claims as his first issue in his habeas petition that appellate counsel provided ineffective representation in a number of ways. (A) He claims that appellate counsel should have argued that the trial court's sentencing order was insufficiently specific. A review of the order, however, shows that it comports with the law that was in effect at that time. (B) He asserts that appellate counsel should have claimed prosecutorial misconduct. This issue was not preserved since trial counsel failed to object to the allegedly improper statements. (C) He asserts that appellate counsel should have argued more convincingly that Florida's capital sentencing statute is unconstitutional. This claim is procedurally barred-it was raised on direct appeal. (D) He asserts that ***253** appellate counsel should have argued that the death penalty is imposed in an arbitrary fashion. This claim is procedurally barred-it was raised on direct appeal. (E) He claims that appellate counsel should have argued that the HAC instruction was vague. This issue was not preserved. Although trial counsel objected on vagueness grounds to the HAC aggravating circumstance pretrial, he did not object to the proposed instruction at trial except on the ground that the evidence did not support it; nor did he propose an alternative instruction. Appellate counsel cannot be faulted. *Ferguson v. Singletary*, 632 So.2d 53 (Fla.1993).(F) Grossman claims that appellate counsel should have argued that codefendant Taylor's acquittal of first-degree felony murder precluded such a conviction for Grossman (and precluded application of the felony murder aggravating circumstance to Grossman) since Taylor was more guilty than Grossman. This issue has already been decided adversely to the defendant. *Eaton v. State*, 438 So.2d 822 (Fla.1983).(G) He claims that appellate counsel should have argued that the trial court failed to hold a hearing pursuant to *Richardson v. State*, 246 So.2d 771 (Fla.1971). The record, however, shows that defense counsel never claimed that a discovery violation took place and never requested a hearing. (H) He claims that appellate counsel should have argued more convincingly that the trial court erred in failing to grant a severance. This issue is procedurally barred-it was raised on appeal. We find no merit to Grossman's ineffectiveness claim.

Grossman next claims that recent federal court decisions have rendered meritorious his claim under *Caldwell v. Mississippi*, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985). This argument has already been decided adversely to the defendant. See, e.g., *Johnson v. State*, 660 So.2d 637 (Fla.1995). Grossman also claims that recent decisions of this court warrant relief. Our decision in *Campbell v. State*, 571 So.2d 415 (Fla.1990), however, is not retroactive. See *Turner v. Dugger*, 614 So.2d 1075 (Fla.1992). Our decisions in *Porter v. State*, 564 So.2d 1060 (Fla.1990), *Hallman v. State*, 560 So.2d 223 (Fla.1990), and *Brown v. State*, 526 So.2d 903 (Fla.1988), inaugurated no fundamental changes in death penalty jurisprudence. See generally *Witt v. State*, 387 So.2d 922 (Fla.1980). We find no merit to these claims.

Based on the foregoing, we affirm the denial of Grossman's rule 3.850 motion, and we deny his petition for writ of habeas corpus.

It is so ordered.

KOGAN, C.J., and OVERTON, SHAW, HARDING and WELLS, JJ., and GRIMES, Senior Justice, concur.
ANSTEAD, J., concurs in result only.
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APPENDIX 3

466 F.3d 1325, 20 Fla. L. Weekly Fed. C 49
(Cite as: 466 F.3d 1325)

United States Court of Appeals,
Eleventh Circuit.
Martin E. GROSSMAN, Petitioner-Appellant,
v.
James McDONOUGH, Secretary, Florida Department of Corrections, Charlie Crist, Attorney General of the State of Florida, Respondents-Appellees.
No. 05-11150.

Oct. 16, 2006.

Background: Following affirmance on direct appeal of his murder conviction and death sentence, 525 So.2d 833, and denial of postconviction relief, 708 So.2d 249, petitioner sought writ of habeas corpus. The United States District Court for the Middle District of Florida, No. 98-01929-CV-T-17MSS,Elizabeth A. Kovachevich, J., 359 F.Supp.2d 1233, entered order denying petition, and petitioner appealed.

Holdings: The Court of Appeals, Marcus, Circuit Judge, held that:
(1) Florida Supreme Court's determination as to harmless nature of error that occurred when trial court denied defendant's motion to sever his trial from that of nontestifying codefendant and admitted codefendant's confession at their joint trial was neither "contrary to" nor an "unreasonable application" of governing United States Supreme Court case law;
(2) Florida courts did not make unreasonable factual determinations or unreasonably apply clearly established federal law in determining that state was not aware of any falsity in statements of witnesses who testified against petitioner or in concluding that undisclosed disorderly conduct charge against one witness or criminal investigation of another were not material; and
(3) determination that attorney representing capital murder defendant had not behaved deficiently at penalty phase of case was not unreasonable application of Supreme Court precedent.

Affirmed.

West Headnotes

[1] Habeas Corpus 197 842

197 Habeas Corpus
197III Jurisdiction, Proceedings, and Relief
197III(D) Review
197III(D)2 Scope and Standards of Review
197k842 k. Review De Novo. Most Cited Cases

Habeas Corpus 197 846

197 Habeas Corpus
197III Jurisdiction, Proceedings, and Relief
197III(D) Review
197III(D)2 Scope and Standards of Review
197k846 k. Clear Error. Most Cited Cases
When examining district court's denial of habeas petition, Court of Appeals review questions of law and mixed questions of law and fact *de novo*, and district court's findings of fact for clear error. 28 U.S.C.A. § 2254.

[2] Habeas Corpus 197 450.1

197 Habeas Corpus
197II Grounds for Relief; Illegality of Restraint
197II(A) Ground and Nature of Restraint
197k450 Federal Review of State or Territorial Cases
197k450.1 k. In General. Most Cited Cases

Habeas Corpus 197 452

197 Habeas Corpus
197II Grounds for Relief; Illegality of Restraint
197II(A) Ground and Nature of Restraint
197k450 Federal Review of State or Territorial Cases
197k452 k. Federal or Constitutional Questions. Most Cited Cases
State court's decision is contrary to, or involves an unreasonable application of, "clearly established federal law," within meaning of statute governing a federal court's ability to grant state prisoner's petition for

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habeas relief on ground previously rejected by state court, only when it is contrary to, or involves an unreasonable application of, the holdings of the United States Supreme Court; "clearly established federal law" is not case law of the lower federal courts, but refers only to the Supreme Court's decisions as of time of relevant state court decision. 28 U.S.C.A. § 2254(d)(1).

[3] Habeas Corpus 197 ⚿452

197 Habeas Corpus
197II Grounds for Relief; Illegality of Restraint
197II(A) Ground and Nature of Restraint
197k450 Federal Review of State or Territorial Cases
197k452 k. Federal or Constitutional Questions. Most Cited Cases
State court decision is "contrary to" clearly established federal law, within meaning of statute governing a federal court's ability to grant state prisoner's petition for habeas relief on ground previously rejected by state court, if state court applied a rule that contradicts the governing law set forth by Supreme Court case law, or if, when faced with materially indistinguishable facts, state court arrived at result different from that reached in Supreme Court case. 28 U.S.C.A. § 2254(d)(1).

[4] Habeas Corpus 197 ⚿450.1

197 Habeas Corpus
197II Grounds for Relief; Illegality of Restraint
197II(A) Ground and Nature of Restraint
197k450 Federal Review of State or Territorial Cases
197k450.1 k. In General. Most Cited Cases
State court decision involves an "unreasonable application" of clearly established federal law, within meaning of statute governing a federal court's ability to grant state prisoner's petition for habeas relief on ground previously rejected by state court, if state court identifies the correct legal rule from Supreme Court case law but unreasonably applies that rule to facts of petitioner's case, or if state court unreasonably extends, or unreasonably declines to extend, a legal principle from Supreme Court case law to new context. 28 U.S.C.A. § 2254(d)(1).

[5] Habeas Corpus 197 ⚿767

197 Habeas Corpus
197III Jurisdiction, Proceedings, and Relief
197III(C) Proceedings
197III(C)4 Conclusiveness of Prior Determinations
197k765 State Determinations in Federal Court
197k767 k. Issues and Findings of Fact; Historical Facts; Credibility. Most Cited Cases
On petition for federal habeas relief filed by state prisoner, state court's determination of facts is entitled to substantial deference. 28 U.S.C.A. § 2254(d)(2), (e).

[6] Habeas Corpus 197 ⚿478

197 Habeas Corpus
197II Grounds for Relief; Illegality of Restraint
197II(B) Particular Defects and Authority for Detention in General
197k478 k. Joinder or Severance of Counts or Defendants. Most Cited Cases

Habeas Corpus 197 ⚿481

197 Habeas Corpus
197II Grounds for Relief; Illegality of Restraint
197II(B) Particular Defects and Authority for Detention in General
197k481 k. Conduct of Trial, in General. Most Cited Cases
Florida Supreme Court's determination as to harmless nature of error that occurred when trial court denied defendant's motion to sever his trial from that of nontestifying codefendant and admitted codefendant's confession at their joint trial in violation of defendant's Sixth Amendment confrontation rights was neither "contrary to" nor an "unreasonable application" of governing United States Supreme Court case law, as required for federal court to grant defendant's petition for habeas relief based on this Sixth Amendment violation, where co-defendant's confession was fully consistent with incriminating statements that defendant had made to three other persons, and that were directly admissible against him; violation of defendant's confrontation rights could have had no substantial and injurious effect or influence in determining jury's verdict, given defendant's own incriminating statements and overwhelming evidence against him, including his fingerprints both on flashlight used to

beat Florida wildlife officer and inside her vehicle. U.S.C.A. Const.Amend. 6; 28 U.S.C.A. § 2254(d)(1).

[7] Habeas Corpus 197 ⚿481

197 Habeas Corpus
197II Grounds for Relief; Illegality of Restraint
197II(B) Particular Defects and Authority for Detention in General
197k481 k. Conduct of Trial, in General. Most Cited Cases
Brecht "harmless error" standard, under which error is harmless unless it had substantial and injurious effect or influence in determining jury's verdict, governs harmless error analysis in habeas corpus cases involving Confrontation Clause transgressions associated with improper admission of out-of-court statements. U.S.C.A. Const.Amend. 6.

[8] Habeas Corpus 197 ⚿481

197 Habeas Corpus
197II Grounds for Relief; Illegality of Restraint
197II(B) Particular Defects and Authority for Detention in General
197k481 k. Conduct of Trial, in General. Most Cited Cases
In deciding whether Florida Supreme Court's prior rejection of federal habeas petitioner's Sixth Amendment Confrontation Clause claim was either "contrary to" or an "unreasonable application" of governing United States Supreme Court case law, federal court could not consider United States Supreme Court case that was not decided until nearly sixteen years after the Florida Supreme Court reached its decision. U.S.C.A. Const.Amend. 6; 28 U.S.C.A. § 2254(d)(1).

[9] Constitutional Law 92 ⚿4594(1)

92 Constitutional Law
92XXVII Due Process
92XXVII(H) Criminal Law
92XXVII(H)4 Proceedings and Trial
92k4592 Disclosure and Discovery
92k4594 Evidence
92k4594(1) k. In General. Most Cited Cases
(Formerly 92k268(5))
Suppression by prosecution of evidence favorable to accused violates due process, where evidence is material either to guilt or to punishment. U.S.C.A. Const.Amends 5, 14.

[10] Criminal Law 110 ⚿1991

110 Criminal Law
110XXXI Counsel
110XXXI(D) Duties and Obligations of Prosecuting Attorneys
110XXXI(D)2 Disclosure of Information
110k1991 k. Constitutional Obligations Regarding Disclosure. Most Cited Cases
(Formerly 110k700(2.1))
Prosecutor has duty to disclose evidence favorable to accused, even though there has been no request for such evidence by accused.

[11] Criminal Law 110 ⚿1992

110 Criminal Law
110XXXI Counsel
110XXXI(D) Duties and Obligations of Prosecuting Attorneys
110XXXI(D)2 Disclosure of Information
110k1992 k. Materiality and Probable Effect of Information in General. Most Cited Cases
(Formerly 110k700(4))
Prosecutor's duty to disclose evidence favorable to accused encompasses impeachment evidence, as well as exculpatory evidence.

[12] Criminal Law 110 ⚿1992

110 Criminal Law
110XXXI Counsel
110XXXI(D) Duties and Obligations of Prosecuting Attorneys
110XXXI(D)2 Disclosure of Information
110k1992 k. Materiality and Probable Effect of Information in General. Most Cited Cases
(Formerly 110k700(2.1))
Evidence is "material," for purposes of assessing prosecutor's disclosure obligations under *Brady*, if there is reasonable probability that, had evidence been disclosed to defense, result of proceeding would have been different.

[13] Habeas Corpus 197 ⚿770

197 Habeas Corpus
197III Jurisdiction, Proceedings, and Relief
197III(C) Proceedings
197III(C)4 Conclusiveness of Prior Determinations
197k765 State Determinations in Federal Court
197k770 k. Particular Issues and Problems. Most Cited Cases
Federal habeas court had to defer to state post-conviction court's factual determination that witness testifying against defendant did not have any undisclosed deal with state, notwithstanding witness' statements that he had such a deal, where detective and prosecutor testified to the contrary. 28 U.S.C.A. § 2254(e).

[14] Habeas Corpus 197 ⚷480

197 Habeas Corpus
197II Grounds for Relief; Illegality of Restraint
197II(B) Particular Defects and Authority for Detention in General
197k480 k. Discovery and Disclosure. Most Cited Cases
Florida courts did not make any unreasonable factual determinations or unreasonably apply clearly established federal law under *Brady*, as required for grant of federal habeas relief, in determining that state was not aware of any falsity in statements of witnesses who testified against petitioner or in concluding that undisclosed disorderly conduct charge against one witness or criminal investigation of another were not material nondisclosures given overwhelming evidence against petitioner, including his incriminating statements and fingerprint evidence that directly linked him to crime charged. 28 U.S.C.A. § 2254(d)(1, 2).

[15] Criminal Law 110 ⚷1880

110 Criminal Law
110XXXI Counsel
110XXXI(C) Adequacy of Representation
110XXXI(C)1 In General
110k1879 Standard of Effective Assistance in General
110k1880 k. In General. Most Cited Cases
(Formerly 110k641.13(1))
Standard for evaluating counsel's performance on ineffective assistance claim is one of reasonableness under prevailing professional norms; for Sixth Amendment purposes, court is not interested in grading counsel's performances, but in whether the adversarial process at trial, in fact, worked adequately. U.S.C.A. Const.Amend. 6.

[16] Criminal Law 110 ⚷1880

110 Criminal Law
110XXXI Counsel
110XXXI(C) Adequacy of Representation
110XXXI(C)1 In General
110k1879 Standard of Effective Assistance in General
110k1880 k. In General. Most Cited Cases
(Formerly 110k641.13(1))
On ineffective assistance claim, issue for court is not what is possible or what is prudent or appropriate, but only what is constitutionally compelled. U.S.C.A. Const.Amend. 6.

[17] Habeas Corpus 197 ⚷709

197 Habeas Corpus
197III Jurisdiction, Proceedings, and Relief
197III(C) Proceedings
197III(C)2 Evidence
197k705 Burden of Proof
197k709 k. Counsel. Most Cited Cases
Burden of persuasion is on habeas petitioner asserting an ineffective assistance claim to prove, by preponderance of evidence, that no competent counsel would have taken the action that his counsel took. U.S.C.A. Const.Amend. 6.

[18] Criminal Law 110 ⚷1960

110 Criminal Law
110XXXI Counsel
110XXXI(C) Adequacy of Representation
110XXXI(C)2 Particular Cases and Issues
110k1958 Death Penalty
110k1960 k. Adequacy of Investigation of Mitigating Circumstances. Most Cited Cases
(Formerly 110k641.13(7))
In judging, for Sixth Amendment purposes, the adequacy of counsel's investigation of potential mitigating circumstances in death penalty case, court con-

siders counsel's perspective at time the investigative decisions were made, and gives heavy measure of deference to counsel's judgments. U.S.C.A. Const.Amend. 6.

[19] Habeas Corpus 197 ⚷486(5)

197 Habeas Corpus
197II Grounds for Relief; Illegality of Restraint
197II(B) Particular Defects and Authority for Detention in General
197k482 Counsel
197k486 Adequacy and Effectiveness of Counsel
197k486(5) k. Post-Trial Proceedings; Sentencing, Appeal, Etc. Most Cited Cases
Florida Supreme Court's determination that attorney representing capital murder defendant had not behaved deficiently at penalty phase of case in failing to call the 33 character witnesses that defendant contended could have given testimony favorable to him, and that any deficiency in counsel's performance could not have affected outcome, did not involve unreasonable application of governing Supreme Court case law, as required for grant of federal habeas relief, given that much of these uncalled witnesses' proffered testimony was cumulative of testimony of the four character witnesses that defense counsel called or would have opened door to evidence regarding defendant's drug and alcohol abuse and prior criminal activity, and given the substantial evidence that was presented of defendant's brutal acts against his young female victim in striking her repeatedly with her own flashlight and then shooting her in head with her own gun. U.S.C.A. Const.Amend. 6; 28 U.S.C.A. § 2254(d)(1).

[20] Sentencing and Punishment 350H ⚷1782

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(G) Proceedings
350HVIII(G)3 Hearing
350Hk1782 k. Reception of Evidence. Most Cited Cases
Evidence that prosecutor elicited from one of capital murder defendant's penalty phase witnesses, regarding defendant's alleged vandalization of third party's car and alleged threats to kill this third party, was proper rebuttal evidence, which was offered in response to witness' direct testimony that defendant was a normal, nonviolent person who acted wholly out of character when he murdered victim; accordingly, defense counsel did not behave deficiently in failing to object to this evidence. U.S.C.A. Const.Amend. 6.

[21] Sentencing and Punishment 350H ⚷1780(2)

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(G) Proceedings
350HVIII(G)3 Hearing
350Hk1780 Conduct of Hearing
350Hk1780(2) k. Arguments and Conduct of Counsel. Most Cited Cases
Prosecutor's argument at penalty phase of capital murder case regarding fear and pain that were reflected in Florida wildlife officer's final radio transmission for help as she was being assaulted, and ultimately murdered, in her own vehicle by defendant was not improper "Golden Rule" argument, where prosecutor's statements were not designed to elicit sympathy for victim, but were made in support of "heinous, atrocious or cruel" aggravating factor.

[22] Criminal Law 110 ⚷1942

110 Criminal Law
110XXXI Counsel
110XXXI(C) Adequacy of Representation
110XXXI(C)2 Particular Cases and Issues
110k1941 Argument and Conduct of Defense Counsel
110k1942 k. In General. Most Cited Cases
(Formerly 110k641.13(2.1))
Defense attorneys who presented a reasoned and rational theme to jury during closing argument did all that the Constitution required, and did not behave in deficient manner for Sixth Amendment purposes. U.S.C.A. Const.Amend. 6.

***1329**James Vincent Viggiano (Court-Appointed), Capital Collateral Regional Counsel, Tampa, FL, for Grossman.

Carol M. Dittmar, Tampa, FL, for Respondents-Appellees.

Appeal from the United States District Court for the Middle District of Florida.

466 F.3d 1325, 20 Fla. L. Weekly Fed. C 49
(Cite as: 466 F.3d 1325)

Before TJOFLAT, BLACK and MARCUS, Circuit Judges.

MARCUS, Circuit Judge:

In this death case Martin E. Grossman appeals from the district court's denial of his petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. He claims that his Sixth Amendment right to confrontation was violated when the state trial court refused to sever his case from his co-defendant, whose confession-which also implicated Grossman-was introduced at trial, albeit against only the co-defendant. Grossman also maintains that the state impermissibly withheld *Brady* material concerning three prosecution witnesses, and that he received ineffective assistance of counsel at the penalty phase of his capital trial. The Supreme Court of Florida affirmed his conviction and sentence on direct appeal and affirmed the denial of his post-conviction requests for collateral relief. After thorough review, we affirm.

I.

Grossman was convicted of first-degree murder by a state-court jury in Pinellas County, Florida, after he shot and killed Margaret Park, a wildlife officer employed by the Florida Game & Fish Commission, while she was engaged in the lawful performance of her duties. The same jury unanimously recommended that Grossman be sentenced to die, and the state trial judge entered an order consonant with that recommendation. The Supreme Court of Florida affirmed Grossman's conviction and sentence on direct appeal. *Grossman v. State*, 525 So.2d 833 (Fla.1988) (*Grossman I*). Grossman then filed a state petition for post-conviction relief, ***1330** which was denied by the trial judge[FN1] in an order subsequently affirmed by the Supreme Court of Florida. *Grossman v. Dugger*, 708 So.2d 249 (Fla.1997) (*Grossman II*). Thereafter, Grossman filed a habeas petition in the United States District Court for the Middle District of Florida, alleging eighteen constitutional errors. In a well-reasoned and comprehensive order, the district judge denied habeas relief on all grounds, *Grossman v. Crosby*, 359 F.Supp.2d 1233 (M.D.Fla.2005) (*Grossman III*), and we granted a certificate of appealability on three issues: first, whether the state trial court violated Grossman's Sixth Amendment right of confrontation when it refused to sever Grossman's trial from his co-defendant, Thayne Taylor; second, whether the prosecutors violated *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), and its progeny by failing to disclose exculpatory material relating to witnesses Charles Brewer, Brian Hancock, and Brian Allan; and, finally, whether Grossman received ineffective assistance of counsel at the penalty phase of his trial. [FN2]

FN1. The judge who resolved Grossman's post-conviction claim for relief was the same judge who presided over the original trial.

FN2. The district court considered eighteen claims: 1) whether the failure to sever violated Grossman's Sixth Amendment rights; 2) whether the state public defender's office had an impermissible conflict of interest; 3) whether the state sentencing court violated Grossman's rights under the Eighth and Fourteenth Amendments by failing to timely state the reasons for imposing a death sentence; 4 & 5) whether the state trial judge violated the Constitution by refusing to give certain requested jury instructions; 6) whether Grossman received ineffective assistance of counsel on direct appeal; 7) whether the state withheld *Brady* material; 8) whether state prosecutors improperly questioned Grossman outside the presence of counsel; 9 & 17) whether Grossman received ineffective assistance of counsel at the penalty phase; 10) whether the jury was properly instructed on aggravating factors at the penalty phase; 11) whether Fla. Stat. § 921.141 is unconstitutional; 12) whether the state trial court violated Grossman's constitutional rights by denying a continuance; 13) whether the state trial court violated Grossman's constitutional rights by admitting gory and gruesome photographs; 14) whether the state trial court erred in admitting victim impact and character evidence; 15) whether Florida's capital sentencing scheme is unconstitutional; 16) whether Grossman received ineffective assistance of counsel at the guilt phase; and 18) whether the Florida capital sentencing scheme comports with *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002).

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The facts of this case, which we glean from the trial testimony, the state collateral hearing, and the opinions of the Florida courts, are these. Grossman and a companion, Thayne (Tommy) Taylor, drove to a wooded area of Pinellas County on December 13, 1984, to shoot a handgun that Grossman, Taylor, and Brian Hancock, Grossman's friend and roommate, had recently stolen. At the time, Grossman was living in nearby Pasco County and was on probation following a recent prison term. Florida wildlife officer Margaret (Peggy) Park was on patrol in the area and became suspicious when she saw Grossman and Taylor. She parked her patrol truck near Grossman's van and took possession of Grossman's weapon, which she found under the driver's seat of the van, and his driver's license.

Grossman pleaded with the officer not to arrest him because possessing a weapon and being outside of Pasco County would have violated the terms of his probation. Officer Park refused his pleas, opened the driver's door to her vehicle, and reached in to pick up her radio microphone so she could call the sheriff's office. Grossman then grabbed the officer's large metallic flashlight and struck her repeatedly on the ***1331** head and shoulders, forcing her upper body into the truck. Officer Park managed to exclaim "I'm hit" over the radio, and deputies from the Pinellas County Sheriff's Office began responding to her location.

Grossman continued his attack on Officer Park and called for help from Taylor, who then joined in the assault. Officer Park drew her firearm, a .357 magnum, and fired one shot that narrowly missed hitting Taylor in the head. Simultaneously, she temporarily disabled Taylor by kicking him in the groin. Grossman, who was significantly larger than Officer Park, gained control of her weapon and fired one shot into the back of her head, killing her.

Grossman and Taylor then took back the seized handgun and driver's license and fled with Officer Park's weapon. They returned to Grossman's home where they told the story of the shooting, both individually and collectively, to Brian Hancock. Hancock and Taylor buried the two guns near the crime scene. Grossman, whose clothing was covered in blood, unsuccessfully attempted to burn the clothes and shoes he was wearing during the attack.[FN3] Taylor eventually discarded those items in a nearby lake. The next day, Grossman and Taylor thoroughly cleaned the van they were driving on the night of the murder and changed the tires on the vehicle.

> FN3. Lawrence Black, one of Grossman's neighbors, testified that he saw a fire behind the Grossman house on the evening of December 14, 1984. Black said he saw Grossman and another man carrying things out of the house and burning them in the yard. Black could not see exactly what items Grossman and his accomplice were burning.

Approximately one week later, on December 20, 1984, Grossman and Taylor told the story of the shooting to yet another friend, Brian Allan. Then, on December 25, Hancock, who testified that he was scared of Grossman, went to the police and told them what he knew. Shortly thereafter, Grossman and Taylor were arrested. Upon his arrest, Taylor confessed to the police and gave them a similar and detailed account of the events that took place on the night of the murder. After Grossman was arrested, but before he was tried, Grossman told the story of the killing, and his central role in it, to still one more person, fellow inmate Charles Brewer.

Grossman and Taylor were charged with first-degree murder, and, over Grossman's objections, were tried together. The state introduced significant physical and forensic evidence. A latent prints examiner testified that Grossman's fingerprints were found on the driver's door handle of Officer Park's vehicle and on her flashlight.[FN4] Brian Moyer, a deputy sheriff in Pasco County, testified that Brian Hancock led him to the location of two guns buried in a wooded area of Pasco County. One was a semiautomatic pistol and one was a .357 magnum. The serial number on the .357 matched that of Officer Park's weapon.

> FN4. Taylor's fingerprints were also recovered from the driver's door handle of Officer Park's vehicle.

The police had recovered two discharged bullets from the scene, one from inside a cup in Officer Park's vehicle and another from inside a wall of that vehicle. An FBI agent qualified as an expert in the field of elemental composition analysis tested the lead composition of those bullets and determined that it was identical to the lead composition of one bullet later recovered from Officer Park's gun.[FN5] Another FBI

***1332** agent, qualified as a firearms and gunpowder expert, testified that the bullet recovered from the cup inside Officer Park's vehicle could *only* have been fired from her own gun.[FN6]

> FN5. Four bullets were subsequently recovered from Officer Park's gun. Three of them had identical lead compositions. One had a slightly different composition, and it was that bullet that matched the two discharged bullets recovered from the scene.
>
> FN6. The agent testified that the other bullet, which had been fired into the metal wall of the vehicle, was damaged. He was able to say that it had been fired from a .357 caliber weapon, which is the kind of weapon Officer Park carried that night, but was not able to definitively establish that it was fired from Officer Park's gun. There were no fingerprints recovered from any of the weapons.

Dr. Edward Corcoran, an associate medical examiner for Pinellas County, conducted an autopsy on Officer Park. The doctor testified that she died of a single gunshot wound to the head. The shot made an entrance wound in the back of her head on the left side and an exit wound in the right temporal region. He said that the bullet went in at about a 45 degree angle from the left back to the right side, with a slight deviation upwards of about 10 degrees. In the doctor's opinion, "this would indicate that the bullet went in, someone holding the gun down firing upwards, or else the gun going in and the head bent over."

Dr. Corcoran testified that in addition to the gunshot wounds, he discovered two lacerations on the top of the right side of the head, a laceration on the back right side of the head, three large defects on the top left side of the head, a bruise on the right side of the forehead, small bruises on the chin, a scrape on the left cheek, a bruise on the left shoulder, bruises and scrapes on the right hand, a scrape on the left hand near the knuckles, and small bruises around the knees and thigh. There was hemorrhaging inside the scalp and extensive fracturing of the skull. The doctor testified that the skull fractures were caused by the bullet. Some of the lacerations on the head were caused by the bullet, and others were caused by external blunt trauma.

Finally, the state introduced the charred shoes; the two weapons; testimony from Black, the neighbor who observed the fire outside Grossman's home; and extensive testimony regarding Grossman's efforts to clean his van and change the van's tires. The state also presented expert testimony as to the significance of blood spatter evidence.[FN7]

> FN7. An investigator from the medical examiner's office testified that blood spatter evidence in the victim's vehicle indicated that when she was shot, Officer Park was probably standing outside the vehicle with her head above the driver's seat, facing the interior of the vehicle, probably toward the area of the radio.

In addition to the physical evidence, the state introduced the testimony of Hancock, Allan, and Brewer, and the details of Taylor's confession to the police. Because Grossman claims that he was prejudiced by the admission of Taylor's confession at their joint trial, we recount at some length the powerful similarities between Taylor's confession, on one hand, and the trial testimony of Hancock, Allan, and Brewer, describing what Grossman told them about the crime, on the other.

Hancock testified that Grossman and Taylor "come back, they run through the door. Grossman was covered full of blood with two guns in his hand saying he just shot a police officer .... Grossman told me he shot a police officer. And Tommy told me the same thing." Hancock added that Grossman told him that Grossman shot the officer because he did not want to go back to prison. [FN8]

> FN8. Grossman's attorney cross-examined Hancock about this point and got Hancock to admit that Grossman did not actually say, on the night of the murder, that he shot the officer because he did not want to go back to prison. Hancock clarified that he had engaged in numerous conversations with Grossman during which Grossman told Hancock that he did not want to go back to prison. The jury heard the following exchange on cross-examination, which best encapsulates Hancock's testimony on this point:
>
> Q (Defense Counsel McCoun): These

> are-your testimony with regards to that point about his fear about going back to jail, you've already told the jury that was something that he didn't say, but something that you surmised or determined in your mind; correct?
>
> A (Brian Hancock): No. He told me several times before the shooting ever-before he even killed her he said that, he would never go back to jail.
>
> Q: I appreciate that. He had been to prison one time and he did not like it; right?
>
> A: That's right.
>
> Q: Okay. But he never told you, sir, that that was the reason why this lady was killed, did he? That's just something that you figured out?
>
> A: That's right.

***1333** Hancock further testified that when he was alone with Grossman he asked Grossman specifically what had happened. Grossman provided a detailed account of the circumstances surrounding the murder. He explained that when Officer Park came upon Grossman and Taylor she asked what they were doing, and whether they had any guns. They denied having any firearms. Park asked both Grossman and Taylor to step outside the vehicle and proceeded to search it. She found a gun under Grossman's seat and placed him under arrest. Grossman pleaded with her not to arrest him because he was on parole. As she went to call in the incident on her radio Grossman hit her on the head with her flashlight, perhaps as many as twenty or thirty times. Grossman called Taylor for help, who then grabbed Park's legs. The officer then kicked Taylor in the groin, pulled out her .357 magnum, and got off one shot, which grazed Taylor. Grossman grabbed Officer Park's weapon from her hand and shot her in the head at point blank range. He then took back the nine-millimeter weapon lying on the seat, along with the officer's weapon, and with Taylor, fled in his van. The next day Grossman and Taylor washed and cleaned the van and changed its tires.

Allan testified that he met up with Grossman and Taylor on December 20, 1984, after returning to Pasco County from Jacksonville, where he had been serving a probationary sentence at a halfway house. Grossman showed Allan a newspaper article detailing the account of Officer Park's death, and told Allan, "I did it, man, I killed her."

According to Allan's testimony, Grossman told him that Officer Park had found a firearm in his van. Thereafter, she walked back to her vehicle and said, "Mr. Grossman, you are going back to prison." Grossman pleaded with the officer not to arrest him, but she persisted. Allan testified that "Martin grabbed the flashlight and repeatedly hit her over the head. Couldn't get a good grip, couldn't get a good hit, so, he got a better grip on the flashlight and hit her a couple more times." Grossman, while attacking Officer Park, yelled to Taylor, "Tom, she still won't go. Tom, she still won't go." After thinking he had beaten her into unconsciousness, Grossman told Allan, he let go of the officer, at which point she pulled out her gun and fired the shot that narrowly missed hitting Taylor. Then, Allan recounted, Grossman "had her around the neck, and he grabbed her gun, ripped it out of her hands, let her go." Like Hancock, Allan testified that he, too, had conversations with Grossman, prior to the murder, during which Grossman told him that he did not like prison and did not want to go back.

Charles Brewer, a fellow inmate of Grossman's, testified that Grossman gave ***1334** him a magazine article detailing the facts of the murder, but that Grossman complained about some inaccuracies in the account. Thus, for example, the article indicated that Officer Park was shot in the back of the head, and Grossman told Brewer "[t]hat was a damned lie. It was in the side of the head." Like Hancock and Allan, Brewer testified that Grossman admitted that he grabbed Park's flashlight, struck her in the head with it, and shot her once in the head with her own weapon. Brewer also testified that Grossman told him he did not want to be arrested by a female officer and that he did not want to go back to jail.

Finally, the state introduced only against Taylor the testimony of Wayne Desmarais, a detective with the Pinellas County Sheriff's Department, who took Taylor's confession. It is this testimony that Grossman claims prejudiced his trial. Taylor told the detective that he and Grossman had driven to the Covered

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Bridge Estates area of Pinellas County on the night of December 13, 1984, so that they could shoot a nine-millimeter weapon. Before they could begin firing, Officer Park drove up to the location, exited her vehicle, and asked Grossman for his driver's license. Officer Park asked Grossman and Taylor to step out of their van and stand to the side while she searched the vehicle. She asked if they had any guns, and they replied they did not. Grossman told her that he was on probation,[FN9] that he did not want any trouble, and that he did not want to go back to jail. Officer Park soon found the nine-millimeter gun in the van and told Grossman he was under arrest.

> FN9. Taylor was unsure whether Grossman used the word "probation" or "parole."

The detective testified that Taylor told him he then lost sight of Grossman and Officer Park for a short period.[FN10] Taylor heard Grossman yelling his name, and he went over to the officer's vehicle, where Grossman had Officer Park pinned down on the driver's seat. Grossman was on top of Officer Park, and he was hitting her head with an aluminum flashlight she had been carrying. Officer Park was kicking her legs frantically, and Taylor attempted to stop her. Officer Park managed to draw her weapon and fire one shot that narrowly missed hitting Taylor in the head, while simultaneously kicking him in the groin. Taylor said that he was lying on the ground and saw Grossman take Officer Park's gun and fire one round into the back of her head. Taylor then retrieved Grossman's license and the nine-millimeter weapon from the officer's car, Grossman and Taylor returned to their van, and they left the scene. The detective testified that Taylor confirmed the firearms were buried near the crime scene and that the clothes Grossman wore at the crime scene had been discarded in a lake.

> FN10. According to Taylor, his vision was obscured by the glare from the headlights on Officer Park's vehicle.

The defense called no witnesses at the guilt phase. The trial judge instructed the jury on premeditation and felony murder based on escape and the robbery or burglary of Officer Park's gun and the seized driver's license. The jury returned a general verdict of first-degree murder against Grossman and a general verdict of third-degree murder against Taylor.

At the penalty phase of Grossman's capital trial, the state did not present any additional evidence. The defense presented the testimony of Myra Grossman, Martin Grossman's mother, who said that her son was a non-violent person who helped to care for his father (who died when Martin was only fifteen years old). She ***1335** recounted that Martin Grossman did not complete junior high and that she loved her son. Grossman also presented the testimony of Thomas Campbell, a detention officer from the Pinellas County Sheriff's Office, who stated that Grossman did not cause any problems while he was incarcerated. Carolyn Middleton, a correctional social worker, provided similar testimony, noting that Grossman was respectful to guards and able to express emotions. Finally, Grossman's best friend, Steven Martakas, testified that he considered Martin to be like a brother and recounted that Grossman was respectful to his mother and had always encouraged him to avoid smoking and taking drugs.

The jury unanimously recommended, and the trial judge agreed, that Grossman should be sentenced to die. The trial judge expressly found, as aggravating circumstances, that Grossman committed the murder while committing the crime of robbery or burglary, that the murder was committed for the purpose of avoiding lawful arrest or escaping from custody, and that the murder was especially wicked, evil, atrocious or cruel. The only mitigating circumstance, the trial court observed, that "could have been found" based on the testimony was that the defendant was nineteen years old at the time the murder was committed. The judge squarely rejected this factor, concluding that it did not "constitute[ ] a mitigating circumstance in this case." The trial court then determined that "the aggravating circumstances far outweigh[ed] the mitigating circumstances" and sentenced Grossman to death.

II.

Grossman commenced his federal habeas petition after the effective date of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Pub.L. No. 104-132, 110 Stat. 1214 (1996), and, therefore, the provisions of that Act govern this appeal. *Wade v. Battle*, 379 F.3d 1254, 1259 (11th Cir.2004). Under AEDPA, Grossman was required to obtain a Certificate of Appealability ("COA") before he could appeal the district court's decision, *see*28 U.S.C. §

2253(c)(1)(A), and "appellate review is limited to the issues specified in the COA." *Murray v. United States*, 145 F.3d 1249, 1251 (11th Cir.1998). Therefore, our review is limited to the three issues noted in the COA.

[1] When examining a district court's denial of a § 2254 habeas petition, we review questions of law and mixed questions of law and fact *de novo*, and findings of fact for clear error. *Maharaj v. Sec'y for Dep't of Corr.*, 432 F.3d 1292, 1308 (11th Cir.2005), *cert. denied*, 549 U.S. 819, 127 S.Ct. 348, 166 L.Ed.2d 33 (2006). However, in reviewing the decisions of the Supreme Court of Florida, we are governed by the explicit terms of AEDPA, which provides that we may grant a writ of habeas corpus *only* if 1) the state decision was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," or 2) the state decision was "based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d).

[2] The phrase "clearly established Federal law," as used in § 2254(d)(1), encompasses only the holdings of the Supreme Court of the United States. *Williams v. Taylor*, 529 U.S. 362, 412, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000) (holding that the language of § 2254(d)(1) expressly "restricts the source of clearly established law to [the Supreme Court's] jurisprudence"). "Clearly established federal law is *not* the case law of the lower federal courts, including this Court." ***1336***Putman v. Head*, 268 F.3d 1223, 1241 (11th Cir.2001). And, clearly established federal law "refers to the holdings ... of [the Supreme Court's] decisions *as of the time of the relevant state-court decision*." *Williams*, 529 U.S. at 412, 120 S.Ct. 1495 (emphasis added).

[3][4] "Moreover, section 2254(d)(1) provides two separate bases for reviewing state court decisions; the 'contrary to' and 'unreasonable application' clauses articulate independent considerations a federal court must consider." *Maharaj*, 432 F.3d at 1308. A state court decision is contrary to clearly established federal law if either "(1) the state court applied a rule that contradicts the governing law set forth by Supreme Court case law, or (2) when faced with materially indistinguishable facts, the state court arrived at a result different from that reached in a Supreme Court case." *Putman*, 268 F.3d at 1241. An "unreasonable application" of clearly established federal law may occur if the state court "identifies the correct legal rule from Supreme Court case law but unreasonably applies that rule to the facts of the petitioner's case." *Id.* "An unreasonable application may also occur if a state court unreasonably extends, or unreasonably declines to extend, a legal principle from Supreme Court case law to a new context." *Id.*

[5] Finally, a federal court may grant a writ of habeas corpus to a state prisoner when the state court's decision "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(2). A state court's determination of the facts, however, is entitled to substantial deference. 28 U.S.C. § 2254(e)(1) (noting that "a determination of a factual issue made by a State court shall be presumed to be correct" and that an "applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence").

III.

[6] As we have noted, Grossman was jointly tried with co-defendant Taylor. Grossman made numerous motions to sever, each of which was denied by the state trial judge. Plainly, Grossman did not want the jury to hear the inculpatory statements co-defendant Taylor made to the police shortly after Taylor was arrested, even though the trial court found them admissible against *only* Taylor. Because Taylor did not testify, Grossman had no opportunity to cross-examine Taylor about those statements, and, accordingly, Grossman contends his Sixth Amendment right of confrontation was violated.

This argument was rejected by the Supreme Court of Florida on direct appeal. We quote from its analysis in some detail to show that the Supreme Court of Florida's determination was neither contrary to nor an unreasonable application of clearly established federal law:

> Appellant and his codefendant were tried jointly, and neither testified at trial. Codefendant Taylor's statement to the police was introduced into evidence against Taylor only and the jury was instructed that this statement could not be used against appellant. This was done on the rationale that Taylor's statement interlocked with the three statements that ap-

pellant made to witnesses Hancock, Allan, and Brewer. At the time of trial this appeared to be permissible under *Parker v. Randolph*, 442 U.S. 62, 99 S.Ct. 2132, 60 L.Ed.2d 713 (1979), where a plurality of the court held that interlocking confessions of codefendants could be introduced in a joint trial as an exception to ***1337***Bruton v. United States*, 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968), without violating the confrontation clause of the sixth amendment, provided the jury was instructed that the codefendant's statement could only be used against the codefendant. The plurality view of *Parker* has since been rejected and we must examine this issue in light of *Cruz v. New York*, [481 U.S. 186], 107 S.Ct. 1714, 95 L.Ed.2d 162 (1987).

Parker was decided on the theory that introduction of the confession of a non-testifying codefendant against the codefendant only, which interlocked with a confession of the defendant, was permissible in a joint trial because it presented nothing of evidentiary value against the defendant which was not already properly before the jury. Consequently, the theory went, the jury could reasonably be expected to follow an instruction that it should not use the non-testifying codefendant's confession against the defendant and, even if it did not, the error would be harmless. In rejecting this theory, the majority in *Cruz* reasoned:

> Quite obviously, what the "interlocking" nature of the codefendant's confession pertains to is not its *harmfulness* but rather its *reliability:* If it confirms essentially the same facts as the defendant's own confession it is more likely to be true. Its reliability, however, may be relevant to whether the confession should (despite the lack of opportunity for cross-examination) be *admitted as evidence* against the defendant, *see Lee v. Illinois*, 476 U.S. 530 [106 S.Ct. 2056, 90 L.Ed.2d 514] (1986), but cannot conceivably be relevant to whether, assuming it cannot be admitted, the jury is likely to obey the instruction to disregard it, or the jury's failure to obey is likely to be inconsequential.

107 S.Ct. at 1718-19 (emphasis in original). The Court then went on to make three holdings, all of which are applicable here. First, it is error to admit a non-testifying codefendant's confession incriminating the defendant notwithstanding an instruction not to consider it against the defendant. This is so even if the defendant's own interlocking confession is admitted. Second, the defendant's confession may be considered as an indica of reliability in determining whether the codefendant's confession may be directly admissible against the defendant. Third, in recognition that its ruling would impact on trials already conducted under the *Parker* theory, the Court held that the defendant's confession could be considered on appeal in determining whether admission of the codefendant's confession was harmless.

It is clear from *Cruz* that admission of Taylor's statement with instructions that it not be used against appellant was error. It is also clear from the record that this error was harmless. Taylor's statement interlocks with and is fully consistent in all significant aspects with all three statements that appellant made to Hancock, Allan, and Brewer and which were directly admissible against appellant. The indicia of reliability are sufficient to have permitted introduction of Taylor's statement as evidence against appellant. Appellant makes two arguments that this is not so, both of which are contrary to the record. First, he argues that it is only Taylor's statement which emphasizes appellant's primary role in the murder. This is contrary to the record which shows that appellant told Hancock, Allan, and Brewer that it was he who first attacked and battered the officer and that it was he who wrestled her weapon away and fired the single shot which killed her. In all three statements, Taylor's role is clearly subordinate while appellant's role ***1338** as the initiator and triggerman is dominant. Second, appellant argues, he and Taylor jointly recounted the story of the murder to Hancock and Allan and neither witness was able to identify for the court which defendant said what. This is contrary to the record which shows that the witnesses were able for the most part to identify appellant as the person who narrated the critical elements of the story. Moreover, even if this were not true, the joint statements of appellant and Taylor given in each other's presence would be admissible against both as admissions against penal interest. We hold that it was error to admit Taylor's statement in the joint trial as evidence against Taylor only, but that this error was harmless under the facts and circumstances of the case. *Cruz; Harrington v. California*, 395 U.S. 250, 89 S.Ct. 1726, 23 L.Ed.2d 284 (1969).

Grossman I, 525 So.2d at 838-39.

In short, the Supreme Court of Florida held that the admission of Taylor's confession at a joint trial with Grossman, even with instructions to disregard the statement as to Grossman, was error under *Cruz,* but that the error was harmless. On habeas review, the district court concluded that the Supreme Court of Florida had identified the appropriate Supreme Court case law (*Cruz*), and that the application of the *Cruz* principles was not objectively unreasonable. Specifically, the district court found that although it was error under *Cruz* to admit Taylor's statement, even with the limiting instruction, it was harmless because "Taylor's statements were fully consistent with Grossman's statements [to Hancock, Allan, and Brewer], which were properly admitted against Grossman." *Grossman III,* 359 F.Supp.2d at 1253.

Grossman argues, nevertheless, that: 1) the admission of Taylor's statement was constitutional error; and 2) the error was fatally prejudicial in light of the Supreme Court's recent decision in *Crawford v. Washington,* 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004). As for his first argument, we agree with Grossman, the Supreme Court of Florida, and the district court that admission of Taylor's statement was erroneous. In *Cruz,* the Supreme Court held that "where a nontestifying codefendant's confession incriminating the defendant is not directly admissible against the defendant, the Confrontation Clause bars its admission at their joint trial, even if the jury is instructed not to consider it against the defendant, and even if the defendant's own confession is admitted against him." 481 U.S. at 193, 107 S.Ct. 1714 (citation omitted).

The factual circumstances described in *Cruz* largely mirror what occurred in this case. Taylor did not testify, yet his statement to the police, which implicated Grossman, was admitted against Taylor with instructions to disregard the statement as to Grossman, precisely because it interlocked with Grossman's confessions to Hancock, Brewer, and Allan. Plainly, there was *Cruz* error. Nevertheless, that alone does not entitle Grossman to habeas relief; as *Cruz* made abundantly clear, "the defendant's confession may be considered ... on appeal in assessing whether any Confrontation Clause violation was harmless." *Cruz,* 481 U.S. at 193-94, 107 S.Ct. 1714. The Supreme Court of Florida determined that the error was harmless. The evidence was overwhelming and Taylor's statements interlocked with and were consistent in all significant aspects with each of the three detailed and inculpatory statements Grossman made to Hancock, Allan, and Brewer.

***1339** On direct appeal, the Supreme Court of Florida specifically found that the *Cruz* error was harmless beyond a reasonable doubt. *See id.* at 839 (citing *Harrington v. California,* 395 U.S. 250, 89 S.Ct. 1726, 23 L.Ed.2d 284 (1969), which analyzed whether a Confrontation Clause error raised on direct appeal was harmless beyond a reasonable doubt). However, in a habeas corpus proceeding under 28 U.S.C. § 2254, we analyze Grossman's claim under a different harmless error standard of review: whether the Confrontation Clause error alleged in this case "had substantial and injurious effect or influence in determining the jury's verdict." *See Brecht v. Abrahamson,* 507 U.S. 619, 623, 113 S.Ct. 1710, 123 L.Ed.2d 353 (1993) (internal quotation marks omitted).

In *Brecht,* the Supreme Court held that constitutional trial errors raised collaterally in a habeas proceeding are subject to the harmless error standard enunciated in *Kotteakos v. United States,* 328 U.S. 750, 66 S.Ct. 1239, 90 L.Ed. 1557 (1946), where it opined that an error is harmless unless the error "had substantial and injurious effect or influence in determining the jury's verdict." *Id.* at 776, 66 S.Ct. 1239. In *Brecht,* the Supreme Court noted the differences between the *Kotteakos* harmless error standard and the "harmless beyond a reasonable doubt" standard, and determined that the harder-to-establish *Kotteakos* formulation was more appropriate in the habeas context, which is designed to afford relief only to those whom society has "grievously wronged." *Brecht,* 507 U.S. at 637, 113 S.Ct. 1710. The *Brecht* Court cited as compelling factors "the State's interest in the finality of convictions that have survived direct review within the state court system," principles of "comity and federalism," the need to avoid degrading the significance of trial or encouraging relitigation of claims, the character of habeas corpus as an unusual remedy, and the social costs and practical difficulties of retrying a defendant after a grant of habeas relief. *See id.* at 635-37, 113 S.Ct. 1710.

[7] Since then, we have had occasion to say more than once that the *Brecht* standard governs harmless error analysis in habeas corpus cases involving *Cruz* viola-

tions and other Confrontation Clause transgressions associated with the improper admission of out-of-court statements. *See* Glock v. Singletary, 65 F.3d 878, 891 (11th Cir.1995) (en banc) (adopting the harmless error analysis of the vacated panel opinion, which had applied the *Brecht* standard to a *Cruz* claim presented in a state habeas petition filed pursuant to § 2254); *see also* Washington v. Crosby, 324 F.3d 1263, 1266 n. 2 (11th Cir.2003) ("Even if we assumed that the district court did not err in finding a Confrontation Clause violation, we would hold that the violation was harmless under *Brecht* ..."); McIntyre v. Williams, 216 F.3d 1254, 1258-59 (11th Cir.2000) (stating in dictum that "admission of the out-of-court statement of a nontestifying codefendant in violation of the Sixth Amendment Confrontation Clause" is trial error subject to *Brecht* harmless error analysis); Cargill v. Turpin, 120 F.3d 1366, 1375-76 (11th Cir.1997) (concluding that admission of a statement for purposes other than proving the truth of the matters contained in the statement did not violate the Confrontation Clause, but finding that even if there had been an error, it would have been harmless under the *Brecht* standard); Cumbie v. Singletary, 991 F.2d 715, 724 (11th Cir.1993) (applying *Brecht* harmless error analysis to erroneous admission of one-way video testimony); *cf.* Ventura v. Att'y Gen., 419 F.3d 1269, 1279 n. 4 (11th Cir.2005) (noting the difference between the harmless error standards of review and opining that the "beyond a reasonable doubt" formulation ***1340** "has little application to a case before us on collateral review"). Thus, the *Brecht* formulation provides the standard against which to measure harmless error in this case. [FN11]

FN11. It is of no moment that *Brecht* was decided after Grossman's direct appeal in the state courts had run its course and while state collateral proceedings were pending. Notably, Grossman's *federal* habeas corpus proceedings commenced after *Brecht* was decided. Indeed, the Supreme Court and our court have applied *Brecht* even in those cases where the federal habeas action was commenced *before Brecht* was decided. *See* Brecht, 507 U.S. at 638, 113 S.Ct. 1710 (applying the *Brecht* rule in *Brecht* itself); Cumbie, 991 F.2d at 724 (applying the *Brecht* standard in a case in which the panel heard oral arguments before *Brecht* was decided).

Grossman offers no convincing explanation for why we should find that the admission of Taylor's inculpatory statement was harmful. The evidence against him-both physical and testimonial-was overwhelming. Grossman's fingerprints were found on the door handle of the officer's vehicle and, significantly, on her flashlight. One of Grossman's neighbors testified that he observed a fire outside Grossman's home, and the state introduced the charred shoes that Grossman attempted to destroy. And, most importantly, each of the recitations Grossman separately gave to Hancock, Allan, and Brewer duplicates each important aspect of Taylor's confession-that Grossman was the one who first attacked the officer, repeatedly beating her with a metal flashlight; that it was Grossman who gained control of the officer's weapon; that Grossman played the dominant role, as the Supreme Court of Florida put it; and that Grossman fired the fatal shot. More specifically, Hancock testified that Grossman told him that Grossman followed the officer to her car, repeatedly struck her with her flashlight, took the officer's gun away from her, and shot her at point blank range. Allan's testimony likewise established that Grossman related the same basic facts he had told Hancock. Finally, as the district court observed, "Grossman admitted the same motivation in statements to fellow inmate Brewer"-to avoid going back to jail. In light of the overwhelming physical and testimonial proof, we cannot say the *Cruz* error had a substantial and injurious effect or influence in determining the jury's verdict.[FN12]

FN12. The Supreme Court of Florida also determined that Taylor's statement was entirely consistent with the detailed confessions Grossman made to Hancock, Brewer, and Allan, and thus that there were sufficient indicia of reliability to have admitted Taylor's statement directly against Grossman. *See* Ohio v. Roberts, 448 U.S. 56, 65-66, 100 S.Ct. 2531, 65 L.Ed.2d 597 (1980) (holding that admission of a statement from an unavailable hearsay declarant does not violate the Confrontation Clause so long as there are sufficient indicia of reliability supporting the statement); *see also* Lee v. Illinois, 476 U.S. 530, 545, 106 S.Ct. 2056, 90 L.Ed.2d 514 (1986) (holding that "[i]f those portions of [a] codefendant's purportedly 'interlocking' statement which bear to any significant de-

> gree on the defendant's participation in the crime *are not thoroughly substantiated by the defendant's own confession,* the admission of the statement" violates the Confrontation Clause (emphasis added)). Notably, *Cruz* did not disturb the holdings of *Roberts* and *Lee,* which were undeniably good law at that time. *Cruz,* 481 U.S. at 193-94, 107 S.Ct. 1714 (observing that "the defendant's confession may be considered at trial in assessing whether his codefendant's statements are supported by sufficient 'indicia of reliability' to be directly admissible against him ... despite the lack of opportunity for cross-examination" and citing *Lee*). The Supreme Court of Florida's finding that there were sufficient indicia of reliability to have permitted the admission of Taylor's statement directly against Grossman also was neither contrary to nor an unreasonable application of clearly established federal law.

The long and short of it is that the Supreme Court of Florida reasonably determined***1341** that the admissibility of Taylor's statement amounted to harmless error.

[8] Grossman argues, however, that his inability to cross-examine Taylor constituted harmful error under the Supreme Court's recent decision in *Crawford.* This claim fails for two reasons. First, we have held that under the Supreme Court's analysis in *Teague v. Lane,* 489 U.S. 288, 310, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989), *Crawford* does not apply retroactively to cases on collateral review. *Espy v. Massac,* 443 F.3d 1362, 1367 (11th Cir.2006) (holding that "*Crawford* did not announce a watershed rule of criminal procedure, and it therefore does not apply retroactively to cases on collateral review"). Second, it fails because AEDPA requires us to consider only clearly established federal law, which "refers to the holdings ... of [the Supreme Court's] decisions *as of the time of the relevant state-court decision.*" *Williams,* 529 U.S. at 412, 120 S.Ct. 1495 (emphasis added); *Hart v. Att'y Gen.,* 323 F.3d 884, 891 (11th Cir.2003); *Putman,* 268 F.3d at 1241. Because *Crawford* was decided in 2004, nearly sixteen years after the Supreme Court of Florida issued its opinion on the severance issue in 1988, it does not qualify as clearly established federal law that we may consider. [FN13] Simply put, the Supreme Court's decision in *Crawford* cannot affect our analysis. We, therefore, agree with the district court that the state court's decision was neither contrary to nor an unreasonable application of clearly established federal law, and that it was not based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding.

> FN13. We need not decide the extent to which AEDPA codifies the exceptions to non-retroactivity set forth in *Teague, see Teague,* 489 U.S. at 311, 109 S.Ct. 1060, because, under *Teague, Crawford* is not retroactively applicable to cases on collateral review. *See Mungo v. Duncan,* 393 F.3d 327, 334-35 (2d Cir.2004) ("In any case, whether § 2254(d)(1) was intended, or out of prudence should be read, to adopt the *Teague* exceptions is a question we need not answer because we conclude that the *Crawford* rule does not qualify as a watershed rule coming within the exception to *Teague.*").

IV.

Grossman's next habeas claim is that the state prosecutor erroneously failed to disclose exculpatory material concerning witnesses Brewer, Hancock, and Allan. Grossman raised this issue in his state post-conviction proceeding and presented evidence at a hearing conducted by the state trial judge. The state court squarely rejected Grossman's *Brady* claims and the Supreme Court of Florida affirmed. *See Grossman II,* 708 So.2d at 251. The district court similarly found that there were no *Brady* violations. *Grossman III,* 359 F.Supp.2d at 1261-63.

[9][10][11][12] In *Brady,* the Supreme Court set forth the now firmly-established constitutional rule that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment." *Brady,* 373 U.S. at 87, 83 S.Ct. 1194. Indeed, the "duty to disclose such evidence is applicable even though there has been no request by the accused, and ... the duty encompasses impeachment evidence as well as exculpatory evidence." *Strickler v. Greene,* 527 U.S. 263, 280, 119 S.Ct. 1936, 144 L.Ed.2d 286 (1999) (citation omitted). Evidence is material "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding ***1342** would have been different." *United*

States v. Bagley, 473 U.S. 667, 682, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985). The state post-conviction court and the Supreme Court of Florida recognized *Brady* as establishing the relevant law, and Grossman does not claim any error in that regard; instead, he contends that the state courts unreasonably applied *Brady* and its progeny to the facts of this case. We disagree.

Grossman first says that the state withheld exculpatory information that it had cut a deal with Brewer to give him assistance on other charges in exchange for his testimony, that the state attorneys knew Brewer's testimony was false, and that Brewer was an agent of law enforcement, as well as information regarding the number of Brewer's prior convictions.

[13] The state trial court took extensive evidence on this claim at a collateral hearing, and concluded that Brewer did not receive *any* deal in exchange for his testimony and was not acting as an agent of law enforcement. The court relied specifically on the hearing testimony of Pinellas County Detective Robert Rhodes and State Attorney Bernie McCabe, both of whom unambiguously said that there were no deals with Brewer. The Supreme Court of Florida affirmed for the reasons offered by the trial judge. *Grossman II*, 708 So.2d at 251-52. The district court, in turn, found that the state court's conclusion was supported by "competent, substantial evidence presented at the hearing," *Grossman III*, 359 F.Supp.2d at 1262, and we agree. Although Brewer testified that he had an agreement with the state, the state post-conviction court was entitled to credit the contrary testimony of the detective and the prosecutor, and we are obliged to defer to that fact-finding.

[14] Grossman also says that Brewer provided false testimony at trial regarding what he heard from Grossman and about Brewer's prior convictions. The state court determined, however, that to the extent Brewer provided any false testimony at trial, the state was not aware of the falsehood, and that Grossman failed to show how the alleged falsities affected the conviction or the sentence. The Supreme Court of Florida again affirmed, and we agree with the district court that the state court's conclusions are supported by substantial, competent evidence. Grossman offers us no argument other than the testimony of Brewer himself, which stands in stark contrast to the accounts provided by the police detective and state attorney. Moreover, he does not begin to establish how the evidence was material-that is, how there is a reasonable probability that the outcome would have been different if the alleged falsities had been disclosed.[FN14] As the district court correctly noted, the evidence of Grossman's guilt was "overwhelming." *Grossman III*, 359 F.Supp.2d at 1263.

> FN14. The parties have argued this issue under the rubric of *Brady*. Some of Grossman's arguments come close to alleging *Giglio* error, "a species of *Brady* error that occurs when the undisclosed evidence demonstrates that the prosecution's case included perjured testimony and that the prosecution knew, or should have known, of the perjury." *Ventura v. Att'y Gen.*, 419 F.3d 1269, 1276-77 (11th Cir.2005) (internal quotation marks omitted). The materiality standard under *Giglio* is less stringent than under a garden variety *Brady* claim; under *Giglio*, a failure to disclose evidence is material if "there is any reasonable likelihood that the false testimony could have affected the judgment of the jury." *Ventura*, 419 F.3d at 1278 (internal quotation marks omitted). But, whether we evaluate Grossman's claim under *Brady* or *Giglio*, the outcome is the same; the allegedly withheld evidence was not material.

***1343** Grossman also alleges that the state, again in violation of *Brady*, failed to disclose that: 1) his friend and roommate Brian Hancock had charges pending against him in Martin County; 2) Hancock was interested in receiving reward money in exchange for his testimony; and 3) the police instructed Hancock to testify that Grossman told him he hit Officer Park "20 to 30 times" with her flashlight. The state court rejected each claim.

In the first place, the state trial judge found that Hancock did not lie at trial about his Martin County arrest and that Hancock purposefully withheld the details of that incident from the Pinellas County authorities. The state court also found that Hancock never lied about any reward money and that his testimony concerning the number of times Grossman hit Officer Park was based on information he learned from Grossman, not information he got from the police. The Supreme Court of Florida affirmed, and the

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district court again concluded that the findings were supported by substantial testimony from the post-conviction hearing.

At trial, the prosecutor asked Hancock if "anyone promised you anything with regard to any possible charges you might have faced for your involvement in this case" and Hancock answered, "No, they haven't." On cross-examination, the defense attorney asked Hancock, "You have not been arrested in this incident, you have not been charged with anything during the past ten months, have you?" Hancock answered, "No, I have not." According to Hancock, he had been arrested in Martin County for disorderly conduct shortly before he testified. Hancock claimed that he told Pinellas County officials about the arrest. Eventually-it is not clear when-Hancock failed to appear on the disorderly conduct charges and was sentenced to 45 days in jail.

It is not clear from the record whether Hancock lied when he said he had not been "charged" with anything in the previous ten months. First, the initial part of the question ("You have not been arrested in this incident, ... have you?") expressly asked about *this incident* (i.e., the murder), and the disorderly conduct arrest was unrelated to the killing of Officer Park. Moreover, it is not clear whether Hancock had been *charged* with disorderly conduct when he testified. He had been arrested at that point, but it is unclear when he was formally charged. Regardless of whether he lied, however, we agree with the district court's conclusion, that even if the state knew about the Martin County arrest, and even if the state withheld that information, there was no *Brady* error because there is no possibility that the result of the proceeding would have been different if the defense knew about that arrest.[FN15]

> FN15. Again, the evidence was not material regardless of whether we evaluate Grossman's claim under *Brady* or *Giglio*.

As for the reward money and the testimony about the number of times Grossman struck Officer Park, the state court's conclusions are adequately supported by the post-conviction testimony of Pinellas County Detective Robert Rhodes, Detective John Halliday, and State Attorney McCabe. Again, the state court's decision was neither an unreasonable application of clearly established federal law nor an unreasonable determination of the facts.

Finally, Grossman maintains that the state failed to disclose that Brian Allan ***1344** was the subject of a criminal investigation when he testified. At the state court post-conviction hearing, a sergeant with the Pasco County Sheriff's Office testified that he first began investigating Allan on September 9, 1985, at which time he purchased a small amount of marijuana from Allan. Allan was arrested soon thereafter by the Pasco County officers on October 31, 1985-the same day that the penalty phase of Grossman's trial began. The Pasco County sergeant said it was three to four days later before he learned that Allan was a witness in Grossman's case, at which time he notified the state attorney's office.

The state trial court found that the state did not know of the Allan investigation *and* that it would not have been helpful for impeachment purposes. The Supreme Court of Florida affirmed. Grossman does not explain why that ruling was erroneous; he simply restates the facts noted above. We agree with the district court that there was no *Brady* violation; there is simply no evidence that the prosecutors knew about the Allan investigation. But, even if the state did know about the investigation, and even if the information could have been used for the purposes of impeachment, there is no real possibility that the result of the proceeding would have been different.

In short, the Supreme Court of Florida correctly determined the relevant federal law, applied that law in a reasonable manner, and did not make any unreasonable factual determinations in rejecting Grossman's *Brady* claims.

V.

Finally, Grossman maintains that he received ineffective assistance of counsel because his attorneys did not effectively prepare for the penalty phase of the trial, failed to object to the state's presentation of non-statutory aggravating factors, failed to object to the state's use of a "Golden Rule" argument, and did not present an effective closing argument. Grossman argues that his attorneys should have interviewed more of his family and friends, and he offers affidavits from thirty-three individuals he contends could have provided mitigation testimony at the penalty phase. After painstaking review, the district court concluded that Grossman received effective assistance at the

penalty phase, and we agree.

Ineffective assistance claims are governed by the well-established standard enunciated in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). In *Strickland*, the Supreme Court held that to prevail on an ineffective assistance claim, a criminal defendant must show both that counsel's performance was deficient and that counsel's performance prejudiced the defense. *Id.* at 687, 104 S.Ct. 2052. The Florida courts recognized and followed the *Strickland* standard in this case, and Grossman does not contend otherwise. Rather, he says that the Florida courts unreasonably determined that, based on the facts of this case, counsel's performance at the penalty phase was constitutionally sufficient.

Grossman argues that his two trial attorneys were ineffective because they failed to interview family and friends who could have provided beneficial testimony at the penalty phase. His attorneys erred, he says, in relying on only three sources for potential penalty phase witnesses-Grossman himself, his mother, and his grandmother-and he put forth thirty-three additional mitigating affidavits. The ***1345** Supreme Court of Florida rejected this claim, and in doing so quoted at length from the state post-conviction court's opinion:

> The Court has weighed all the above matters in light of *Strickland v. Washington*, 466 U.S. 668, [104 S.Ct. 2052, 80 L.Ed.2d 674] (1984). The Defendant has failed to make the required showing of either deficient performance or sufficient prejudice to support his ineffectiveness claim.
>
> The Court has evaluated the conduct of the Defendant's counsel from counsel's perspective at the time of the trial. Defendant introduced thirty-three affidavits that were represented as possible mitigation witnesses that were available a[t] the time of trial but were not used by the defense. Several of the possible witnesses represented by the affidavits were known to the defense, and the defense had determined not to use them.
>
> Defense counsel, Mr. McCoun, at the time of trial recognized that while trying to present a favorable picture of the Defendant, equally negative things would also be presented. Mr. McCoun did not want to use witnesses who would say that the Defendant was into stealing and heavy drug use. Moreover, defense counsel called three mitigating witnesses in addition to the Defendant's mother. The mitigating witnesses that were called had close contact with the defendant near the time that he committed the crime; whereas, many of the potential witnesses that were represented by the affidavits had not seen the Defendant in years.
>
> The Court finds that Mr. McCoun did a competent, effective job of representing the Defendant at all phases of the trial. Even if counsel were deemed ineffective for the reasons stated by the Defendant, such alleged ineffectiveness did not come close to being so prejudicial to the Defendant that it affected the outcome of the case. The facts of this case showed the Defendant's conduct to be so egregious that proof of mitigating circumstances was extremely difficult.
>
> The trial court applied the right rule of law governing ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), and competent substantial evidence supports its finding. We find no error.

Grossman II, 708 So.2d at 251 (second alteration added and footnote omitted).

[15][16][17][18] The standard governing counsel's performance is "reasonableness under prevailing professional norms." *Strickland*, 466 U.S. at 688, 104 S.Ct. 2052. "We are not interested in grading lawyers' performances; we are interested in whether the adversarial process at trial, in fact, worked adequately." *White v. Singletary*, 972 F.2d 1218, 1221 (11th Cir.1992). "To state the obvious: the trial lawyers, in every case, could have done something more or something different. So, omissions are inevitable. But, the issue is not what is possible or what is prudent or appropriate, but only what is constitutionally compelled." *Chandler v. United States*, 218 F.3d 1305, 1313 (11th Cir.2000) (en banc) (internal quotation marks omitted). The burden of persuasion is on the petitioner to prove by a preponderance of the evidence that no competent counsel would have taken the action that his counsel did take. *See* ***1346***Marquard v. Sec'y for Dep't of Corr.*, 429 F.3d 1278, 1304 (11th Cir.2005), *cert. denied*, 547 U.S. 1181, 126 S.Ct. 2356, 165 L.Ed.2d 283 (2006). In judging the adequacy of

counsel's investigation of potential mitigating circumstances, we consider "counsel's perspective at the time investigative decisions are made" and give "a heavy measure of deference to counsel's judgments." *Rompilla v. Beard*, 545 U.S. 374, 125 S.Ct. 2456, 2462, 162 L.Ed.2d 360 (2005) (internal quotation marks omitted).

[19] The district court determined, we think properly, that Grossman's counsel did an effective and competent preparation for the penalty phase. Grossman's attorneys talked to Grossman, his mother, and his grandmother; attempted to develop other witnesses based on those conversations; notably researched Grossman's past addresses, and his educational, medical, and emotional background; located witnesses who had known Grossman while he was in jail and who could testify about his courteous, cooperative, and nonviolent demeanor; and explored the possibility of mental mitigating facts with Dr. Sidney Merin. Grossman's trial counsel presented four mitigating witnesses, including Myra Grossman (Grossman's mother), Steven Nicholas Martakas (Grossman's best friend), and two jail employees who interacted with Grossman while he was incarcerated.[FN16]

> FN16. These efforts far exceed those the Supreme Court found deficient in *Rompilla*. In that case, the Court found deficient performance where defense counsel failed to examine a prior conviction file that the state attorneys said they intended to use (and quote from) at the penalty phase. *Rompilla*, 545 U.S. 374, 125 S.Ct. at 2467, 162 L.Ed.2d 360. Here, Grossman does not allege that his counsel failed to review any files they knew the state would present at the penalty phase; indeed, the state presented *no* evidence at the penalty stage. More importantly, defense counsel undertook substantial efforts in preparation for the penalty phase.

As the district court recognized, "[t]he defense strategy for penalty phase was to demonstrate that Grossman was not an animal but a young man with positive characteristics who did not deserve to die." *Grossman III*, 359 F.Supp.2d at 1268. The district judge addressed the thirty-three affidavits this way, and, after thorough review, we agree with her analysis:

> Many of the affidavits offered to support Grossman's argument in this case presented facts cumulative to the testimony of Myra Grossman and Steve Martakas. In addition, many of the affidavits, and much of the mitigation now suggested by the defense, were inconsistent with the penalty phase strategy, because the evidence would have reminded the jury of Grossman's negative character traits, such as his drug use and prior criminal history.
>
> The affidavits themselves were of limited evidentiary value. They are distinctly one-sided, and the testimony at the state evidentiary hearing established that the affiants had very limited knowledge of Martin Grossman. The affiants who knew Grossman as a child had lost touch with him after his family moved to New Port Richey, Florida. Some of the affidavits were identified as inaccurate; some affiants felt pressured into signing the statements, and many affidavits were based on speculation and information heard through other people.
>
> Both Attorney McCoun's and Attorney Ira Berman's testimony revealed why they would not have used as witnesses many of the affiants, such as Rosol and Paul Melton, who were instrumental in turning Grossman in to the ***1347** police. They chose not to put on witnesses who would have had negative things to say about Grossman or his mother, or who would have opened the door to testimony about Grossman's drug and alcohol abuse and his previous criminal activities. The testimony of the social worker, Kevin Sullivan, strategically would not have been presented for the same reason.

Id. at 1268-69 (citations and footnote omitted).

The district judge made clear that many of the affiants were rejected for sound and considered reasons. The practice of submitting post-hoc affidavits is not out of the ordinary, and it is not often successful:

> It is common practice for petitioners attacking their death sentences to submit affidavits from witnesses who say they could have supplied additional mitigating circumstance evidence, had they been called, or, if they were called, had they been asked the right questions .... But the existence of such affidavits, artfully drafted though they may be, usually proves little of significance .... That other witnesses could have been called or other testimony elicited usually proves at most the wholly unremarkable fact that

> with the luxury of time and the opportunity to focus resources on specific parts of a made record, post-conviction counsel will inevitably identify shortcomings in the performance of prior counsel. As we have noted before, in retrospect, one may always identify shortcomings, but perfection is not the standard of effective assistance.
>
> The widespread use of the tactic of attacking trial counsel by showing what "might have been" proves that nothing is clearer than hindsight-except perhaps the rule that we will not judge trial counsel's performance through hindsight. We reiterate: The mere fact that other witnesses might have been available or that other testimony might have been elicited from those who testified is not a sufficient ground to prove ineffectiveness of counsel.

Waters v. Thomas, 46 F.3d 1506, 1513-14 (11th Cir.1995) (citations, internal quotation marks, and alterations omitted). Grossman's counsel conducted an investigation, interviewed Grossman's family members and friends, had a strategy for the penalty phase, and called mitigation witnesses. The Supreme Court of Florida did not unreasonably apply clearly established federal law in finding the performance was not ineffective.

Moreover, we agree with the district court that even if the performance was ineffective, Grossman has not successfully established the prejudice prong of the *Strickland* analysis. As the Supreme Court of Florida held, the conduct of Grossman's attorneys "did not come close to being so prejudicial to the Defendant that it affected the outcome of the case." *Grossman II*, 708 So.2d at 251 (quoting the state post-conviction court's opinion). The trial testimony shows that "Grossman committed outrageous and brutal acts against a young female wildlife officer, striking her repeatedly with her own flashlight and then shooting her in the head with her own gun." *Grossman III*, 359 F.Supp.2d at 1270. Against a very substantial array of evidence, there is simply no "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694, 104 S.Ct. 2052. We can discern nothing unreasonable in the state court's determination on this point either.

***1348**[20] Grossman also argues that counsel was ineffective for failing to object to the state's introduction of non-statutory aggravating factors. Specifically, he claims that the prosecution elicited prejudicial, irrelevant testimony from Myra Grossman about a time when Grossman allegedly vandalized Brian Hancock's car and when Grossman allegedly threatened to kill Hancock. As the district court noted, this testimony was proper rebuttal evidence, offered in response to Myra Grossman's direct testimony that Grossman, her son, was a normal, nonviolent person who acted wholly out of character when he murdered the victim. Counsel's performance was neither deficient nor prejudicial on this score.

[21] Next, Grossman argues that counsel was ineffective for failing to object to the prosecution's improper use of a "Golden Rule" argument. "A 'golden rule' argument asks the jurors to place themselves in the victim's position, asks the jurors to imagine the victim's pain and terror or imagine how they would feel if the victim were a relative." *Hutchinson v. State*, 882 So.2d 943, 954 (Fla.2004). Grossman complains because the prosecutor, in closing argument, told the jury there was "terror and pain" in the victim's voice when she made a transmission on her police radio, that Officer Park suffered fear and pain before she died, and that the blows to her head with the flashlight were "terrorizing," and because the prosecutor described the struggle that occurred before Officer Park died. The district court determined that these comments were not improper "Golden Rule" arguments because they were not designed to elicit sympathy for the victim, but rather were presented to the jury as relevant arguments in support of the "heinous, atrocious, or cruel" aggravating factor. We agree.

In *Kennedy v. Dugger*, the prosecutor offered the following argument to the jury: "Can you imagine, in your own living room not bothering a soul on a Saturday afternoon? He stopped up at his relative's house and had a beer and he walked back down to your own house, and, a total stranger, because you got in his way, destroys you." 933 F.2d 905, 913 (11th Cir.1991). We found that was not an improper "Golden Rule" argument because it was relevant to the defendant's future dangerousness. *Id.* This case is even clearer, where the prosecutor was permitted to comment on those aspects of the crime that made this particular murder arguably *heinous, atrocious,* or *cruel.* Indeed, the prosecutor here never asked the jurors to place themselves in the victim's position; he simply described the circumstances of her death,

which undeniably involved physical pain and enormous emotional terror, circumstances that are plainly relevant to whether the murder was heinous, atrocious, or cruel. There was no "Golden Rule" violation, and Grossman's counsel did not provide deficient representation by failing to object.[FN17]

> FN17. Moreover, we agree with the district court that even if there was error, there was no showing of prejudice. The comments were not a focal point of the closing argument, and, in light of the significant number of aggravating circumstances, there is no reasonable probability that the outcome would have been different if the prosecutor had not made them. *See Bertolotti v. State*, 476 So.2d 130, 133 (Fla.1985) (noting that because the jury's recommendation is only advisory, prosecutorial misconduct must be egregious before a new penalty phase is appropriate, and finding that an improper Golden Rule argument did not warrant re-sentencing).

[22] Finally, Grossman argues that his attorneys were ineffective because they ***1349** did not present an effective closing argument. Grossman maintains that they should have presented additional mitigating factors and explained in greater detail why the aggravating factors were not satisfied. The district court rejected this claim and explained its reasoning in these terms:

> A review of defense counsel's closing argument refutes Grossman's claim of ineffectiveness based on the alleged inadequacy of the closing argument. While the defense may not have focused on emphasizing particular mitigating factors to current counsel's satisfaction, the overall theme of the closing argument was to repeatedly stress the penalty phase strategy emphasizing that Grossman was a normal child, with family and friends who cared about him; that he was not a morally corrupt beast and that this incident was totally out of character for him; and that his ability to behave appropriately in prison demonstrated that there was no need for him to be executed, as society would be protected by the imposition of a life sentence. Counsel also emphasized the gravity of the decision the jury was being asked to make and the importance of disregarding feelings of anger, sympathy or revenge.

Grossman III, 359 F.Supp.2d at 1272 (citations omitted). Grossman's attorneys presented a reasoned and rational theme to the jury during closing argument. That is all the Constitution requires. *See Chandler*, 218 F.3d at 1314 (noting that "counsel cannot be adjudged incompetent for performing in a particular way in a case, as long as the approach taken might be considered sound trial strategy" (internal quotation marks omitted)).

VI.

In short, the decisions of the Florida courts were neither contrary to nor unreasonable applications of clearly established federal law; nor were the decisions based on an unreasonable determination of the facts in light of the evidence presented in the state court proceedings. Accordingly, we affirm the district court's denial of habeas relief.

AFFIRMED.

C.A.11 (Fla.),2006.
Grossman v. McDonough
466 F.3d 1325, 20 Fla. L. Weekly Fed. C 49

END OF DOCUMENT

APPENDIX 4

Supreme Court of Florida

No. SC10-118

MARTIN EDWARD GROSSMAN,
Appellant,

vs.

STATE OF FLORIDA,
Appellee.

[February 8, 2010]

PER CURIAM.

Martin Edward Grossman, a prisoner under sentence of death and under an active death warrant, appeals from the trial court's order summarily denying his motion to vacate his sentence pursuant to Florida Rule of Criminal Procedure 3.851. Because the order concerns postconviction relief from a sentence of death, this Court has jurisdiction over the appeal under article V, section 3(b)(1), of the Florida Constitution. In his successive motion filed after the death warrant was signed, the summary denial of which is the subject of the present appeal, Grossman raised claims that were either previously raised in his postconviction proceedings

that concluded in 1997 or repeatedly rejected by this Court as legally without merit. Therefore, as more fully explained in this opinion, we affirm the trial court's order.

FACTS AND PROCEDURAL HISTORY

In 1985, Martin Grossman was convicted of the 1984 first-degree murder of Wildlife Officer Margaret Park and was sentenced to death on the recommendation of a unanimous jury. This case has a long procedural history. The conviction and death sentence have been reviewed and affirmed on direct appeal and have been the subject of multiple state and federal proceedings.[1] The facts of this case are set forth in this Court's opinion in Grossman's direct appeal of his conviction and sentence:

> Appellant and a companion, Taylor, drove to a wooded area of Pinellas County on the night of December 13, 1984, to shoot a handgun which appellant had recently obtained by burglarizing a home. Appellant lived in neighboring Pasco County at his mother's home and was on probation following a recent prison term. Wildlife Officer Margaret Park, patrolling the area in her vehicle, came upon the two men and became suspicious. She left her vehicle with the motor, lights, and flashers on, and took possession of appellant's weapon and driver's license. Appellant pleaded with her not to turn

1. These cases are: Grossman v. State, 525 So. 2d 833 (Fla. 1988), cert. denied, 489 U.S. 1071 (1989); Grossman v. Dugger, 708 So. 2d 249 (Fla. 1997); Grossman v. Crosby, 880 So. 2d 1211 (Fla. 2004); Grossman v. Crosby, 359 F. Supp. 2d 1233 (M.D. Fla. 2005), aff'd sub nom. Grossman v. McDonough, 466 F.3d 1325 (11th Cir. 2006), cert. denied, 550 U.S. 958 (2007); Grossman v. State, 932 So. 2d 192 (Fla. 2006); and Grossman v. State, 5 So. 3d 668 (Fla. 2009).

him in as having a weapon in his possession and being outside of Pasco County would cause him to return to prison for violation of probation. Officer Park refused the plea, opened the driver's door to her vehicle and picked up the radio microphone to call the sheriff's office. Appellant then grabbed the officer's large flashlight and struck her repeatedly on the head and shoulders, forcing her upper body into the vehicle. Officer Park reported "I'm hit" over the radio and screamed. Appellant continued the attack, and called for help from Taylor, who joined in the assault. Officer Park managed to draw her weapon, a .357 magnum, and fired a wild shot within the vehicle. Simultaneously, she temporarily disabled Taylor by kicking him in the groin. Appellant, who is a large man, wrestled the officer's weapon away and fired a fatal shot into the back of her head. The spent slug exited her head in front and fell into a drinking cup inside the vehicle. Blood stains, high velocity splatters, the location of the spent slug, and the entry and exit wounds show that the victim's upper body was inside the vehicle with her face turned inward or downward at the moment she was killed. Appellant and Taylor took back the seized handgun and driver's license, and fled with the officer's weapon. They returned to the Grossman home, where they told the story of the killing, individually and collectively, to a friend who lived with the Grossmans. The friend, Brian Hancock, and Taylor buried the two weapons nearby. Appellant, who was covered with blood, attempted unsuccessfully to burn his clothes and shoes which Taylor later disposed of in a nearby lake. Approximately a week later appellant and Taylor, individually and collectively, recounted the story of the murder to another friend, Brian Allan. Approximately eleven days after the murder, Hancock told his story to the police and appellant and Taylor were arrested. Taylor, upon his arrest, recounted the story of the murder to a policeman and, later, appellant told the story to a jailmate, Charles Brewer. Appellant and Taylor were tried jointly over appellant's objection. At trial, the state introduced the testimony of Hancock, Allan, and Brewer against appellant. The state also introduced Taylor's statement to the policeman against Taylor only. In addition, the state introduced the charred shoes, the two weapons, prints taken from the victim's vehicle, testimony from a neighbor who observed the attempted burning of the clothes, appellant's efforts to clean the Grossman van, and the changing of the van tires. Expert testimony as to the cause of death and the significance of blood splatter evidence was also introduced by the state. The jury was

> instructed that Taylor's admissions to the policeman could only be used against him, not appellant. The jury was instructed on premeditation and felony murder based on robbery, burglary, and escape. A general verdict of first-degree murder was returned against the appellant and Taylor was found guilty of third-degree murder.

Grossman, 525 So. 2d at 835-36.

During the penalty phase, defense counsel called four witnesses: (1) Myra Grossman, Grossman's mother; (2) Thomas Campbell, a correctional officer overseeing Grossman; (3) Steven Martakas, Grossman's friend from junior high school; and (4) Carolyn Middleton, a social worker at the jail housing Grossman. These witnesses testified that Grossman's father was disabled and that Grossman was often tasked from a very young age with taking care of him. Grossman dropped out of junior high school, and his father died when Grossman was fifteen years old. Grossman respected his parents and was not a violent person. Grossman never exhibited behavioral problems while in jail, and he was very nervous and scared about being executed. Following the penalty phase, the jury unanimously recommended death, and the judge imposed a sentence of death. Grossman, 525 So. 2d at 836.[2] This Court affirmed Grossman's conviction and death sentence on direct appeal. Id. at 846.

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2. The trial court found four aggravating circumstances:

> (1) the murder was committed while engaged in the commission of or an attempt to commit, or flight after committing or attempt to commit, the crime of robbery or burglary; (2) the murder was committed for

On March 8, 1990, before Grossman filed any postconviction motions, Governor Bob Martinez signed a death warrant setting the execution of Grossman for the week of May 10, 1990. Grossman filed a petition for writ of habeas corpus in this Court, and this Court granted a stay of execution to allow Grossman the opportunity to seek postconviction relief. Grossman, 708 So. 2d at 250. Grossman filed a motion to vacate his conviction and sentence under Florida Rule of Criminal Procedure 3.850 in the trial court in August 1990 ("original postconviction motion") and simultaneously filed an amended habeas petition in this Court. Id.

In his original postconviction motion, Grossman made numerous claims, but three claims are directly relevant to our determination that the present successive motion includes claims that Grossman has previously raised. First, Grossman argued in claim VI of his original postconviction motion that he was denied the effective assistance of counsel during the penalty phase because counsel failed to have Grossman examined by a competent mental health professional as required by Ake v. Oklahoma, 470 U.S. 68 (1985). The original court-appointed mental health expert for the defense was Dr. Sidney Merin. However, Dr. Merin did not testify

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> the purpose of avoiding or preventing a lawful arrest; (3) the murder was committed to disrupt or hinder the lawful exercise of government function or the enforcement of laws; and (4) the murder was especially wicked, evil, atrocious, or cruel. Numbers two and three were treated as one circumstance by the trial judge.

Id. at 840. The trial court found no mitigating circumstances. Id. at 846.

during Grossman's penalty phase proceedings. After his evaluation of Grossman, Dr. Merin advised defense counsel that "[his] findings would not be helpful to [the] defense position in either the guilt or innocence phase or, if it is held, the sentencing phase of Mr. Grossman's trial." In his original postconviction motion, Grossman alleged that a new mental health expert, Dr. Brad Fisher, had evaluated Grossman in March 1990 and had prepared a report that rebutted the contentions of Dr. Merin.[3] Dr. Fisher's report indicated that testing did not reveal any signs of "a current psychotic condition or of any major affective disorder." However, Dr. Fisher noted that his testing revealed "soft signs of organic impairment," which was supported by Grossman's history of "chronic and extensive drug and alcohol dependence," and that "[f]urther testing would be required to determine the nature and extent of this probable mental disability." Grossman attached Dr. Fisher's report to his motion and was prepared to call Dr. Fisher to testify at an evidentiary hearing.[4] The trial court summarily denied this claim, and this Court affirmed that denial. Grossman, 708 So. 2d at 252.

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3. This report by Dr. Fisher is the same report from Dr. Fisher attached by Grossman to his third successive postconviction motion, the summary denial of which is the subject of the present appeal.

4. In his current successive motion, Grossman alleges that in addition to Dr. Fisher, Dr. Henry Dee, an expert who had evaluated Grossman, was also available to testify at an evidentiary hearing to support Grossman's allegations under claim VI of Grossman's original postconviction motion. However, claim VI does not refer to Dr. Dee. Grossman alleges that Dr. Dee is now deceased.

Second, Grossman claimed in claim V of his original postconviction motion that counsel was ineffective during the penalty phase for failing to investigate, develop, and present mitigating evidence. Grossman received an evidentiary hearing on this claim. The only expert offered by the defense at the evidentiary hearing in 1994 was Kevin Sullivan, a licensed clinical social worker. Sullivan testified that Grossman was raised in a dysfunctional environment and that a number of factors negatively impacted his development, including that Grossman had been given inappropriate caretaking responsibilities from a young age; that his family had relocated at a critical time in his development; and that he experienced grief at the loss of his father and grandfather.

The trial court denied relief on this claim:

> The Defendant has failed to make the required showing of either deficient performance or sufficient prejudice [under Strickland v. Washington, 466 U.S. 668 (1984)] to support his ineffectiveness claim.
>
> The Court has evaluated the conduct of the Defendant's counsel from counsel's perspective at the time of the trial. Defendant introduced thirty-three affidavits that were represented as possible mitigation witnesses that were available at the time of trial but were not used by the defense. Several of the possible witnesses represented by the affidavits were known to the defense, and the defense had determined not to use them.
>
> Defense counsel, Mr. McCoun, at the time of trial, recognized that while trying to present a favorable picture of the Defendant, equally negative things would also be presented. Mr. McCoun did not want to use witnesses who would say that the Defendant was into stealing and heavy drug use. Moreover, defense counsel called three mitigating witnesses in addition to the Defendant's mother. The mitigating witnesses that were called had close contact with the

> Defendant near the time that he committed the crime; whereas, many of the potential witnesses that were represented by the affidavits had not seen the Defendant in years.
>
> The Court finds that Mr. McCoun did a competent, effective job of representing the Defendant at all phases of the trial. Even if counsel were deemed ineffective for the reasons stated by the Defendant, such alleged ineffectiveness did not come close to being so prejudicial to the Defendant that it affected the outcome of the case. The facts of this case showed the Defendant's conduct to be so egregious that proof of mitigating circumstances was extremely difficult.

This Court affirmed the trial court's denial of this claim. Grossman, 708 So. 2d at 251.

Third, also pertinent to the issues that he now raises, Grossman argued in his original postconviction motion that inmate Charles Brewer, who testified for the State, was acting as a State agent when he procured incriminating information from Grossman, and that the State failed to disclose this fact in violation of Brady v. Maryland, 373 U.S. 83 (1963). After an evidentiary hearing, the trial court found:

> Defendant states that Charles Brewer, a trusty at the Pinellas County Jail while Defendant was being held there awaiting trial, was a state agent, and the State withheld this fact along with an agreement that Mr. Brewer had reached with prosecutors regarding charges that were pending against Mr. Brewer. Mr. Brewer testified that he had his brother contact law enforcement after he heard Defendant discussing the case. Mr. Brewer said that he talked to the homicide detectives only one time and that was when they took his taped statement.
>
> Detective Robert Rhodes testified that he taped Mr. Brewer's statement on July 25, 1985, and that was the only time he ever met with Mr. Brewer. The State did not make any deals with Mr. Brewer in exchange for the statement, and Detective Rhodes did not suggest

counsel during the penalty phase. Grossman, 359 F. Supp. 2d at 1245-47.[5] The federal district court denied the habeas petition, id., and the Eleventh Circuit affirmed. Grossman v. McDonough, 466 F.3d 1325 (11th Cir. 2006).

Subsequently, Grossman filed his first and second successive motions for postconviction relief, the summary denial of which was affirmed by this Court. See Grossman, 932 So. 2d 192 (affirming summary denial of Grossman's first successive postconviction motion); Grossman, 5 So. 3d 668 (affirming summary denial of Grossman's second successive postconviction motion). None of these successive motions or appeals raised any issues related specifically to either the guilt or penalty phase of Grossman's trial.

On January 12, 2010, Governor Crist signed a death warrant for Grossman, scheduling his execution for February 16, 2010. Grossman then filed his third successive motion for postconviction relief, raising three claims as set forth below, and the State filed its response. After holding an initial hearing pursuant to Florida Rule of Criminal Procedure 3.851(h)(6) on January 20, 2010, to determine whether an evidentiary hearing should be held on this motion, the trial court summarily denied claims one and two, and dismissed claim three.

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5. Grossman's initial federal habeas petition was filed before his state habeas petition, but it was stricken. Grossman, 359 F. Supp. 2d at 1245. After he refiled the petition, the case was administratively closed pending the outcome of two Florida cases that addressed issues arising from Ring v. Arizona, 536 U.S. 584 (2002). Grossman, 359 F. Supp. 2d at 1245.

ANALYSIS

In the present appeal, Grossman argues that the trial court erred in summarily denying his claims that (1) he was denied his constitutional rights because he was not granted an evidentiary hearing on his claim in his original postconviction motion that trial counsel provided ineffective assistance in the penalty phase of Grossman's trial by failing to have him examined by a competent mental health professional and newly discovered evidence now supports his ineffective assistance claim; (2) Florida's death penalty statute is arbitrary and capricious in violation of his constitutional rights because the trial court and jury did not hear all of his available mitigating evidence, the State violated Giglio by presenting the false testimony of witness Charles Brewer, and he was denied the opportunity to present new evidence pertinent to his claim for clemency; and (3) proceeding with the execution of Grossman will violate the Eighth Amendment of the United States Constitution because he may be incompetent at the time of the execution. We now address and reject all three claims.

I. Ineffective Assistance of Counsel During Penalty Phase

In his third successive postconviction motion, Grossman argued that his constitutional rights were violated when the trial court considering his original postconviction motion summarily denied his claim that trial counsel provided ineffective assistance at the penalty phase of his trial by failing to have him

examined by a competent mental health professional as required by Ake v. Oklahoma. He contended that the sentencing court therefore did not hear all possible evidence regarding mitigating circumstances before sentencing and attached the report of Dr. Fisher to his motion. Grossman further alleged that he would now call Dr. Michael Maher, who recently reviewed the raw data generated by testing done by Dr. Fisher and Dr. Dee. He alleges that Dr. Maher, a new expert, would "testify about Mr. Grossman's life-long intellectual neurological deficits[,] . . . how it affected Grossman's state of mind at the time of the crime," and about Grossman's dependency on alcohol and drugs, which manifested at an early age. Dr. Maher would "also conduct a clinical evaluation of his own to establish statutory or non-statutory mitigation." The postconviction court summarily denied this claim as procedurally barred and untimely.

As we explained in Tompkins v. State, 994 So. 2d 1072, 1080-81 (Fla. 2008):

> Florida Rule of Criminal Procedure 3.851 governs the filing of postconviction motions in capital cases. Rule 3.851(d)(1) generally prohibits the filing of a postconviction motion more than one year after the judgment and sentence become final. An exception permits filing beyond this deadline if the movant alleges that "the facts on which the claim is predicated were unknown to the movant or the movant's attorney and could not have been ascertained by the exercise of due diligence." Fla. R. Crim. P. 3.851(d)(2)(A). . . . Rule 3.851 also provides certain pleading requirements for initial and successive postconviction motions. Fla. R. Crim. P. 3.851(e)(1)-(2). For example, the motion must state the nature of the relief sought, Fla. R. Crim. P. 3.851(e)(1)(C), and must include "a detailed allegation of the

> factual basis for any claim for which an evidentiary hearing is sought." Fla. R. Crim. P. 3.851(e)(1)(D).
>
> Rule 3.851(f)(5)(B) permits the denial of a successive postconviction motion without an evidentiary hearing "[i]f the motion, files, and records in the case conclusively show that the movant is entitled to no relief." A postconviction court's decision regarding whether to grant a rule 3.851 evidentiary hearing depends on the written materials before the court; therefore, for all intents and purposes, its ruling constitutes a pure question of law and is subject to de novo review. See, e.g., Rose v. State, 985 So. 2d 500, 505 (Fla. 2008). In reviewing a trial court's summary denial of postconviction relief, this Court must accept the defendant's allegations as true to the extent that they are not conclusively refuted by the record. See Rolling v. State, 944 So. 2d 176, 179 (Fla. 2006).

Because Grossman's claim was summarily denied, our review is de novo. Walton v. State, 3 So. 3d 1000, 1005 (Fla. 2009).

We conclude that summary denial of this claim was proper for two reasons. First, as the trial court concluded, this claim is procedurally barred. Grossman's contention that his constitutional rights were violated when the original postconviction court summarily denied his ineffective assistance claim is merely an impermissible attempt to resurrect that ineffective assistance claim, the summary denial of which was affirmed by this Court. See Grossman, 708 So. 2d at 252. This claim was also raised in Grossman's federal habeas petition, which was denied by the federal district court. See Grossman, 359 F. Supp. 2d at 1267-70 ("Grossman has failed to demonstrate any error in the denial of his claim that his attorneys were ineffective in the investigation and presentation of mitigating evidence."). In fact, Grossman was permitted an evidentiary hearing on his

ineffective assistance of counsel claim that his counsel was deficient in not offering mental health testimony—claim V in his original postconviction motion.

Second, we agree with the trial court's conclusion that Grossman's claim does not present newly discovered evidence and is therefore untimely. To obtain a new trial based on newly discovered evidence, a defendant must meet two requirements: First, the evidence must not have been known by the trial court, the party, or counsel at the time of trial, and it must appear that the defendant or defense counsel could not have known of it by the use of diligence. Second, the newly discovered evidence must be of such nature that it would probably produce an acquittal on retrial. See Jones v. State, 709 So. 2d 512, 521 (Fla. 1998).

We reject Grossman's claim on the first prong of Jones and therefore need not reach the second prong. Grossman attempts to argue that the proposed testimony of his new expert, Dr. Maher, concerning nonstatutory mental mitigation, is newly discovered evidence in light of the decision of the United States Supreme Court in Porter v. McCollum, 130 S. Ct. 447 (2009), because "[p]rior to Porter, Florida Courts did not consider non-statutory mental mitigation as mitigation." We reject this claim. Porter did not grant Florida courts the authority to consider this type of mitigation, but rather recognized that Florida courts already do so: "Under Florida law, mental health evidence that does not rise to the level of establishing a statutory mitigating circumstance may nonetheless be

considered by the sentencing judge and jury as mitigating." 130 S. Ct. at 454 (citing Hoskins v. State, 965 So. 2d 1, 17-18 (Fla. 2007)).

Accordingly, we deny relief on this claim.

II. The Constitutionality of Florida's Death Penalty Statute as Applied

We turn next to Grossman's claim that the Florida death penalty statute is arbitrary and capricious as applied to him, in violation of Furman v. Georgia, 408 U.S. 238 (1972), because (1) the court and jury did not hear all available mitigating evidence at the penalty phase; (2) the State violated Giglio by presenting the false testimony of witness Charles Brewer; and (3) Grossman has not had the opportunity to present newly discovered evidence in clemency proceedings. In the first of these three claims, Grossman merely reasserts the same allegations we rejected above as procedurally barred—that the trial court and jury were not able to consider all possible mitigating evidence at the penalty phase. Therefore, we do not further address this subclaim.

A. Giglio Claim

Grossman alleged in his third successive postconviction motion that the State violated Giglio by presenting the false testimony of witness Charles Brewer. Specifically, Grossman contended that his death sentence is arbitrary and capricious because he is being treated differently than another death row inmate, Paul Beasley Johnson, whose sentence of death was recently vacated by this Court

due to prosecutorial misconduct resulting from a Giglio violation.[6] See Johnson v. State, 35 Fla. L. Weekly S43 (Fla. Jan. 14, 2010).

We conclude that summary denial of this claim was proper. Johnson is distinguishable and applied well-established precedent to the unique facts of that case. There, a successive rule 3.851 motion presented newly discovered evidence that the State committed a Giglio violation by knowingly presenting false testimony:

> Specifically, we conclude that newly disclosed evidence shows the following. First, after Johnson was arrested and counsel was appointed, the State intentionally induced Johnson to make incriminating statements to a jailhouse informant in violation of Johnson's right to counsel. Because Johnson's statements were impermissibly elicited, the informant's testimony concerning those statements was inadmissible under United States v. Henry, 447 U.S. 264 (1980). Second, although the prosecutor at Johnson's first trial knew that Johnson's statements were impermissibly elicited and that the informant's testimony was inadmissible, he knowingly used false testimony and misleading argument to convince the court to admit the testimony. And third, because the informant's testimony was admitted and then later used at Johnson's 1988 trial, and because the State has failed to show that this error did not contribute to the jury's advisory sentences of death, we must vacate the death sentences under Giglio v. United States, 405 U.S. 150 (1972), and remand for a new penalty phase proceeding before a new jury.

Johnson, 35 Fla. L. Weekly at S43.

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6. To establish a Giglio violation, a defendant must show that: (1) the prosecutor presented or failed to correct false testimony; (2) the prosecutor knew the testimony was false; and (3) the false evidence was material. See Guzman v. State, 941 So. 2d 1045, 1050 (Fla. 2006). If the first two prongs are established, the false evidence is deemed material if there is any reasonable possibility that it could have affected the jury's verdict. See id.

In Grossman's original postconviction motion, he raised a claim of prosecutorial misconduct regarding Brewer's testimony. Following the 1995 evidentiary hearing on that claim, the trial court denied relief, finding that there was no evidence that the State knew Brewer's testimony was false at the time of trial and further found that, in any event, Grossman had not shown how Brewer's allegedly false testimony affected the judgment or sentence in Grossman's case. In his third successive postconviction motion, Grossman does not provide any new evidence or indication that prosecutorial misconduct occurred. Therefore, unlike in Johnson, Grossman's claim is successive, and we deny relief on that basis.

B. Clemency Proceedings

Grossman next argued in his third successive postconviction motion that the death penalty is arbitrary and capricious as applied to him because he had a clemency proceeding in October 1988, but has not had an opportunity to present further information about his life in a recent clemency proceeding. He asserted that newly discovered evidence would explain why he acted impulsively at nineteen years of age when he committed the murder. He further contended that the clemency procedures are impermissibly arbitrary.

We conclude that the trial court properly denied this claim without an evidentiary hearing. This Court recently rejected an identical claim in Johnston v. State, 35 Fla. L. Weekly S64 (Fla. Jan. 21, 2010):

> Johnston contends that his original clemency hearing was inadequate to protect his rights because it was conducted before his full life history and mental illness history were developed. We rejected a similar argument in Bundy that time must be given to prepare and present a case for clemency in a second clemency proceeding before the death sentence may be carried out. Bundy[v. State], 497 So. 2d [1209] at 1211 [(Fla. 1986)]. We also noted in Marek v. State, 14 So. 3d 985 (Fla. 2009), after Marek raised a second challenge to the clemency process, that "five justices of the United States Supreme Court concluded [in Ohio Adult Parole Authority v. Woodard, 523 U.S. 272 (1998)] that some minimal procedural due process requirements should apply to clemency . . . [b]ut none of the opinions in that case required any specific procedures or criteria to guide the executive's signing of warrants for death-sentenced inmates." Marek, 14 So. 3d at 998. We again conclude that no specific procedures are mandated in the clemency process and that Johnston has been provided with the clemency proceedings to which he is entitled.
>
> Further, we decline to depart from the Court's precedent, based on the doctrine of separation of powers, in which we have held that it is not our prerogative to second-guess the executive on matters of clemency in capital cases. Johnston has not provided any reason for the Court to depart from its precedents or to hold that an additional clemency proceeding is required before a death warrant is signed. Because these same claims have been raised and ruled on in the Court's prior precedents, and Johnston has provided no reason for the Court to depart from those precedents, relief is denied.

Johnston, 35 Fla. L. Weekly at S69; see also Marek, 14 So. 3d at 998; Bundy, 497 So. 2d at 1211. Similarly, Grossman has not provided any reason why this Court should depart from its well-established precedent on this issue, and we thus deny relief on this claim.

III. Competency to be Executed

Grossman's final argument in his third successive postconviction motion is that executing him would be cruel and unusual punishment because he may be incompetent at the time of execution. The trial court dismissed this claim on the ground that the claim was premature under both section 922.07, Florida Statutes (2009), and Florida Rule of Criminal Procedure 3.811(c). Rule 3.811(c) provides that "[n]o motion for a stay of execution pending hearing, based on grounds of the prisoner's insanity to be executed, shall be entertained by any court until such time as the Governor of Florida shall have held appropriate proceedings for determining the issue pursuant to the appropriate Florida statutes." See also § 922.07, Fla. Stat. (2009) (outlining procedures for Governor to follow when he or she is informed that a person under sentence of death may be insane). We conclude that the trial court properly dismissed this claim because under rule 3.811(c) and section 922.07, Grossman must exhaust his administrative remedies before he can raise this issue in court. The trial court also properly dismissed this claim on the basis that it lacked jurisdiction to consider the claim under Florida Rule of Criminal Procedure 3.811(d)(1). Rule 3.811(d)(1) provides in pertinent part: "The motion shall be filed in the circuit court of the circuit in which the execution is to take place . . . ." Accordingly, we affirm the trial court's dismissal of this claim.

CONCLUSION

For the reasons discussed above, we affirm the trial court's summary denial of Grossman's third successive motion for postconviction relief.

It is so ordered.

PARIENTE, LEWIS, CANADY, POLSTON, LABARGA, and PERRY, JJ. concur.
QUINCE, C.J., recused.

NO MOTION FOR REHEARING WILL BE ALLOWED.

An Appeal from the Circuit Court in and for Pinellas County,
Joseph Anthony Bulone, Judge – Case No. 84-11698 CFANO

Bill Jennings, Capital Collateral Regional Counsel, and Richard E. Kiley, James Viggiano, and Andrew Ali Shakoor, Assistant CCR Counsel, Middle Region, Tampa, Florida,

for Appellant

Bill McCollum, Attorney General, and Carol M. Dittmar, Senior Assistant Attorney General, and Stephen D. Ake, Assistant Attorney General, Tampa, Florida,

for Appellee

APPENDIX 4

Supreme Court of Florida

No. SC10-118

MARTIN EDWARD GROSSMAN,
Appellant,

vs.

STATE OF FLORIDA,
Appellee.

[February 8, 2010]

PER CURIAM.

Martin Edward Grossman, a prisoner under sentence of death and under an active death warrant, appeals from the trial court's order summarily denying his motion to vacate his sentence pursuant to Florida Rule of Criminal Procedure 3.851. Because the order concerns postconviction relief from a sentence of death, this Court has jurisdiction over the appeal under article V, section 3(b)(1), of the Florida Constitution. In his successive motion filed after the death warrant was signed, the summary denial of which is the subject of the present appeal, Grossman raised claims that were either previously raised in his postconviction proceedings

that concluded in 1997 or repeatedly rejected by this Court as legally without merit. Therefore, as more fully explained in this opinion, we affirm the trial court's order.

FACTS AND PROCEDURAL HISTORY

In 1985, Martin Grossman was convicted of the 1984 first-degree murder of Wildlife Officer Margaret Park and was sentenced to death on the recommendation of a unanimous jury. This case has a long procedural history. The conviction and death sentence have been reviewed and affirmed on direct appeal and have been the subject of multiple state and federal proceedings.[1] The facts of this case are set forth in this Court's opinion in Grossman's direct appeal of his conviction and sentence:

> Appellant and a companion, Taylor, drove to a wooded area of Pinellas County on the night of December 13, 1984, to shoot a handgun which appellant had recently obtained by burglarizing a home. Appellant lived in neighboring Pasco County at his mother's home and was on probation following a recent prison term. Wildlife Officer Margaret Park, patrolling the area in her vehicle, came upon the two men and became suspicious. She left her vehicle with the motor, lights, and flashers on, and took possession of appellant's weapon and driver's license. Appellant pleaded with her not to turn

1. These cases are: Grossman v. State, 525 So. 2d 833 (Fla. 1988), cert. denied, 489 U.S. 1071 (1989); Grossman v. Dugger, 708 So. 2d 249 (Fla. 1997); Grossman v. Crosby, 880 So. 2d 1211 (Fla. 2004); Grossman v. Crosby, 359 F. Supp. 2d 1233 (M.D. Fla. 2005), aff'd sub nom. Grossman v. McDonough, 466 F.3d 1325 (11th Cir. 2006), cert. denied, 550 U.S. 958 (2007); Grossman v. State, 932 So. 2d 192 (Fla. 2006); and Grossman v. State, 5 So. 3d 668 (Fla. 2009).

him in as having a weapon in his possession and being outside of Pasco County would cause him to return to prison for violation of probation. Officer Park refused the plea, opened the driver's door to her vehicle and picked up the radio microphone to call the sheriff's office. Appellant then grabbed the officer's large flashlight and struck her repeatedly on the head and shoulders, forcing her upper body into the vehicle. Officer Park reported "I'm hit" over the radio and screamed. Appellant continued the attack, and called for help from Taylor, who joined in the assault. Officer Park managed to draw her weapon, a .357 magnum, and fired a wild shot within the vehicle. Simultaneously, she temporarily disabled Taylor by kicking him in the groin. Appellant, who is a large man, wrestled the officer's weapon away and fired a fatal shot into the back of her head. The spent slug exited her head in front and fell into a drinking cup inside the vehicle. Blood stains, high velocity splatters, the location of the spent slug, and the entry and exit wounds show that the victim's upper body was inside the vehicle with her face turned inward or downward at the moment she was killed. Appellant and Taylor took back the seized handgun and driver's license, and fled with the officer's weapon. They returned to the Grossman home, where they told the story of the killing, individually and collectively, to a friend who lived with the Grossmans. The friend, Brian Hancock, and Taylor buried the two weapons nearby. Appellant, who was covered with blood, attempted unsuccessfully to burn his clothes and shoes which Taylor later disposed of in a nearby lake. Approximately a week later appellant and Taylor, individually and collectively, recounted the story of the murder to another friend, Brian Allan. Approximately eleven days after the murder, Hancock told his story to the police and appellant and Taylor were arrested. Taylor, upon his arrest, recounted the story of the murder to a policeman and, later, appellant told the story to a jailmate, Charles Brewer. Appellant and Taylor were tried jointly over appellant's objection. At trial, the state introduced the testimony of Hancock, Allan, and Brewer against appellant. The state also introduced Taylor's statement to the policeman against Taylor only. In addition, the state introduced the charred shoes, the two weapons, prints taken from the victim's vehicle, testimony from a neighbor who observed the attempted burning of the clothes, appellant's efforts to clean the Grossman van, and the changing of the van tires. Expert testimony as to the cause of death and the significance of blood splatter evidence was also introduced by the state. The jury was

> instructed that Taylor's admissions to the policeman could only be used against him, not appellant. The jury was instructed on premeditation and felony murder based on robbery, burglary, and escape. A general verdict of first-degree murder was returned against the appellant and Taylor was found guilty of third-degree murder.

Grossman, 525 So. 2d at 835-36.

During the penalty phase, defense counsel called four witnesses: (1) Myra Grossman, Grossman's mother; (2) Thomas Campbell, a correctional officer overseeing Grossman; (3) Steven Martakas, Grossman's friend from junior high school; and (4) Carolyn Middleton, a social worker at the jail housing Grossman. These witnesses testified that Grossman's father was disabled and that Grossman was often tasked from a very young age with taking care of him. Grossman dropped out of junior high school, and his father died when Grossman was fifteen years old. Grossman respected his parents and was not a violent person. Grossman never exhibited behavioral problems while in jail, and he was very nervous and scared about being executed. Following the penalty phase, the jury unanimously recommended death, and the judge imposed a sentence of death. Grossman, 525 So. 2d at 836.[2] This Court affirmed Grossman's conviction and death sentence on direct appeal. Id. at 846.

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2. The trial court found four aggravating circumstances:

> (1) the murder was committed while engaged in the commission of or an attempt to commit, or flight after committing or attempt to commit, the crime of robbery or burglary; (2) the murder was committed for

On March 8, 1990, before Grossman filed any postconviction motions, Governor Bob Martinez signed a death warrant setting the execution of Grossman for the week of May 10, 1990. Grossman filed a petition for writ of habeas corpus in this Court, and this Court granted a stay of execution to allow Grossman the opportunity to seek postconviction relief. Grossman, 708 So. 2d at 250. Grossman filed a motion to vacate his conviction and sentence under Florida Rule of Criminal Procedure 3.850 in the trial court in August 1990 ("original postconviction motion") and simultaneously filed an amended habeas petition in this Court. Id.

In his original postconviction motion, Grossman made numerous claims, but three claims are directly relevant to our determination that the present successive motion includes claims that Grossman has previously raised. First, Grossman argued in claim VI of his original postconviction motion that he was denied the effective assistance of counsel during the penalty phase because counsel failed to have Grossman examined by a competent mental health professional as required by Ake v. Oklahoma, 470 U.S. 68 (1985). The original court-appointed mental health expert for the defense was Dr. Sidney Merin. However, Dr. Merin did not testify

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> the purpose of avoiding or preventing a lawful arrest; (3) the murder was committed to disrupt or hinder the lawful exercise of government function or the enforcement of laws; and (4) the murder was especially wicked, evil, atrocious, or cruel. Numbers two and three were treated as one circumstance by the trial judge.

Id. at 840. The trial court found no mitigating circumstances. Id. at 846.

during Grossman's penalty phase proceedings. After his evaluation of Grossman, Dr. Merin advised defense counsel that "[his] findings would not be helpful to [the] defense position in either the guilt or innocence phase or, if it is held, the sentencing phase of Mr. Grossman's trial." In his original postconviction motion, Grossman alleged that a new mental health expert, Dr. Brad Fisher, had evaluated Grossman in March 1990 and had prepared a report that rebutted the contentions of Dr. Merin.[3] Dr. Fisher's report indicated that testing did not reveal any signs of "a current psychotic condition or of any major affective disorder." However, Dr. Fisher noted that his testing revealed "soft signs of organic impairment," which was supported by Grossman's history of "chronic and extensive drug and alcohol dependence," and that "[f]urther testing would be required to determine the nature and extent of this probable mental disability." Grossman attached Dr. Fisher's report to his motion and was prepared to call Dr. Fisher to testify at an evidentiary hearing.[4] The trial court summarily denied this claim, and this Court affirmed that denial. Grossman, 708 So. 2d at 252.

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3. This report by Dr. Fisher is the same report from Dr. Fisher attached by Grossman to his third successive postconviction motion, the summary denial of which is the subject of the present appeal.

4. In his current successive motion, Grossman alleges that in addition to Dr. Fisher, Dr. Henry Dee, an expert who had evaluated Grossman, was also available to testify at an evidentiary hearing to support Grossman's allegations under claim VI of Grossman's original postconviction motion. However, claim VI does not refer to Dr. Dee. Grossman alleges that Dr. Dee is now deceased.

Second, Grossman claimed in claim V of his original postconviction motion that counsel was ineffective during the penalty phase for failing to investigate, develop, and present mitigating evidence. Grossman received an evidentiary hearing on this claim. The only expert offered by the defense at the evidentiary hearing in 1994 was Kevin Sullivan, a licensed clinical social worker. Sullivan testified that Grossman was raised in a dysfunctional environment and that a number of factors negatively impacted his development, including that Grossman had been given inappropriate caretaking responsibilities from a young age; that his family had relocated at a critical time in his development; and that he experienced grief at the loss of his father and grandfather.

The trial court denied relief on this claim:

> The Defendant has failed to make the required showing of either deficient performance or sufficient prejudice [under Strickland v. Washington, 466 U.S. 668 (1984)] to support his ineffectiveness claim.
>
> The Court has evaluated the conduct of the Defendant's counsel from counsel's perspective at the time of the trial. Defendant introduced thirty-three affidavits that were represented as possible mitigation witnesses that were available at the time of trial but were not used by the defense. Several of the possible witnesses represented by the affidavits were known to the defense, and the defense had determined not to use them.
>
> Defense counsel, Mr. McCoun, at the time of trial, recognized that while trying to present a favorable picture of the Defendant, equally negative things would also be presented. Mr. McCoun did not want to use witnesses who would say that the Defendant was into stealing and heavy drug use. Moreover, defense counsel called three mitigating witnesses in addition to the Defendant's mother. The mitigating witnesses that were called had close contact with the

> Defendant near the time that he committed the crime; whereas, many of the potential witnesses that were represented by the affidavits had not seen the Defendant in years.
>
> The Court finds that Mr. McCoun did a competent, effective job of representing the Defendant at all phases of the trial. Even if counsel were deemed ineffective for the reasons stated by the Defendant, such alleged ineffectiveness did not come close to being so prejudicial to the Defendant that it affected the outcome of the case. The facts of this case showed the Defendant's conduct to be so egregious that proof of mitigating circumstances was extremely difficult.

This Court affirmed the trial court's denial of this claim. Grossman, 708 So. 2d at 251.

Third, also pertinent to the issues that he now raises, Grossman argued in his original postconviction motion that inmate Charles Brewer, who testified for the State, was acting as a State agent when he procured incriminating information from Grossman, and that the State failed to disclose this fact in violation of Brady v. Maryland, 373 U.S. 83 (1963). After an evidentiary hearing, the trial court found:

> Defendant states that Charles Brewer, a trusty at the Pinellas County Jail while Defendant was being held there awaiting trial, was a state agent, and the State withheld this fact along with an agreement that Mr. Brewer had reached with prosecutors regarding charges that were pending against Mr. Brewer. Mr. Brewer testified that he had his brother contact law enforcement after he heard Defendant discussing the case. Mr. Brewer said that he talked to the homicide detectives only one time and that was when they took his taped statement.
>
> Detective Robert Rhodes testified that he taped Mr. Brewer's statement on July 25, 1985, and that was the only time he ever met with Mr. Brewer. The State did not make any deals with Mr. Brewer in exchange for the statement, and Detective Rhodes did not suggest

questions for Mr. Brewer to ask the Defendant or ask Mr. Brewer to be an agent for the State.

The State Attorney, Bernie McCabe, testified that he interviewed Mr. Brewer at the State Attorney's Office prior to the trial and that he emphasized to Mr. Brewer that there were no deals in exchange for Mr. Brewer's testimony. Defendant's claim that Mr. Brewer was a state agent at the time that he discussed the Peggy Park murder with Defendant and that the State struck a deal with Mr. Brewer in exchange for his testimony is without merit.

The trial court also denied Grossman's claim that the State violated Giglio v. United States, 405 U.S. 150 (1972), by presenting the false testimony of Brewer:

> Defendant claims that Mr. Brewer provided false testimony about his prior record and about statements that Mr. Brewer attributed to Defendant. It does not appear from the evidence that the State was aware of the alleged falsity of Mr. Brewer's testimony about his prior record. Defendant states that Mr. Brewer's testimony concerning statements allegedly made by the Defendant was false; specifically, that the Defendant shot the victim because she was a woman and that if he had shot her in the back of the head it would have blown her face away. State's Exhibit Number Two is a transcript of Mr. Brewer's taped interview with Detective Rhodes. Mr. Brewer did not dispute the accuracy of the transcript of the taped interview, and stated that he did not remember at the time of the Rule 3.850 hearing what he had said during the taped interview. Defendant has failed to show how the alleged falsity of this aspect of Mr. Brewer's testimony affected the conviction or the sentence imposed in this case; therefore, this claim has no merit.

On appeal, this Court found that competent, substantial evidence supported the trial court's finding as to the Brady claim concerning Brewer, but did not specifically address the Giglio claim. Grossman, 708 So. 2d at 252.

Grossman later filed an amended federal habeas petition in which he raised, inter alia, the same issues concerning witness Brewer and ineffective assistance of

counsel during the penalty phase. Grossman, 359 F. Supp. 2d at 1245-47.[5] The federal district court denied the habeas petition, id., and the Eleventh Circuit affirmed. Grossman v. McDonough, 466 F.3d 1325 (11th Cir. 2006).

Subsequently, Grossman filed his first and second successive motions for postconviction relief, the summary denial of which was affirmed by this Court. See Grossman, 932 So. 2d 192 (affirming summary denial of Grossman's first successive postconviction motion); Grossman, 5 So. 3d 668 (affirming summary denial of Grossman's second successive postconviction motion). None of these successive motions or appeals raised any issues related specifically to either the guilt or penalty phase of Grossman's trial.

On January 12, 2010, Governor Crist signed a death warrant for Grossman, scheduling his execution for February 16, 2010. Grossman then filed his third successive motion for postconviction relief, raising three claims as set forth below, and the State filed its response. After holding an initial hearing pursuant to Florida Rule of Criminal Procedure 3.851(h)(6) on January 20, 2010, to determine whether an evidentiary hearing should be held on this motion, the trial court summarily denied claims one and two, and dismissed claim three.

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5. Grossman's initial federal habeas petition was filed before his state habeas petition, but it was stricken. Grossman, 359 F. Supp. 2d at 1245. After he refiled the petition, the case was administratively closed pending the outcome of two Florida cases that addressed issues arising from Ring v. Arizona, 536 U.S. 584 (2002). Grossman, 359 F. Supp. 2d at 1245.

ANALYSIS

In the present appeal, Grossman argues that the trial court erred in summarily denying his claims that (1) he was denied his constitutional rights because he was not granted an evidentiary hearing on his claim in his original postconviction motion that trial counsel provided ineffective assistance in the penalty phase of Grossman's trial by failing to have him examined by a competent mental health professional and newly discovered evidence now supports his ineffective assistance claim; (2) Florida's death penalty statute is arbitrary and capricious in violation of his constitutional rights because the trial court and jury did not hear all of his available mitigating evidence, the State violated Giglio by presenting the false testimony of witness Charles Brewer, and he was denied the opportunity to present new evidence pertinent to his claim for clemency; and (3) proceeding with the execution of Grossman will violate the Eighth Amendment of the United States Constitution because he may be incompetent at the time of the execution. We now address and reject all three claims.

I. Ineffective Assistance of Counsel During Penalty Phase

In his third successive postconviction motion, Grossman argued that his constitutional rights were violated when the trial court considering his original postconviction motion summarily denied his claim that trial counsel provided ineffective assistance at the penalty phase of his trial by failing to have him

examined by a competent mental health professional as required by Ake v. Oklahoma. He contended that the sentencing court therefore did not hear all possible evidence regarding mitigating circumstances before sentencing and attached the report of Dr. Fisher to his motion. Grossman further alleged that he would now call Dr. Michael Maher, who recently reviewed the raw data generated by testing done by Dr. Fisher and Dr. Dee. He alleges that Dr. Maher, a new expert, would "testify about Mr. Grossman's life-long intellectual neurological deficits[,] . . . how it affected Grossman's state of mind at the time of the crime," and about Grossman's dependency on alcohol and drugs, which manifested at an early age. Dr. Maher would "also conduct a clinical evaluation of his own to establish statutory or non-statutory mitigation." The postconviction court summarily denied this claim as procedurally barred and untimely.

As we explained in Tompkins v. State, 994 So. 2d 1072, 1080-81 (Fla. 2008):

> Florida Rule of Criminal Procedure 3.851 governs the filing of postconviction motions in capital cases. Rule 3.851(d)(1) generally prohibits the filing of a postconviction motion more than one year after the judgment and sentence become final. An exception permits filing beyond this deadline if the movant alleges that "the facts on which the claim is predicated were unknown to the movant or the movant's attorney and could not have been ascertained by the exercise of due diligence." Fla. R. Crim. P. 3.851(d)(2)(A). . . . Rule 3.851 also provides certain pleading requirements for initial and successive postconviction motions. Fla. R. Crim. P. 3.851(e)(1)-(2). For example, the motion must state the nature of the relief sought, Fla. R. Crim. P. 3.851(e)(1)(C), and must include "a detailed allegation of the

> factual basis for any claim for which an evidentiary hearing is sought." Fla. R. Crim. P. 3.851(e)(1)(D).
>
> Rule 3.851(f)(5)(B) permits the denial of a successive postconviction motion without an evidentiary hearing "[i]f the motion, files, and records in the case conclusively show that the movant is entitled to no relief." A postconviction court's decision regarding whether to grant a rule 3.851 evidentiary hearing depends on the written materials before the court; therefore, for all intents and purposes, its ruling constitutes a pure question of law and is subject to de novo review. See, e.g., Rose v. State, 985 So. 2d 500, 505 (Fla. 2008). In reviewing a trial court's summary denial of postconviction relief, this Court must accept the defendant's allegations as true to the extent that they are not conclusively refuted by the record. See Rolling v. State, 944 So. 2d 176, 179 (Fla. 2006).

Because Grossman's claim was summarily denied, our review is de novo. Walton v. State, 3 So. 3d 1000, 1005 (Fla. 2009).

We conclude that summary denial of this claim was proper for two reasons. First, as the trial court concluded, this claim is procedurally barred. Grossman's contention that his constitutional rights were violated when the original postconviction court summarily denied his ineffective assistance claim is merely an impermissible attempt to resurrect that ineffective assistance claim, the summary denial of which was affirmed by this Court. See Grossman, 708 So. 2d at 252. This claim was also raised in Grossman's federal habeas petition, which was denied by the federal district court. See Grossman, 359 F. Supp. 2d at 1267-70 ("Grossman has failed to demonstrate any error in the denial of his claim that his attorneys were ineffective in the investigation and presentation of mitigating evidence."). In fact, Grossman was permitted an evidentiary hearing on his

ineffective assistance of counsel claim that his counsel was deficient in not offering mental health testimony—claim V in his original postconviction motion.

Second, we agree with the trial court's conclusion that Grossman's claim does not present newly discovered evidence and is therefore untimely. To obtain a new trial based on newly discovered evidence, a defendant must meet two requirements: First, the evidence must not have been known by the trial court, the party, or counsel at the time of trial, and it must appear that the defendant or defense counsel could not have known of it by the use of diligence. Second, the newly discovered evidence must be of such nature that it would probably produce an acquittal on retrial. See Jones v. State, 709 So. 2d 512, 521 (Fla. 1998).

We reject Grossman's claim on the first prong of Jones and therefore need not reach the second prong. Grossman attempts to argue that the proposed testimony of his new expert, Dr. Maher, concerning nonstatutory mental mitigation, is newly discovered evidence in light of the decision of the United States Supreme Court in Porter v. McCollum, 130 S. Ct. 447 (2009), because "[p]rior to Porter, Florida Courts did not consider non-statutory mental mitigation as mitigation." We reject this claim. Porter did not grant Florida courts the authority to consider this type of mitigation, but rather recognized that Florida courts already do so: "Under Florida law, mental health evidence that does not rise to the level of establishing a statutory mitigating circumstance may nonetheless be

considered by the sentencing judge and jury as mitigating." 130 S. Ct. at 454 (citing Hoskins v. State, 965 So. 2d 1, 17-18 (Fla. 2007)).

Accordingly, we deny relief on this claim.

II. The Constitutionality of Florida's Death Penalty Statute as Applied

We turn next to Grossman's claim that the Florida death penalty statute is arbitrary and capricious as applied to him, in violation of Furman v. Georgia, 408 U.S. 238 (1972), because (1) the court and jury did not hear all available mitigating evidence at the penalty phase; (2) the State violated Giglio by presenting the false testimony of witness Charles Brewer; and (3) Grossman has not had the opportunity to present newly discovered evidence in clemency proceedings. In the first of these three claims, Grossman merely reasserts the same allegations we rejected above as procedurally barred—that the trial court and jury were not able to consider all possible mitigating evidence at the penalty phase. Therefore, we do not further address this subclaim.

A. Giglio Claim

Grossman alleged in his third successive postconviction motion that the State violated Giglio by presenting the false testimony of witness Charles Brewer. Specifically, Grossman contended that his death sentence is arbitrary and capricious because he is being treated differently than another death row inmate, Paul Beasley Johnson, whose sentence of death was recently vacated by this Court

due to prosecutorial misconduct resulting from a Giglio violation.[6] See Johnson v. State, 35 Fla. L. Weekly S43 (Fla. Jan. 14, 2010).

We conclude that summary denial of this claim was proper. Johnson is distinguishable and applied well-established precedent to the unique facts of that case. There, a successive rule 3.851 motion presented newly discovered evidence that the State committed a Giglio violation by knowingly presenting false testimony:

> Specifically, we conclude that newly disclosed evidence shows the following. First, after Johnson was arrested and counsel was appointed, the State intentionally induced Johnson to make incriminating statements to a jailhouse informant in violation of Johnson's right to counsel. Because Johnson's statements were impermissibly elicited, the informant's testimony concerning those statements was inadmissible under United States v. Henry, 447 U.S. 264 (1980). Second, although the prosecutor at Johnson's first trial knew that Johnson's statements were impermissibly elicited and that the informant's testimony was inadmissible, he knowingly used false testimony and misleading argument to convince the court to admit the testimony. And third, because the informant's testimony was admitted and then later used at Johnson's 1988 trial, and because the State has failed to show that this error did not contribute to the jury's advisory sentences of death, we must vacate the death sentences under Giglio v. United States, 405 U.S. 150 (1972), and remand for a new penalty phase proceeding before a new jury.

Johnson, 35 Fla. L. Weekly at S43.

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6. To establish a Giglio violation, a defendant must show that: (1) the prosecutor presented or failed to correct false testimony; (2) the prosecutor knew the testimony was false; and (3) the false evidence was material. See Guzman v. State, 941 So. 2d 1045, 1050 (Fla. 2006). If the first two prongs are established, the false evidence is deemed material if there is any reasonable possibility that it could have affected the jury's verdict. See id.

In Grossman's original postconviction motion, he raised a claim of prosecutorial misconduct regarding Brewer's testimony. Following the 1995 evidentiary hearing on that claim, the trial court denied relief, finding that there was no evidence that the State knew Brewer's testimony was false at the time of trial and further found that, in any event, Grossman had not shown how Brewer's allegedly false testimony affected the judgment or sentence in Grossman's case. In his third successive postconviction motion, Grossman does not provide any new evidence or indication that prosecutorial misconduct occurred. Therefore, unlike in Johnson, Grossman's claim is successive, and we deny relief on that basis.

B. Clemency Proceedings

Grossman next argued in his third successive postconviction motion that the death penalty is arbitrary and capricious as applied to him because he had a clemency proceeding in October 1988, but has not had an opportunity to present further information about his life in a recent clemency proceeding. He asserted that newly discovered evidence would explain why he acted impulsively at nineteen years of age when he committed the murder. He further contended that the clemency procedures are impermissibly arbitrary.

We conclude that the trial court properly denied this claim without an evidentiary hearing. This Court recently rejected an identical claim in Johnston v. State, 35 Fla. L. Weekly S64 (Fla. Jan. 21, 2010):

> Johnston contends that his original clemency hearing was inadequate to protect his rights because it was conducted before his full life history and mental illness history were developed. We rejected a similar argument in Bundy that time must be given to prepare and present a case for clemency in a second clemency proceeding before the death sentence may be carried out. Bundy[v. State], 497 So. 2d [1209] at 1211 [(Fla. 1986)]. We also noted in Marek v. State, 14 So. 3d 985 (Fla. 2009), after Marek raised a second challenge to the clemency process, that "five justices of the United States Supreme Court concluded [in Ohio Adult Parole Authority v. Woodard, 523 U.S. 272 (1998)] that some minimal procedural due process requirements should apply to clemency . . . [b]ut none of the opinions in that case required any specific procedures or criteria to guide the executive's signing of warrants for death-sentenced inmates." Marek, 14 So. 3d at 998. We again conclude that no specific procedures are mandated in the clemency process and that Johnston has been provided with the clemency proceedings to which he is entitled.
>
> Further, we decline to depart from the Court's precedent, based on the doctrine of separation of powers, in which we have held that it is not our prerogative to second-guess the executive on matters of clemency in capital cases. Johnston has not provided any reason for the Court to depart from its precedents or to hold that an additional clemency proceeding is required before a death warrant is signed. Because these same claims have been raised and ruled on in the Court's prior precedents, and Johnston has provided no reason for the Court to depart from those precedents, relief is denied.

Johnston, 35 Fla. L. Weekly at S69; see also Marek, 14 So. 3d at 998; Bundy, 497 So. 2d at 1211. Similarly, Grossman has not provided any reason why this Court should depart from its well-established precedent on this issue, and we thus deny relief on this claim.

III. Competency to be Executed

Grossman's final argument in his third successive postconviction motion is that executing him would be cruel and unusual punishment because he may be incompetent at the time of execution. The trial court dismissed this claim on the ground that the claim was premature under both section 922.07, Florida Statutes (2009), and Florida Rule of Criminal Procedure 3.811(c). Rule 3.811(c) provides that "[n]o motion for a stay of execution pending hearing, based on grounds of the prisoner's insanity to be executed, shall be entertained by any court until such time as the Governor of Florida shall have held appropriate proceedings for determining the issue pursuant to the appropriate Florida statutes." See also § 922.07, Fla. Stat. (2009) (outlining procedures for Governor to follow when he or she is informed that a person under sentence of death may be insane). We conclude that the trial court properly dismissed this claim because under rule 3.811(c) and section 922.07, Grossman must exhaust his administrative remedies before he can raise this issue in court. The trial court also properly dismissed this claim on the basis that it lacked jurisdiction to consider the claim under Florida Rule of Criminal Procedure 3.811(d)(1). Rule 3.811(d)(1) provides in pertinent part: "The motion shall be filed in the circuit court of the circuit in which the execution is to take place . . . ." Accordingly, we affirm the trial court's dismissal of this claim.

CONCLUSION

For the reasons discussed above, we affirm the trial court's summary denial of Grossman's third successive motion for postconviction relief.

It is so ordered.

PARIENTE, LEWIS, CANADY, POLSTON, LABARGA, and PERRY, JJ. concur.
QUINCE, C.J., recused.

NO MOTION FOR REHEARING WILL BE ALLOWED.

An Appeal from the Circuit Court in and for Pinellas County,
Joseph Anthony Bulone, Judge – Case No. 84-11698 CFANO

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