

IN THE SUPREME COURT OF FLORIDA

DONALD LENNETH BANKS,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

Case No. SC14-979

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

ANSWER BRIEF OF APPELLEE

PAMELA JO BONDI
ATTORNEY GENERAL

CARINE L. EMPLIT
ASSISTANT ATTORNEY GENERAL
Florida Bar No. 11943
Office of the Attorney General
PL-01, The Capitol
Tallahassee, Fl 32399-1050
Primary E-Mail:
capapp@myfloridalegal.com
Secondary E-Mail:
carine.emplit@myfloridalegal.com
(850) 414-3300 Ext. 3580
(850) 487-0997 (FAX)

Counsel for Appellee

TABLE OF CONTENTS

	PAGE#
TABLE OF CONTENTS	i
TABLE OF CITATIONS	iii
PRELIMINARY STATEMENT	1
STANDARD OF REVIEW	1
STATEMENT OF THE CASE AND FACTS	2
SUMMARY OF THE ARGUMENT	6
ARGUMENT	11
ISSUE I: WHETHER THE TRIAL COURT ERRED IN FINDING THAT PENALTY PHASE COUNSEL WAS NOT INEFFECTIVE IN ITS INVESTIGATION AND PRESENTATION OF MITIGATION EVIDENCE (Restated)	11
ISSUE II: WHETHER THE TRIAL COURT ERRED IN FINDING THAT GUILT PHASE COUNSEL WAS NOT INEFFECTIVE FOR NOT FILING A MOTION TO SUPPRESS THE SEARCH OF HIS HOME (Restated)	37
ISSUE III: WHETHER THE TRIAL COURT ERRED IN FINDING THAT GUILT PHASE COUNSEL WAS NOT DEFICIENT WHEN HE FAILED TO CONTEST THE STATE'S DNA EVIDENCE (Restated)	53
ISSUE IV: WHETHER THE TRIAL COURT ERRED IN FINDING THAT GUILT PHASE COUNSEL WAS NOT INEFFECTIVE WHEN HE ELLICITED TESTIMONY DURING SUDIE JOHNSON'S CROSS-EXAMINATION CONCERNING A SURVEILLANCE VIDEO SHE VIEWED, WHICH DEPICTED BANKS STABBING ANOTHER INDIVIDUAL (Restated)	62
ISSUE V: WHETHER THE TRIAL COURT ERRED IN FINDING THAT GUILT PHASE COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO IMPEACH STATE WITNESSES, SUDIE JOHNSON AND DETECTIVE BODINE (Restated)	66
ISSUE VI: WHETHER THE TRIAL COURT ERRED IN FINDING THAT GUILT PHASE COUNSEL WAS NOT DEFICIENT WHEN HE FAILED TO CALL KEYANA SMITH AS A WITNESS IN BANKS' DEFENSE (Restated)	72
ISSUE VII: WHETHER THE TRIAL COURT ERRED IN FINDING THAT TRIAL COUNSEL WAS NOT INEFFECTIVE WHEN HE FAILED TO OBJECT TO ALLEGED IMPROPER STATEMENTS MADE BY THE PROSECUTOR (Restated)	75

ISSUE VIII: WHETHER THE ALLEGED CUMULATIVE ERRORS COMMITTED DURING BANKS' TRIAL CONSTITUTE A VIOLATION OF HIS RIGHT TO A FAIR TRIAL (Restated)	95
CONCLUSION	97
CERTIFICATE OF SERVICE	97
CERTIFICATE OF COMPLIANCE	97

TABLE OF CITATIONS

CASES	PAGE#
<i>Anderson v. State</i> , 18 So.3d 501 (Fla. 2009)	93
<i>Asay v. State</i> , 769 So.2d 974 (Fla. 2000)	32
<i>Banks v. State</i> , 131 S.Ct. 1689, 179 L.Ed.2d 627, 79 USLW 3538 (2011)	3
<i>Banks v. State</i> , 46 So.3d 989 (Fla. 2010)	2, 3
<i>Bertolotti v. State</i> , 476 So.2d 130 (Fla. 1985)	91
<i>Bradley v. State</i> , 33 So.3d 664 (Fla. 2010)	28, 30
<i>Brim v. State</i> , 695 So.2d 268 (Fla. 1997)	59, 60
<i>Brown v. State</i> , 894 So.2d 137 (Fla. 2004)	59
<i>Brown v. State</i> , 959 So.2d 146 (Fla. 2007)	33
<i>Burger v. Kemp</i> , 483 U.S. 776, 107 S.Ct. 3114, 97 L.Ed.2d 638 (1987)	50
<i>Butler v. State</i> , 842 So.2d 817 (Fla. 2003)	59
<i>Chandler v. Moore</i> , 240 F.3d 907 (11th Cir. 2001)	50
<i>Chandler v. United States</i> , 218 F.3d 1305 (11th Cir. 2000)	29, 50
<i>Conahan v. State</i> , 844 So.2d 629 (Fla. 2003)	91
<i>Darling v. State</i> , 966 So.2d 366 (Fla. 2007)	90

<i>Downs v. State,</i> 740 So.2d 506 (Fla. 1999)	95
<i>Ferguson v. State,</i> 593 So.2d 508 (Fla. 1992)	93
<i>Gonzalez v. State,</i> 990 So.2d 1017 (Fla. 2008)	91
<i>Gore v. State,</i> 719 So.2d 1197 (Fla. 1998)	91
<i>Griffin v. State,</i> 866 So.2d 1 (Fla. 2003)	94
<i>Hendrix v. Sec'y, Fla. Dep't of Corr.,</i> 527 F.3d 1149 (11th Cir. 2008)	31
<i>Hildwin v. State,</i> 84 So.3d 180 (Fla. 2011)	89
<i>Hodges v. State,</i> 885 So.2d 338 (Fla. 2004)	32
<i>Hoskins v. State,</i> 75 So.2d 250 (Fla. 2011)	30
<i>Howell v. State,</i> 877 So.2d 697 (Fla. 2004)	59
<i>Johnson v. State,</i> 104 So.3d 1010 (Fla. 2012)	1
<i>Kimmelman v. Morrison,</i> 477 U.S. 365, 106 S.Ct. 2574, 91 L.Ed.2d 305 (1986)	51
<i>Ladd v. Jones,</i> 864 F.2d 108-10 (11th Cir.)	50
<i>Lugo v. State,</i> 845 So.2d 74	91
<i>Mann v. State,</i> 603 So.2d 1141 (Fla. 1992)	91
<i>McGirth v. State,</i> 48 So.3d 777 (Fla. 2010)	89

<i>Merck v. State,</i> 975 So.2d 1054 (Fla. 2007)	91
<i>Michel v. Louisiana,</i> 350 U.S. 91, 76 S.Ct. 158, 100 L.Ed. 83 (1955)	28
<i>Mungin v. State,</i> 932 So.2d 986 (Fla. 2006)	92
<i>Nixon v. State,</i> 2 So.3d 137 (Fla. 2009)	33
<i>Occhicone v. State,</i> 768 So.2d 1037 (Fla. 2000)	28, 29, 32, 59
<i>Patrick v. State,</i> 104 So.3d 1046 (Fla. 2012)	95
<i>Rivera v. State,</i> 859 So.2d 495 (Fla. 2003)	26
<i>Schoenwetter v. State,</i> 46 So.3d 535 (Fla. 2010)	34, 95
<i>State v. Sireci,</i> 502 So.2d 1221 (Fla. 1987)	32
<i>Stephens v. State,</i> 975 So.2d 405 (Fla. 2007)	89, 92
<i>Strickland v. Washington,</i> 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)	28, 29
<i>United States v. Jacoby,</i> 955 F.2d 1527 (11th Cir. 1992)	90
<i>United States v. Winfield,</i> 960 F.2d 970 (11th Cir. 1992)	50
<i>Urbini v. State,</i> 714 So.2d 411 (Fla. 1998)	92
<i>Vining v. State,</i> 827 So.2d 201 (Fla. 2002)	94
<i>Waters v. Thomas,</i> 46 F.3d 1506 (11th Cir. 1995)	30

<i>White v. Singletary</i> , 972 F.2d 1218 (11th Cir. 1992)	30, 59
<i>Wickham v. State</i> , 124 So.3d 841 (Fla. 2013)	26
<i>Zakrzewski v. State</i> , 866 So.2d 688 (Fla. 2003)	51
OTHER AUTHORITIES	
Fla.R.App.P. 9.210(c)	ix
Fla.R.App.P. 9.210(b)	1

PRELIMINARY STATEMENT

Appellant, DONALD LENNETH BANKS, the defendant in the trial court, will be referred to as appellant, the defendant or by his proper name. Appellee, the State of Florida, will be referred to as the State. Pursuant to Rule 9.210(b), Fla. R. App. P. (2014), this brief will refer to a volume according to its respective designation within the Index to the Record of Appeal. A citation to a volume will be followed by any appropriate page number within the volume. The symbol "IB" will refer to appellant's initial brief and will be followed by any appropriate page number. All double underlined emphasis is supplied.

Unless the contrary is indicated, bold-typeface emphasis is supplied; cases cited in the text of this brief and not within quotations are underlined; other emphases are contained within the original quotations.

STANDARD OF REVIEW

Arguments I-VII

An appellate court reviews a claim of ineffective assistance of counsel *de novo*. *Johnson v. State*, 104 So.3d 1010, 1022 (Fla. 2012) (explaining that the appellate court reviews *de novo* the postconviction court's rulings on the performance and prejudice prongs, but defers to that court's findings of fact as long as such findings are supported by competent, substantial

evidence in the record).

Argument VIII

There is no standard of review for this issue, as the Court is not reviewing any particular ruling or action by the trial court.

STATEMENT OF THE CASE AND FACTS

This is a postconviction appeal of the trial court's denial of an initial postconviction motion in a capital case. Banks was convicted of first degree murder for the killing of Linda Volum. He was sentenced to death. The jury was presented evidence establishing that Banks had been with Volum and at her home, where her body was later discovered, on the date of her murder; that they had sex that day; that he had cut himself while in her home and left blood at the scene of the murder; that he drove her vehicle to an ATM and attempted to withdraw cash from her account; and that he confessed to his girlfriend, Sudie Johnson, providing details only the killer would have known. *Banks v. State*, 46 So.3d 989, 993 (Fla. 2010).

On appeal to the Florida Supreme Court, Banks raised six issues.¹ The Florida Supreme Court affirmed the conviction and

¹ The claims included: (1) whether the trial court erred in denying a cause challenge to a prospective juror whose daughter had been the victim of an armed robbery; (2) whether the trial court erred in allowing the State to exercise peremptory

death sentence. *Id.* at 1001.

Banks then sought certiorari review in the United States Supreme Court. The United States Supreme Court denied certiorari review on March 21, 2011. *Banks v. State*, 131 S.Ct. 1689, 179 L.Ed.2d 627, 79 USLW 3538 (2011) (No. 10-8429).

On March 16, 2012, Banks filed a motion to vacate judgment of conviction and sentence, which was later heard by the trial court. It raised thirteen claims: (1) counsel was deficient for failing to file a suppression motion to suppress evidence recovered from Banks' home; (2) counsel was deficient in failing to object to the State's introduction of DNA evidence without introduction of population statistics; (3) counsel was deficient in his cross-examination of State witness, Sudie Johnson, in that he opened the door to testimony of a prior robbery committed by Banks; (4) defense counsel was deficient in failing to object to the State's opening and closing arguments during which the State inferred Banks had sexually battered the victim; (5) counsel was deficient for failing to object to the

challenges against two African-Americans; (3) whether the trial court erred in admitting DNA results without requiring the presentation of statistical evidence; (4) whether the trial court erred in denying a motion for mistrial when a witness mentioned Banks' involvement in another crime; (5) whether the trial court erred during the penalty phase by allowing the State to present a video of Banks committing an armed robbery; and (6) whether the trial court erred in finding the cold, calculated, and premeditated (CCP) aggravating circumstance.

introduction of Banks' hospital records through Sudie Johnson as hearsay; (6) counsel was deficient for failing to investigate and call numerous witnesses during the guilt phase; (7) counsel was deficient for failing to object to instances of prosecutorial misconduct in both the guilt and penalty phases; (8) counsel was deficient for failing to retain shoeprint and latent print experts, as well as an independent medical examiner; (9) counsel was deficient for failing to impeach Sudie Johnson and Detective Bodine; (10) counsel was deficient for failing to utilize an independent DNA expert to test untested evidence; (11) counsel was deficient in the penalty phase for failing to present statutory mental mitigation and additional non-statutory mitigation; (12) counsel failed to object to the variance in the indictment regarding the principal instruction; (13) the cumulative effect of errors deprived Banks of a fair trial. The State timely responded. Thereafter, on October 25, 2012, Banks filed an amended motion to vacate judgment of conviction and sentence, maintaining the same claims, and a *Huff* hearing was subsequently held. The trial court held a hearing on claims 1-11 on July 22-24, and November 13, 2013 before Circuit Judge Hugh Carithers. Banks was represented by Rick Sichta, Esquire and the State was represented by Assistant Attorney General Stephen White and Assistant State Attorney Alan Mizrahi. Banks called Refik Eler, Esquire, and Michael Edwards, his trial

counsel; Alan Chipperfield, Banks' former trial counsel; Alan Mizrahi, the prosecutor who tried Banks' case; Michael Hurst, Investigator; Detective Bodine, Jacksonville Sheriff's Office; Detective Larry Kuczkowski, Jacksonville Sheriff's Office; Richard Kocik, latent print examiner with the Jacksonville Sheriff's Office; James M. Pollock. Jr., FDLE; Professor Paul Friedman, who testified about latent print examination; Keyana Smith, a former Winn-Dixie cashier who had handled a transaction for Volum and Banks on the date of Volum's murder; Kurt Banks' Banks' uncle; Donald Banks, Sr., Banks' father; Mary Patterson, Banks' mother; Shar-Day Edwards, Banks' sister; Sudie Johnson, Banks' former girlfriend; Ray Bailey, Banks' former step-father; Sara Flynn, mitigation specialist; and Dr. Richard Dudley, Jr., psychiatrist. Banks also testified.

Eler and Edwards testified concerning the ineffective assistance claims. Both testified to their lengthy criminal defense experience and explained why they made the decisions they did in representing Banks at trial. Dr. Dudley testified that, based on reports generated from Dr. Krop, who had previously examined Banks, he felt that Banks was under extreme mental or emotional disturbance at the time he committed the murder. Detectives testified as to their investigation of the case, including other potential suspects. Johnson testified to the circumstances surrounding her consent, given to law

enforcement, to search the home she shared with Banks. Finally, McMillian's family and friends testified about Banks' childhood.

After both parties filed their post-hearing briefs, the trial court denied Banks' amended motion in a twenty-seven page order. This appeal follows.

SUMMARY OF THE ARGUMENT

ISSUE I

Banks submits that the trial court erred in finding that trial counsel was not ineffective in its investigation and presentation of mitigation evidence during the penalty phase. Trial counsel was not deficient because obtaining a more favorable expert in postconviction does not automatically render trial counsel deficient; because Banks' mitigation specialist's testimony was largely based on hearsay and reflected matters different from what trial counsel was able to obtain from the same sources; because both trial counsels' testimony was more credible than that of Banks' mother concerning their attempts at securing her testimony at the penalty phase; because Kurt Banks and Ray Bailey would have provided little beneficial testimony; and because trial counsel's decision not to call Banks' sister, Shar-Day Edwards, was reasonable trial strategy. Banks was not prejudiced by the failure of trial counsel to present these witnesses, as their testimony would not have resulted in a different trial outcome.

ISSUE II

Banks submits that the trial court erred in finding that trial counsel was not deficient when he did not file a suppression motion, seeking to suppress evidence obtained from the search of his home. Trial counsel was not deficient because the search had been voluntarily and knowingly consented to by the resident, Sudie Johnson. Moreover, had Johnson refused to consent to the search, law enforcement would have sought a search warrant and ultimately recovered the evidence at issue via the warrant, thus Banks cannot prove the required prejudice.

ISSUE III

Banks submits that the trial court erred in finding that trial counsel was not ineffective when he failed to contest the State's DNA evidence because the State failed to present population statistics to form the necessary foundation for admission of that DNA evidence. Trial counsel was not deficient because the outcome of trial would not have been different had he objected. Trial counsel was aware that population statistics had been calculated as to most of the evidence; that the State's witness was qualified to testify to them; and the witness testified at the evidentiary hearing that he could have calculated the remainder of the statistics within thirty to sixty minutes. Had he raised an objection, the population

statistics would have been admitted into evidence. Furthermore, trial counsel's failure to object was based on sound trial strategy. He knew that the statistics would appear overwhelming to the jury. Additionally, the defense never contested the fact that Banks was in Volum's home and had cut himself there. Thus, the DNA evidence admitted at trial was not inconsistent with Banks' defense. Lastly, the jury was provided with expert guidance from a crime laboratory analyst concerning the significance of the DNA evidence found at the scene.

ISSUE IV

Banks submits that the trial court erred in finding that trial counsel was not ineffective when he elicited testimony from State witness, Sudie Johnson, on cross-examination, regarding a surveillance video she had seen, which depicted Banks stabbing another individual. Trial counsel was not deficient because Johnson uttered the statement while he was attempting to impeach her with her feelings of betrayal. Trial counsel was trying to get Johnson to admit that she had and was continuing to cooperate with the State to get back at Banks, whom she had learned had been sleeping with Volum. The trial court conducted a voir dire of the jury and issued a curative instruction regarding the statement after trial counsel moved for a mistrial. Finally, Banks' testified that he was a nine-time convicted felon, thus evidence concerning a prior crime for

which he had been convicted was not prejudicial.

ISSUE V

Banks submits that the trial court erred in finding that trial counsel was not ineffective when he failed to impeach State witnesses, Sudie Johnson and Detective Bodine. Trial counsel was not deficient in not attempting to further impeach Johnson because those attempts would have been based on inadmissible hearsay.² (PCR/8 1160-61) Any attempts to impeach Detective Bodine would likewise have been based on inadmissible hearsay and trial counsel's failure to impeach him constituted reasonable trial strategy; Eler's goal was to highlight for the jury, during his cross-examination of Detective Bodine, what he, and law enforcement as a whole, failed to do during their investigation, thus he stayed away from questions which would lead to testimony emphasizing what he did do.

ISSUE VI

Banks submits that the trial court erred in finding that trial counsel was not ineffective for failing to call Keyana Smith, a Winn-Dixie employee, who conducted a sales transaction

² While both Banks' initial brief and the trial court's order denying his 3.851 motion indicate that Johnson could have been, but was not impeached with her sole felony conviction, the record actually reflects that Eler did inquire of her conviction and she readily admitted that she believed she had one. (R/IX 369)

for Volum and Banks on the day of her murder. Banks testified to this transaction and the State did not present any evidence to rebut this fact; in fact, the State conceded that the two had been together on the date Volum was killed. Trial counsel was not deficient because Banks failed to establish any reasonable probability of a different outcome at trial had Smith testified. In fact, Smith's testimony could have only bolstered the State's theory that the killing was a murder payoff for money owed to Banks by Volum since Volum was unable to obtain cash back during the transaction.

ISSUE VII

Banks submits that the trial court erred in finding that trial counsel was not ineffective for failing to object to statements he argues constitute prosecutorial misconduct. As the trial court found, trial counsel was not deficient because the comments were not improper, it was trial counsel's strategy not to object and prejudice was not demonstrated in light of the jury instructions given and trial counsel's closing argument.

ISSUE VIII

Banks submits that the cumulative errors committed during his trial constitute a violation of his right to a fair trial and require a reversal of his guilt and penalty phase. As the trial court found, because Banks has failed to demonstrate that trial counsel was deficient on any individual basis, his claim

alleging ineffectiveness on a cumulative basis fails.

None of the appellate issues merit any relief.

ARGUMENT

ISSUE I

WHETHER THE TRIAL COURT ERRED IN FINDING THAT PENALTY
PHASE COUNSEL WAS NOT INEFFECTIVE IN ITS INVESTIGATION
AND PRESENTATION OF MITIGATION EVIDENCE (RESTATED)

Banks submits that the trial court erred in finding that trial counsel was not ineffective in its investigation and presentation of mitigation evidence during the penalty phase. (IB 38-60) As the trial court found, trial counsel was not deficient for a number of reasons, including: the fact that Banks obtained a more favorable expert in postconviction does not render trial counsel's performance deficient; that Banks' mitigation specialist's testimony was largely based on hearsay and reflected matters different from what counsel was able to obtain from the same sources; that both trial attorneys' testimony was more credible than that of Banks' mother concerning their attempts at securing her testimony at the penalty phase; that Kurt Banks and Ray Bailey would have provided little helpful testimony; and that trial counsel's decision not to call Banks' sister, Shar-Day Edwards, was reasonable trial strategy. The trial court also seemingly addressed prejudice when it found that had the evidence presented at the evidentiary hearing been presented at trial, it

would not have resulted in a different trial outcome.

Trial Testimony

At the penalty phase, trial counsel presented the testimony of Donald Banks, Sr. and Dr. Harry Krop. (R/XIV 875-80; 880-911)

Donald Banks, Sr. testified about his time in the military, his marriage to Banks' mother, which resulted in divorce, and his departure from the family home, at the time of his divorce, when Banks was roughly seven years of age. (R/XIV 875-77) He admitted that he did not have much involvement in Banks' life before his divorce and departure and did not know about Bank's upbringing. (R/XIV 877-78) The last time he spoke with Banks was five years prior. (R/XIV 879)

Dr. Krop testified that he performed a psychological examination of Banks, which included interviewing him, conducting psychological testing of him, administering neuropsychological testing to him, and reviewing materials, such as police reports, witness statements, deposition transcripts, as well as trial transcripts. (R/XIV 882-83) He also reviewed Banks' school records, medical records, jail records, and interviewed family members, including Banks' father, uncle and sister. He left numerous messages for Banks' mother, but she never returned his calls. (R/XIV 883) As part of his examinations, he finds it important to obtain "as much collateral or independent information from other people or

records which either support or perhaps refute the information that's given by the client." (R/XIV 885) He did just that in this case and nearly everything Banks told him was supported by other documentation. (R/XIV 888)

Dr. Krop found no evidence of any major mental illness. He testified that Banks was functioning in the borderline range of intelligence, in the lower five, six percentile of the overall population when compared to other people his age. He had an I.Q. of 74. (R/XIV 890-91)

Dr. Krop described deficits in the neuropsychological testing, which suggested mild to moderate deficits only in the frontal lobe portion of the brain, as the most significant aspect of the testing. (R/XIV 891)

He also found a history of substance abuse, including alcohol, borderline intellectual functioning, and anti-social personality traits. (R/XIV 894)

On cross-examination, Dr. Krop testified about Banks' intermittent cooperation with him and his testing. Banks was cooperative during their first meeting; was not at the second, resulting in Krop contacting his attorney and asking him to come in and try to "elicit his cooperation." Krop described Banks' level of cooperation as "sort of an off and on again kind of thing." (R/XIV 896-97)

Dr. Krop also testified about Banks' admissions regarding

fabricating some of the information he had previously provided to Krop about prior criminal offenses. (R/XIV 897)

Dr. Krop diagnosed Banks with antisocial disorder. (R/XIV 908) He agreed, with the State, that the term "sociopath" is an old term describing the same disorder. (R/XIV 909)

Evidentiary Hearing Testimony

Michael Edwards, Banks' penalty phase counsel, testified at the evidentiary hearing. (PCR/11 1904-PCR/12 2006; PCR/12 2047-2110) He was appointed to represent Banks in mid-2007. (PCR/11 1904) He became a member of the Florida Bar in 1978. (PCR/12 2082) Prior to undertaking Banks' representation, he had worked as both a prosecutor and defense attorney. (PCR/12 2080) He had tried twenty-three cases charging first degree murder; in approximately eleven of those, the State had filed a death notice, and in several, he was successful in having the death notice dropped prior to trial. He tried four cases in which the death penalty was sought; he participated as the guilt phase attorney in two and handled the entire trial in two. (PCR/11 1905) He is death-qualified and attends the Life Over Death seminar every two years. (PCR/11 1914; PCR/12 2080) He was responsible for handling the penalty phase and Eler was responsible for the guilt phase. (PCR/12 1931)

He did not think he needed a mitigation specialist in Banks' case. He opined that he can do exactly what a mitigation

specialist does. (PCR/11 1916) He reasoned that trial counsel bears the ultimate responsibility of obtaining mitigation. Thus, even if he had employed a mitigation specialist, it would have been his responsibility to locate witnesses and then determine which witnesses to use and not use. (PCR/12 2083-84) He did, however, rely on Investigator Hurst for assistance with his penalty phase preparation, but did the majority of fact and mitigation investigation himself. (PCR/11 1907-08) He located a file, during the evidentiary hearing, which included records reflecting that Hurst ran searches of several of the witnesses named in the 3.851 motion and that he had contacted some of them. (PCR/12 2090)

His penalty phase theory was presenting Banks as a man with a low IQ, frontal lobe injury, who came from a rough upbringing. (PCR/12 1933) He spoke to Banks, more than once, about what to present at the penalty phase. He accepted Banks input and based on that, the final decisions on how to proceed were made, including presenting Banks' testimony. (PCR/12 1934) He sought five mitigators: low IQ, deficient brain issue, antisocial personality trait, he was not the only participant in the murder, and he had a difficult childhood. (PCR/12 1935)

He called Dr. Krop and Banks' biological father at the penalty phase. (PCR/12 1937) He would have liked to call several others, including Banks' mother; his uncle, Dane Banks; his

sister, Shar-Day; and his step-father, who never responded to him. (PCR/12 1937-38) Alan Chipperfield, Banks' first attorney, had a list of family members, which was passed down to him. He tried calling those relatives.

He spoke with Dane Banks, who appeared, unannounced, at his office one day (as he had apparently done with Chipperfield). They discussed family members and specifically, reaching Banks' biological father, Donald Banks, Sr. (PCR/12 1939) Edwards had already spoken with Banks' biological father, and spoke with him a total of four times before he testified at trial. (PCR/12 1985) Banks, Sr. told him he left Banks and his mother when Banks was 7 years old and did not know enough to testify about his childhood. (PCR/12 1985-86)

Dane Banks, on other hand, did prove to be helpful, as he knew a lot about Banks' background, his time in juvenile facilities, and his step-father. Dane helped him make contact with Banks' sister, mother, step-father and other relatives.

He spoke to Shar-Day, Banks' sister, who proved to be unhelpful. (PCR/11 1910)

He spoke to Banks' mother twice, trying to convince her to testify on her son's behalf. He was unsuccessful and asked Dane to speak to her; Dane was also unsuccessful. He offered to pay her expenses in coming to testify. (PCR/12 2095) Banks' mother directed him not to ever call her again and told him that she

did not want anything to do with Banks, that he was the devil and would get what he deserves. (PCR/11 1912; 12 1944, 1988, 2094)

He has a general philosophy that he will not subpoena a witness to testify if that witness would be harmful to the case or harbor animosity towards him because they were compelled to appear.

He believed that Dane was going to testify on Banks' behalf and was delighted at that thought. (PCR/12 1940) After the guilty verdict, he contacted Dane about testifying at the penalty phase and Dane refused, citing business obligations. Edwards practically begged him to come and testify because of his vast knowledge of Bank's life and although Dane never specifically said "no," he kept referring to his business obligations and need to make money as excuses for not coming. (PCR/12 1941-42) He tried convincing Dane to cooperate and does not believe there is anything else he could have done to obtain his cooperation. (PCR/12 2094) Relying on his philosophy of not forcing a witness to testify, he chose not to subpoena Dane.

He would have liked to present testimony from a witness about the neighborhood where Banks grew up and his childhood, but he could not find such a witness. (PCR/12 1986-87, 2003, 2057, 2060, 2106) He had not heard of Dorothy Bailey, Kurt Banks, and Bill Powell before the evidentiary hearing. (PCR/12

1986-87)

He was present when Eler spoke to Sudie Johnson. He did not consider calling her to testify at the penalty phase and still would not consider it. (PCR/12 1983) He was concerned about what she might say during cross-examination by the State and felt that her testimony would be more detrimental than beneficial. (PCR/12 1984)

In addition to family members, he also spoke to Dr. Krop, Dr. Miller, Dr. Bloomfield, and Dr. Stillman. (PCR/12 1944, 2102)

He spoke with Dr. Krop a minimum of five times prior to him testifying. (PCR/12 1951) He has an "excellent professional relationship" with Dr. Krop. Dr. Krop has an "excellent" reputation in Northeast Florida. (PCR/12 2100) In each of the four capital cases he has tried, he used the services of Dr. Krop, as well as in cases where the death penalty was later waived. (PCR/12 2099-2100) Dr. Krop is regularly used by criminal defense attorneys in capital cases. (PCR/12 2100)

Dr. Krop conducted neuropsychological testing of Banks, reviewed police reports, guilt phase transcripts, medical records, employment records, Jacksonville jail records and he spoke with Dane Banks and Donald Banks, Sr. (PCR/12 1959-60, 1962-63)

His history with Dr. Miller goes back further, to the days

when Edwards worked as prosecutor. Dr. Miller was at the forefront of the concept of forensic psychiatry in Northeast Florida. (PCR/12 2100-01) Dr. Miller is respected in the criminal defense community. (PCR/12 2100) He did not, however, call Dr. Miller to testify because Dr. Miller had told him that his testimony would not be helpful to Banks. (PCR/12 2103)

Dr. Miller had Banks sent for an MRI before Edwards became involved in his case. Dr. Miller relayed that the MRI came back normal. (PCR/12 2070) Further testing was not recommended. (PCR/12 2106) Edwards discussed the statutory mitigators with both Dr. Krop and Dr. Miller to determine which mitigators they could testify applied to Banks. (PCR/12 2070-71)

Dr. Bloomfield also has a good reputation within the community. (PCR/12 2101-02) He, too, was not called to testify because he would not have helped as there were some concerns about Banks malingering during his contact with him. (PCR/12 2103)

Finally, he consulted with Dr. Stillman briefly, for a total of four mental health professionals. (PCR/12 2102) Banks refused to go to Shands to meet with Dr. Stillman for purposes of a neuropsychological exam. Edwards had to go to the jail and convince Banks to attend. (PCR/12 1930)

He felt it necessary to argue Banks' antisocial personality disorder diagnosis in light of his criminal record because it

somewhat explained that previous behavior. He would not have presented that evidence had Banks not had a criminal record. (PCR/12 2087)

He had the majority of the records Sichta addressed at the hearing at the time of the penalty phase and used it in preparation for the hearing; he also allowed Drs. Krop and Miller access to that information. (PCR/12 2089)

Banks' decision to testify during the penalty phase was against his advice and he opined that it hurt Banks' case. That was because Banks refused to answer the State's questions on cross-examination, left the witness chair and ultimately the courtroom. (PCR/12 2084)

Banks made his representation difficult. (PCR/12 2086)

In 2007, when he was involved in Banks' case, he believed he did all he could to find witnesses; he spoke to four different experts, and he gathered the bulk of the information presented. (PCR/12 2075)

He would have liked to present evidence at the penalty phase of Banks' childhood, but recognized that that would have opened the door to his time spent in juvenile facilities and refusal to follow the rules while incarcerated. (PCR/12 1977)

He visited Banks at the jail anywhere from five to twelve times and Hurst may have accompanied him on one occasion and may have visited him on his own one to two times. (PCR/12 1924)

Banks' mother, Mary Patterson, also testified at the evidentiary hearing. (PCR/13 2176-2239) She testified that she was not aware that her son, Banks, had been charged with first degree murder and facing death. She denied speaking to his attorneys, Investigator Hurst, or ASA Mizrahi in 2005. She was not aware that he had gone to trial and had been convicted. She denied speaking to Banks' first attorney, Alan Chipperfield and claimed to have only spoken with the postconviction mitigation specialist, Sarah. (PCR/13 2178-79)

She and Banks resided in a "nice neighborhood" in Jersey City, New Jersey. (PCR/13 2179) Her former husband/Bank's father remained in Banks' life until he turned 7 or 8 years old. (PCR/13 2181) She described Banks, Sr. as being "a little bit crazy," paranoid and "destructive" after he returned from Vietnam. (PCR/13 2181-82) He also did cocaine. (PCR/13 2182, 2187) Banks' personality changed when she and his father divorced. (PCR/13 2190, 2213) Banks began to rebel and get into trouble with the law. (PCR/13 2193)

Banks had a pretty good upbringing before she and his father divorced. (PCR/13 2225) His father never beat him, beyond a typical spanking. Although Banks did not receive the love he sought from his father, he obtained it from her and her mother. (PCR/13 2226) She was not aware of Bailey, Banks' step-father, abusing Banks either. Bailey worked hard, did not abuse drugs

and tried to set a good example for Banks. (PCR/13 2230) Banks followed her rules, was not defiant and never became violent with her. (PCR/13 2233-34) She was not aware of any head injuries Banks may have suffered. (PCR/13 2234) She acknowledged that she did not spend that much time with Banks as an adult because he was in and out of prison. (PCR/13 2234-35) While incarcerated, he wrote his mother, but never mentioned hearing voices or having any mental defects. She took him to the doctor regularly as a child and he was never diagnosed with any mental illness. (PCR/13 2235) As a young child, Banks did not have problems in school. His problems occurred, later, because he did not attend school. (PCR/13 2236)

After the divorce, she and Banks moved to Irvington, New Jersey. None of Banks, Sr.'s family ever visited them there. (PCR/13 2195)

Banks did not do well in school - he was not paying attention. (PCR/13 2195) As a young child, Banks was in Boy Scouts. (PCR/13 2197)

She described Banks, Sr.'s family as having issues with substance abuse and trouble with the law, leading to terms of incarceration. (PCR/13 2199)

A few years after her divorce, she married Ray Bailey. (PCR/13 2200) She denied that Bailey ever struck Banks with a slap-jack. (PCR/12 2201) The neighborhood that Bailey and Banks

moved to was "nice." (PCR/12 2202)

After his arrest for Volum's murder, she never made contact with Banks because she couldn't handle it. (PCR/13 2220) She would not visit him in prison, but testified that she would have come to court for him. (PCR/13 2222-2223)

Banks' half-sister, Shar-Day Edwards, testified on his behalf. (PCR/13 2244-2266) Her father was shot in both kneecaps while in the service. He used to experience flashbacks from his tour in Vietnam, and he was "probably a little traumatized from being in the war." (PCR/13 2248) He expressed some paranoia. His father spoke openly of his experience in Vietnam. (PCR/13 2249) She testified that her father did drugs, including cocaine and heroin. (PCR/13 2250) When she was four years old, she saw her father snort something and asked him about it. Her father told her that it was medicine for adults. (PCR/13 2251) She is fourteen years younger than Banks so whatever she knows of his childhood was told to her by her parents. (PCR/13 2265)

She was contacted by one of Banks' attorneys sometime between 2005-2008 by phone and the conversation lasted approximately 30 minutes. (PCR/13 2262-63) The person calling explained to her the importance of telling him everything she knew about her brother, bad and good. (PCR/13 2263) She readily admitted that she was not open with the attorney because, she claimed, it was a sensitive subject. (PCR/13 2264)

Banks' former step-father was called on his behalf. (PCR/14 2365-2387) He was previously married to Banks' mother. (PCR/14 2366) He described Banks as a child who mostly kept to himself. (PCR/14 2370) Banks had a short attention span. (PCR/14 2371) Banks always had visitation with his father. (PCR/14 2372) Often, when he returned from visiting his father, he would be sullen and moody. (PCR/14 2372-73) Banks struggled in school, having "every problem a kid could have in school." (PCR/14 2373) He and Banks' mother received calls from the school regarding Banks' absenteeism and disruptiveness. (PCR/14 2374) He felt as if Bank's issues came from his relationship with his father and the paternal side of his family. (PCR/14 2375)

He and Banks' mother smoked marijuana every day and Banks was aware of it, but he never smoked in front of him. (PCR/14 2380, 2386) Banks' mother did not spend much time with him. (PCR/14 2382) Banks began getting arrested around age 12 and spent the better part of his childhood in juvenile facilities. (PCR/14 2385)

He denied ever hurting Banks, physically or emotionally, and tried to provide him with a good environment in which to grow. (PCR/14 2385) Banks was never neglected. (PCR/14 2386)

He denied every being contacted by members of Bank's defense team at any time between 2005-2008. (PCR/14 2382-83)

Kurt Banks was called by Banks. (PCR/13 2132-2164) He

testified that Banks is his paternal nephew and that he grew up with him, residing in the same house. Banks' parents were young when he was conceived. (PCR/13 2134) He described Banks as a hyperactive child. (PCR/13 2148) He noticed a change in Banks after his parents' divorce and noticed that his parents did not provide the supervision they had previously provided. (PCR/13 2140-41) He made it clear to Banks that he, his mother and father (Banks' paternal grandparents) were there for him at that time and would provide whatever he needed. (PCR/13 2157-58) Banks began having trouble with the law at age 13. (PCR/13 2144) He did not recall Banks' parents obtaining counseling for him. (PCR/13 2145) When Banks was sent to a youth house, his father did not visit him. (PCR/13 2147) Kurt "didn't really know too much [about] what was going on in there." Banks would call him once in a while and he would visit Banks once in a while. (PCR/13 2151) He described the neighborhood where Banks began his life as "pretty nice" and "real nice." (PCR/13 2149) He described the area where he moved after his parents' divorce - Irvington - as a "little rougher" but that "it was all right." (PCR/13 2150) He admitted that he was not constantly around Banks growing up. (PCR/13 2160)

Banks grew up in a large family and was a happy child. He had several good male role models. (PCR/13 2158) He never witnessed any abuse of Banks and it appeared that all of Banks'

needs were being met. (PCR/13 2156, 2159) He never witnessed anyone doing drugs in Banks' presence when he was a child. (PCR/13 2158-59)

Kurt admitted that he has a criminal history, including a robbery with a weapon, on which he served 6 years in prison, as well as armed robbery, accepting stolen goods "and stuff like that." (PCR/13 2152) He was in prison in North Carolina when he found out that Banks had been arrested for murder and at the time of the trial. (PCR/13 2153-54)

Trial Court's Ruling

The trial court found that Edwards was not ineffective in his penalty phase preparation. The trial court relied in *Wickham v. State*, 124 So.3d 841, 859 (Fla. 2013) and *Rivera v. State*, 859 So.2d 495, 504 (Fla. 2003) for the proposition that Edwards' performance was not incompetent merely because Banks found a more favorable mental health expert in postconviction. (PCR/8 1166-67)

The trial court also addressed the mitigation specialist, Sarah Flynn, who testified on Banks' behalf. The trial court noted that her testimony was almost entirely hearsay and was based on conversations she had with Banks' family members, as well as Dr. Dudley's findings. The court also noted that the recitation of Banks' past from Flynn was "incredibly divergent" from the past discovered by penalty phase counsel, although

they had relied on the same sources of information. (PCR/8 1167-68)

The trial court also gave greater weight to the testimony of Banks' two trial attorneys over the testimony of his mother, Mary Patterson, in finding that counsel did contact her and ask for her assistance but that she refused; it found that if Kurt Banks could have been located and brought to trial, he would have offered little evidence that would have been helpful to Banks' case; it found that counsel had made a strategic decision in not calling Shar-Day Edwards because she would not have been helpful; and it found that counsel would not have been able to locate Ray Bailey prior to trial and if he had, he would not have been an appropriate witness as his evidentiary testimony was not beneficial to Banks. (PCR/8 1163-66)

Although it did not explicitly find that Banks had failed to demonstrate prejudice, the trial court appears to have addressed this prong of the *Strickland* analysis when it found that the testimony provided by Bank's witnesses at the evidentiary hearing would likely not have affected the death sentence in light of the CCP aggravator and the premeditation. (PCR/8 1168)

Analysis³

The Florida Supreme Court explained the legal test for ineffective assistance of counsel claims in *Bradley v. State*, 33 So.3d 664, 671-72 (Fla. 2010) (citing *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)). A claim for ineffective assistance of trial counsel must satisfy two criteria.

First, counsel's performance must be shown to be deficient. *Id.* at 671. Deficient performance means that counsel's performance fell below the standard guaranteed by the Sixth Amendment. When examining counsel's performance, an objective standard of reasonableness applies, and great deference is given to counsel's performance. *Id.* The defendant bears the burden to "overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" *Id.* (quoting *Michel v. Louisiana*, 350 U.S. 91, 101, 76 S.Ct. 158, 100 L.Ed. 83 (1955)). This Court has made clear that "[s]trategic decisions do not constitute ineffective assistance of counsel." *Id.* (quoting *Occhicone v. State*, 768 So.2d 1037, 1048 (Fla. 2000)) There is a strong presumption that trial

³ Because each claim in Appellant's brief is predicated upon ineffective assistance of counsel, the applicable law, as provided here, will apply to each issue in this Answer Brief and will not be repeated under each issue.

counsel's performance was not ineffective. *Id.*

Second, the deficient performance must have prejudiced the defendant, ultimately depriving the defendant of a fair trial with a reliable result. *Id.* at 672. A defendant must do more than speculate that an error affected the outcome. The prejudice prong is met only if there is a reasonable probability that "but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* (quoting *Strickland*, 466 U.S. at 694, 104 S.Ct. 2052)

The dispositive question is "whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Id.* at 686, 104 S.Ct. at 2064. "Given the strong presumption in favor of competence, the petitioner's burden of persuasion-though the presumption is not insurmountable-is a heavy one." *Chandler v. United States*, 218 F.3d 1305, 1314 (11th Cir. 2000). Unless the petitioner can rebut the "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance," he cannot establish that counsel's performance was constitutionally deficient. *Strickland*, 466 U.S. at 689, 104 S.Ct. at 2065. "The test has nothing to do with what the best lawyers would have done. Nor is

the test even what most good lawyers would have done. We ask only whether some reasonable lawyer at the trial could have acted, in the circumstances, as defense counsel acted at trial." *White v. Singletary*, 972 F.2d 1218, 1220 (11th Cir. 1992); see also *Waters v. Thomas*, 46 F.3d 1506, 1514 (11th Cir. 1995) (stating that "perfection is not the standard of effective assistance"). Both deficient performance and prejudice must be shown. *Bradley* at 672.

First, Banks takes issue with the fact that Edwards failed to utilize a mitigation specialist, an investigator or anyone else to assist him in his penalty phase investigation and preparation. Edwards testified at the evidentiary hearing that he did use the services of Investigator Hurst, but did most of the work himself. He also relied on Banks' uncle, Dane Banks, to obtain historical information and obtain assistance in reaching other, reluctant family members. (PCR/11 1907-08; PCR/12 2083-84)

While, as Banks has cited, the ABA guidelines may suggest use of a mitigation specialist, failure to use an "expert" in mitigation investigation does not per se constitute ineffective assistance. *Hoskins v. State*, 75 So.2d 250, 256 (Fla. 2011).

On a related note, the emergence of an additional expert witness, such as a mental health expert, who testifies more beneficially for the defendant at a state collateral proceeding

does not mean that trial counsel was ineffective. See *Hendrix v. Sec'y, Fla. Dep't of Corr.*, 527 F.3d 1149, 1154 (11th Cir. 2008). "[C]laims based on such witnesses are made seemingly without regard to the trial counsel's actual investigation and the basis for his strategic decisions." *Id.* See also *Smith v. State*, 126 So.3d 1038, 1052 (Fla. 2013) (citing *Cherry v. State*, 781 So.2d 1040, 1052 (Fla. 2000) (holding that simply because defendant found a new expert in postconviction proceedings who reached conclusions different from those of the appointed expert during trial does not mean that relief is warranted); *Dufour v. State*, 905 So.2d 42, 59 (Fla. 2005) ("Simply presenting the testimony of experts during the evidentiary hearing that are inconsistent with the mental health opinion of an expert retained by trial counsel does not rise to the level of prejudice necessary to warrant relief."))

This is not a case where counsel failed to make an investigation or locate witnesses altogether; there was no deficient performance. In fact, trial counsel conducted a thorough investigation for mitigation purposes. He obtained records, which he turned over to Dr. Krop, who later testified on Banks' behalf. He attempted to secure witnesses to testify at the penalty phase. He engaged the assistance of four different mental health experts.

Dr. Krop conducted neuropsychological testing of Banks,

reviewed police reports, guilt phase transcripts, medical records, employment records, Jacksonville jail records and he spoke with Dane Banks and Donald Banks, Sr.

Dr. Miller referred Banks for an MRI, which came back normal. He was not called as a witness because he had told trial counsel that his testimony would not be helpful to Banks.

Dr. Bloomfield was not called to testify because he would not have helped as he bore some concerns about Banks malingering during his contact with him.

Trial counsel testified that he made a strategic decision only to present Dr. Krop's findings to the jury.

This is similar to the facts in *Hodges v. State*, 885 So.2d 338, 348 (Fla. 2004). There this Court held that in light of evidence demonstrating that counsel pursued mental health mitigation and received unusable or unfavorable reports, the decision not to present the experts' findings did not constitute ineffective assistance of counsel. See *Occhicone v. State*, 768 So.2d 1037, 1048 (Fla. 2000); see also *Asay*, 769 So.2d 974, 986 (Fla. 2000) (no ineffective assistance of counsel in deciding against pursuing additional mental health mitigation after receiving an unfavorable diagnosis); *State v. Sireci*, 502 So.2d 1221, 1223 (Fla. 1987) (not ineffective assistance of counsel to rely on psychiatric evaluations that may have been less than complete).

As for the family members who testified at the evidentiary hearing, the trial court's findings should be accorded deference. Patterson denied ever being contacted by anyone concerning her son's charges and trial, yet both Edwards and Chipperfield testified that they contacted her and she was uncooperative. Banks failed to provide an explanation as to why his trial counsel would lie as to their contact with Patterson. (PCR/8 1163) Even Dr. Krop testified that he called her, but she would not return his calls. The trial court's findings on issues of credibility are due deference by a reviewing court. Appellate courts do not "reweigh the evidence or second-guess the circuit court's findings as to the credibility of witnesses." *Nixon v. State*, 2 So.3d 137, 141 (Fla. 2009) (quoting *Brown v. State*, 959 So.2d 146, 149 (Fla. 2007)).

Furthermore, as the trial court found, what she did testify to, if presented at trial, would not have been helpful for purposes of mitigation. She testified that Banks grew up in a nice neighborhood; that had a pretty good upbringing; that his father never beat him; and although Banks did not receive the love he sought from his father, he obtained it from her and her mother. She was not aware of any head injuries Banks may have suffered and he did not exhibit any problems at school. Banks' step-father did not abuse him and tried to provide an

example for him. Her account of his upbringing sounds like most children in today's world. (PCR/8 1164)

Kurt Banks was in a North Carolina prison at the time of Banks' trial. He was an admitted convicted felon. Had he been located and transported, however, his testimony would have offered little in the way of mitigation. He described the neighborhood in which Banks resided as nice. He stated that until Banks' parents were divorced, Banks had a good life. There was no abuse or drug use in his presence. Banks always had the support of extended family, even after his parents' divorce, including his grandmother and uncles, even when he was incarcerated in juvenile facilities. Lastly, he admitted that was not constantly around Banks as he was growing up. (PCR/8 1164-65)

Ray Bailey, Banks' step-father, also testified that Banks was never abused during the five year period he was married to Banks' mother and Banks was not in custody. (PCR/8 1165)

Banks' half-sister, Shar-Day Edwards testified that she is fourteen years younger than Banks so whatever she knew of his childhood was told to her by her parents.

The facts presented at the evidentiary hearing are analogous to those presented in *Schoenwetter v. State*, 46 So.3d 535, 557-58 (Fla. 2010). There, the appellant claimed that his attorneys rendered ineffective assistance by failing to present

more evidence of his social background. He claimed that his attorney should have called as witnesses at trial his biological father, his paternal grandmother, and Laura Blankman, an investigator hired by the defense. Each of these individuals testified at the postconviction evidentiary hearing. After reviewing their postconviction testimony, the court found that counsel was not deficient in failing to present those witnesses and that appellant's case was not prejudiced by their absence during the penalty phase.

Similarly to Banks, Sr.'s testimony, Schoenwetter's father testified that he was arrested and sent to prison when appellant was approximately eighteen months old and that he was divorced from appellant's mother while still in prison. He also testified that he visited his son in jail shortly after appellant's arrest. Prior to that visit, Ingram had not seen appellant since he was seven or eight years old. Ingram stated that he would have been willing to testify at the penalty phase, but asserted that he had never been contacted by the Public Defender's office.

Schoenwetter's paternal grandmother testified that his mother had not permitted her to have a relationship with appellant and that she had only seen him on four occasions. She stated that she spoke by telephone with someone from the Public Defender's office prior to appellant's trial, but was not asked

to testify. She expressed the opinion that had appellant been permitted to have a relationship with her and her family, he would not have been in trouble with the law.

During the evidentiary hearing, appellant's attorneys testified that they were unable to locate Schoenwetter's father while preparing their case for mitigation.

The Court concluded that Schoenwetter's attorneys were not deficient within the meaning of *Strickland*. The record reveals that trial counsel made strong efforts to locate appellant's paternal family, which included attempted contact by mail and by telephone, as well as hiring a mitigation specialist. The court further found that the failure to call the witnesses did not satisfy the *Strickland* requirement of prejudice because had their testimony been presented at the penalty phase, it is unlikely that the jury would have given it much weight.

Similarly, Banks is unable to prove prejudice. Had these witnesses testified at trial, their evidentiary hearing testimony indicates that they would have testified to matters which would not been helpful to Banks' mitigation. Certainly, this testimony would not have so affected the trial as to result in a life recommendation.

This is, of course, in addition to the weighty aggravating circumstances. Had the postconviction witnesses testified at the penalty phase, it is unlikely that the jury would have rendered

a different recommendation in light of the State's evidence including the presence of Banks's DNA on the victim, in the victim and in her home; the testimony of Sudie Johnson, to whom Banks had confessed and shared intimate details of the murder that no one else knew; Volum's laptop located at Johnson's home; Banks' bloody footprint left at the scene; the cut to his leg, which was argued to have been caused by the same weapon used to stab Volum to death; the fact that he was trying to use Volum's debit card after she was murdered; and his trial testimony, which, for most the part, did not dispute this physical evidence.

Banks has been unable to demonstrate deficient performance, as well as *Strickland* prejudice, and thus the trial court's ruling denying this claim should be affirmed.

ISSUE II

WHETHER THE TRIAL COURT ERRED IN FINDING THAT GUILT
PHASE COUNSEL WAS NOT INEFFECTIVE FOR NOT FILING A
MOTION TO SUPPRESS THE SEARCH OF HIS HOME (RESTATED)

Banks submits that the trial court erred in finding that trial counsel was not deficient when he did not file a suppression motion, seeking to suppress evidence obtained from the search of his home. As the trial court found, trial counsel was not deficient because the search had been voluntarily and knowingly consented to by the resident, Sudie Johnson. Moreover, had Johnson refused to consent to the search, law

enforcement would have sought a search warrant and ultimately recovered the evidence at issue via the warrant, thus Banks cannot prove the required prejudice.

Trial Testimony

Sudie Johnson testified on behalf of the State. (R/IX 346-389) She testified that she had been in a relationship with Banks since November, 2004. (R/IX 348) Banks did not come home the night of March 9, 2005, the night of Volum's murder. She saw a white sedan pulling up in her driveway before dawn, on the morning of March 10, 2005. (R/IX 348-49) Banks exited the vehicle, carrying a dark green pillowcase. (R/IX 352) He was wearing an Enyce shirt, denim jacket and jeans. (R/IX 350-51, 352-53) This was the same clothing she had last seen him wearing. (R/IX 353) She asked Banks what he had in the pillowcase and he told her he had a laptop for her. She watched him remove the laptop from the pillowcase and saw bloody clothing underneath it. She asked what it was and he replied, 'I just murked somebody' which she explained was slang for murder. (R/IX 353) She also noticed that Banks was limping when he entered the home. After he had taken a shower, she noticed that his leg was bleeding. (R/IX 355) He remained at the house for approximately one hour before leaving in the white sedan he had pulled up in earlier. (R/IX 356) The following day, after she had charged the laptop, she accessed it and saw the name 'L.

Volum.' (R/IX 357) Later that day, a commercial for the local news aired and it was concerning an incident which had occurred two streets up from her; Banks, who was back home at the time, looked at her and stated, 'I did that.' (R/IX 357-58) She eventually asked Banks how he committed the murder and he explained that he put Volum in a choker hold and stabbed her from behind. He stabbed her in her torso until she fell down. He accidentally stabbed himself in the leg as he stabbed her. (R/IX 358-59) She asked him why he did this and he stated it was a 'murder pay-back.' (R/IX 359) He also relayed that he had entered the home in his underclothes and left a crackpipe at the scene to make it look like foul play. (R/IX 360)

Johnson was asked about the search of her home during the following exchange:

STATE: And did the police eventually search your home?

JOHNSON: Yes.

. . .

STATE: **And did you allow the police to come into your home and search it and photograph it?**

JOHNSON: **Yes.**

STATE: **You gave consent?**

JOHNSON: **Yes.**

(R/IX 363) (emphasis added)

Evidentiary Hearing Testimony

Refik Eler, Banks' guilt phase counsel, was called by the defense at the evidentiary hearing. (PCR/10 1680-11, 1902). He testified that he began his career as an attorney in 1986, when he was hired as an Assistant State Attorney for the Fourth Judicial Circuit. He worked there until 1989. (PCR/11 1868-69) He went into private practice with Frank Tassone, with whom he later became a partner, and remained there for eighteen years, until 2006, before going out on his own, practicing almost exclusively criminal defense. In 2009, he was appointed Chief Assistant Public Defender for the Fourth Judicial Circuit. He tried many capital cases before representing Banks. (PCR/11 1869)

Although he argued in closing that Sudie Johnson felt pressured by police to allow them to search her home, and inquired of her regarding same during trial, he did not believe that to be true. Ms. Johnson consented and executed a written consent. (PCR/11 1738-39)

Prior to trial, and in preparation for Johnson's cross-examination, he reviewed all of the police reports, her sworn statement, her consents to search, her deposition transcript and he met with and spoke to her on numerous occasions. (PCR/11 1832)

In none of her sworn statements, did Johnson indicate that

she did not sign the consent-to-search forms freely and voluntarily. Based on this, he did not feel as if he could file a suppression motion, alleging lack of consent, in good faith. (PCR/11 1879)

He felt as if law enforcement had probable cause to enter and search, and could have obtained a search warrant. (PCR/11 1741, 1880) He could have filed a motion to suppress but he did not have a good-faith basis to file it because law enforcement had probable cause and Ms. Johnson consented. (PCR/11 1741, 1747, 1750-51) He also deposed her about this issue and she confirmed that she had consented to the search, both verbally and in writing. (PCR/11 1744) He felt that based on the totality of the circumstances, she did consent. (PCR/11 1745) He described Johnson as a strong-willed person, who he did not believe could be pressured. (PCR/11 1761, 1879) He did not feel as if the recovery of the items, particularly Volum's laptop, was damning because it was consistent with Bank's version of events - that she gave him her laptop to satisfy a drug debt. (PCR/11 1749)

Three items were recovered during the search: a Nechi brand T-shirt, a Sean John jacket, and a computer. Those items did not change Sudie Johnson's testimony regarding Bank's confession to the murder. (PCR/11 1880) Nor did they change the forensic evidence recovered, including the DNA, footprints and

shoeprints. (PCR/11 1880-81)

Detective Pat Bodine, a homicide detective with the Jacksonville Sheriff's Office also testified at the evidentiary hearing. (PCR/12 2020-46) As of the time of his testimony, he had been with the sheriff's office since 1996. (PCR/12 2020) He was assigned as lead investigator to the Banks' case on the date Volum's body was found. (PCR/12 2021) He spoke to Sudie Johnson approximately two weeks later. He had been told by other detectives that she had come to the department on an unrelated matter and made statements about this case. (PCR/12 2022-23) She had driven herself there. (PCR/12 2024) He did not recall telling her that she would be arrested as an accomplice if she did not provide information and denied that his partner, Detective Sullivan, did. (PCR/12 2023-24) He described Johnson as "very cooperative, very willing to provide information." The interview of Johnson lasted approximately one and a half hours. (PCR/12 2024) At approximately 3:40 a.m. that morning, he and five other detectives, including an evidence technician, arrived at Johnson's home. None were in uniform. (PCR/12 2025-26) This was the second time law enforcement visited her home, but the first time Detective Bodine went. No warrant was obtained for either search as Johnson consented to both. Johnson consented to the second search, for which he was present. (PCR/12 2027) Johnson pointed out various pieces of evidence that she had

discussed during her interview. (PCR/12 2028) He collected some clothing, a computer, and beer cans. (PCR/12 2029) She did not indicate, during her interview, that she felt coerced or did not want law enforcement in her home; in fact, she was "very cooperative, very forthcoming with information." (PCR/12 2040-42) He also indicated that although Johnson provided consent to search her home, he believed that he had the requisite probable cause to obtain a search warrant. (PCR/12 2042)

Sudie Johnson testified on Banks' behalf. (PCR/13 2266-2309) She and Banks resided together for one year. (PCR/13 2267) She did not suspect that he had mental health issues. (PCR/13 2276) She wrote Banks while he was in jail and told him that she had been coerced by the police to allow them to search her home. (PCR/13 2278) She relayed that the police told her if she did not consent to their entry, they would force their way in and destroy her property in the process. (PCR/13 2278) The police also told her that she would be charged as an accomplice if she did not allow them to enter. (PCR/13 2279) She felt coerced; the officers present at her home were in uniform and armed. (PCR/13 2280) Officers entered the home, took custody of Banks and left her home after approximately 45 minutes. (PCR/13 2284) She went to the Police Memorial Building later that night and was questioned about Bank's lifestyle and the murder. She was also shown a surveillance video of a robbery. She identified Banks

from the video. (PCR/13 2285) She was also shown a photograph of an individual at an ATM. His face was not visible, so detectives asked her if she could identify the person's clothing and she identified it as Banks'. (PCR/13 2286) She could not recall whether she drove herself to the building or whether an officer brought her there. (PCR/13 2291)

She agreed that her recollection of the events would have been better back in 2005 and 2006 than at the hearing, several years later. (PCR/13 2295) She initially provided a statement to law enforcement which was transcribed by a court reporter; she gave ASA Mizrahi a sworn statement a few days later; she testified in a deposition taken by Alan Chipperfield; she testified in a second deposition conducted by Mr. Eler; and she testified at two trials. (PCR/13 2296) She agreed that her feeling tired and hungry had nothing to do with the veracity of the statements she provided to detectives or her consent to search. (PCR/13 2297) She acknowledged that she signed written consents to search her home. (PCR/13 2297-98) She acknowledged the following exchange, which occurred during her first statement to detectives:

DETECTIVE: Okay. Would you consent to a search of your house so we could recover evidence related to this case?

JOHNSON: No problem. The only thing I'm thinking is related is the laptop that possibly belonged to the deceased lady. That's the only thing brought in my house.

(PCR/13 2299) (emphasis added)

She also acknowledged the following exchange which occurred during a deposition taken by Alan Chipperfield on June 29, 2005:

ATTORNEY: Tell me how it is the police got into your home. Can you run through those facts for me.

JOHNSON: Well, Detective Kuczykowski gave me some information that Donald had did something and I was wanting to know what it was that he did and he said he couldn't tell me at the time. **I said, well, do you want to go in my house and see if Donald Banks is in the house.** I said, I don't know if he's in the house right now, but he should be because he's not working. **So he said that I need you to sign this consent to let us in the house. Well, I said, you know, if he did something wrong then, you know, he needs to get apprehended,** but if he didn't do anything wrong, do you still need to talk to him, because they said they needed to talk to him. **So I signed the consent.** He asked me did I have any children. I said no children, but I do have pets. He asked me how many and what kind. I told him how many and what kind. He told me to go, once I unlocked the door for them, to go get my dog and cats, whenever they see the canine, that's probably -- they would probably just scatter away. So I went to open the door and I was opening the door and Donald was calling me on the cell phone and he said who is at the door. So he was apparently in the house. He said, is that -- who is that at the door. I said, it's me. He said, you're giving up on me. And I said, well, I have to open the door for them. They're here for you. So I opened the door, I went to proceed right past my chair that's by the front door, through the kitchen to the utility room where the animals were. I picked up my dog and came back though the way I came in and walked back out.

ATTORNEY: Okay. When you signed the consent for them to go in your home, did you do that willingly?

JOHNSON: Well, they kind of threatened me because they said if they didn't get Donald Banks now they possibly could come back with a warrant, they said, and tear up my house and I told them that I didn't

want them to tear up my house, you know, if I wasn't home. So **I feel like I wanted them to do it while I was there so nothing was done while I wasn't at home.**

(PCR/13 2299-2301) (emphasis added)

In addressing this prior testimony, Johnson conceded that her recollection of the events was better at the time she provided the statements and depositions than at the evidentiary hearing.

(PCR/13 2301)

She was also questioned about her prior testimony, given during a deposition, concerning her consent related to the second entry into her home for purposes of conducting a search:

ATTORNEY: Now, I understand that later that night you eventually went down to the Police Memorial Building, you gave a statement and then later that night they came back to your house and the police went inside your house again.

JOHNSON: Right. Because they said they needed to collect evidence.

ATTORNEY: Okay.

JOHNSON: Or possibly clothing from the surveillance.

ATTORNEY: **On that occasion did you sign written consent?**

JOHNSON: **Yes, I did.**

ATTORNEY: **A second written consent?**

JOHNSON: **Yes, I did.**

ATTORNEY: And who had you sign that? Which detective?

JOHNSON: I think it was somebody from Detective Bodine's team. I think the name - I think his name was Officer Bee or something like that. I'm not sure.

ATTORNEY: Okay. Was it the same kind of form that you had signed the first time?

JOHNSON: Yes.

ATTORNEY: So they went to your house - into your house for the second time to collect evidence. Did they do that with your consent?

JOHNSON: Yes, they did. But they asked me before I signed the consent that if I was uncomfortable about - uncomfortable about them going through anything in the house at different times that I could stop them at anytime. Well, of course, there was people in three rooms of my house and only my one body could be in one place and they was going through things that wasn't Donald's belongings, that was actually my belongings. And they said they was - they was there just to look for Donald's things. And they asked me where Donald's things were and I told them where Donald's things were, but they did not only just go through Donald's things, they also went through my things, too.

ATTORNEY: Okay. Did you at anytime ask them to stop?

JOHNSON: I couldn't see them until it was all over. Like I said, there was a whole lot of people in my house in three different rooms. I'm only one person.

ATTORNEY: Okay. I'm not trying to blame you. I'm just --

JOHNSON: No, I'm just saying that's what happened.
. . .

ATTORNEY: So, you didn't ask them - to stop them?

JOHNSON: No, because I couldn't seem them in the rooms.

(PCR/13 2302-04)

Again, Johnson agreed that her recollection of the events was better at the time of her deposition than of the evidentiary hearing, over eight years later, and that it was a fair

description of the consents to search. (PCR/13 2304)

Johnson was asked about the answers she provided during a second deposition she gave to Eler on October 27, 2006:

ATTORNEY: Tell me what they asked you about. Did they advise you that your right to consent or to consent?

JOHNSON: Yes.

ATTORNEY: What did they tell you?

JOHNSON: It's -- I can't remember. It's been a year ago.

ATTORNEY: **Did you do a written consent?**

JOHNSON: **Yeah.** They told me to sign the form and give me rights to into the house. They said if I did not let them in the house they -- they were going to come back with a search warrant, if they had to come back with a search warrant, the house would be destroyed in the midst of the search warrant. So I gave them the consent to go in because I didn't want my home damaged.

ATTORNEY: Okay. You gave them consent based on their indication to you that your home would be destroyed?

JOHNSON: Right.

ATTORNEY: **And had that not been the case, you probably would not have given consent?**

JOHNSON: **I would have gave them consent,** but I wouldn't have -- you know, they pretty much gave me no choice. **I would have gave them consent.** I just --

ATTORNEY: Did you feel as though they were trying to coerce you at any point?

JOHNSON: No. What do you mean by that?

ATTORNEY: Well, coerce you like make you sign against your will.

JOHNSON: Well, I mean with them threaten me --

threatening me to, you know, pretty much if they had to come back without my consent, pretty much they had me in, you know, a corner?

ATTORNEY: That a question? So is that a yes?

JOHNSON: Pretty much they had me in a corner.

ATTORNEY: Okay. So at any point - and I have asked you this in an earlier deposition, I apologize, I'm not trying to repeat things, but **was this the same kind of pressure apparent during your interview?**

JOHNSON: **No.**

ATTORNEY: **No?**

JOHNSON: **No.**

ATTORNEY: **You didn't feel the pressure and need to cooperate or else?**

JOHNSON: **No.**

ATTORNEY: Okay. **They never threatened you in any way?**

JOHNSON: **No.**

ATTORNEY: **They never threatened to take -- you know, do you have children?**

JOHNSON: **No.**

ATTORNEY: Okay. . . . Going back to the search, were you present for the search?

JOHNSON: Yeah.

ATTORNEY: **And you voluntarily let them do that?**

JOHNSON: **Yes.**

(PCR/13 2304-07) (emphasis added)

Johnson acknowledged that her recollection of the events was better at the time she gave statements to detectives than at

the time of October deposition, and confirmed that they fairly and accurately represented what occurred when she consented to the search of her home. (PCR/13 2307-08)

Johnson also testified, at the evidentiary hearing, that she had already told detectives about Banks' confession before the second search of her home and that items related to the murder may be in her home. (PCR/13 2308)

Trial Court's Ruling

The trial court found that there was no reasonable basis on which to allege that Eler had been ineffective for failing to move to suppress the evidence obtained from Johnson's home because Johnson had consented to the searches.

Analysis

Eler, in no uncertain terms, testified at the evidentiary hearing that he did not have a good faith basis on which to file a suppression motion, based on Sudie Johnson's consent, verbal and in writing.

An attorney is not ineffective for failing to raise or preserve a meritless issue. *Ladd v. Jones*, 864 F.2d 108, 109-10 (11th Cir.), *cert. denied sub nom. Ladd v. Burton*, 493 U.S. 842, 110 S.Ct. 129, 107 L.Ed.2d 89 (1989); *United States v. Winfield*, 960 F.2d 970, 974 (11th Cir. 1992) ("a lawyer's failure to preserve a meritless issue plainly cannot prejudice a client"). "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) (quoting *Burger v. Kemp*, 483 U.S. 776, 794, 107 S.Ct. 3114, 97 L.Ed.2d 638 (1987)). Counsel cannot be deemed deficient for not filing a frivolous motion. *Chandler v. Moore*, 240 F.3d 907, 917 (11th Cir. 2001) (finding that counsel was not ineffective for failing to raise a meritless issue); *Johnston v. State*, 63 So.2d 730, 740 (Fla. 2011) (holding that counsel cannot be deemed ineffective for failing to file a meritless motion).

In order to establish prejudice as a result of trial counsel's failure to file and argue a motion to suppress, Banks must demonstrate that the motion to suppress would have been successful. See *Zakrzewski v. State*, 866 So.2d 688, 694 (Fla. 2003) ("[W]here defense counsel's failure to litigate a Fourth Amendment claim competently is the principal allegation of ineffectiveness, the defendant must also prove that his Fourth Amendment claim is meritorious.") (quoting *Kimmelman v. Morrison*, 477 U.S. 365, 375, 106 S.Ct. 2574, 91 L.Ed.2d 305 (1986)). The record reflects that Sudie Johnson voluntarily consented to not only one but two searches of her home, both verbally and in writing. The evidence presented shows that Johnson was not under physical duress at the time she consented.

In fact, she drove herself to the police department, offered to allow officers to search her home and even pointed items out to detectives. Accordingly, trial counsel cannot be deemed ineffective for failing to argue a non-meritorious suppression claim.

Additionally, Banks cannot prove prejudice because it was clear that law enforcement could have sought a search warrant, based on probable cause, had Johnson refused to give consent. Eler conceded this point at the evidentiary hearing and detectives also agreed.

Finally, he remains unable to prove prejudice because of the weight of the evidence against him, in addition to the items recovered from Johnson's home. This Court's confidence in the guilty verdict should not be undermined in light of the remaining evidence supporting his guilt, including his confession to Johnson, including details only the killer would have known; his DNA found in Volum's vagina, anus and on her body; his blood being at the crime scene, some mixed with Volum's; his bloody footprint left at the scene; the cut to his leg, which was argued to have been caused by the same weapon used to stab Volum to death; and the fact that he was trying to use Volum's debit card after she was murdered.

The outcome of this case would have been the same had counsel moved the court to suppress the evidence found as a

result of the search of Johnson's home. First, it is likely that the motion would have been denied. However, assuming it was granted, there remained sufficient evidence against Banks to sustain a conviction. Banks cannot meet his burden in proving either deficient performance or prejudice as it relates to this claim. Thus, the trial court properly denied relief on this claim.

ISSUE III

WHETHER THE TRIAL COURT ERRED IN FINDING THAT GUILT
PHASE COUNSEL WAS NOT DEFICIENT WHEN HE FAILED TO
CONTEST THE STATE'S DNA EVIDENCE (RESTATED)

Banks submits that the trial court erred in finding that trial counsel was not ineffective when he failed to contest the State's DNA evidence because the State failed to present population statistics to form the necessary foundation for admission of that DNA evidence. As the trial court found, trial counsel was not deficient because the outcome of trial would not have been different had he objected. Trial counsel was aware that population statistics had been calculated as to most of the evidence, that the State's witness was qualified to testify to them and the witness testified at the evidentiary hearing that he could have calculated the remainder of the statistics within thirty to sixty minutes. Had he raised an objection, the population statistics would have been admitted. Furthermore, the trial court found that trial counsel's failure to object was

based on sound trial strategy. He knew that the statistics would appear overwhelming to the jury. Lastly, the trial court cited the defense presented at trial; the defense never contested the fact that Banks was in Volum's home and had cut himself there. Thus, the DNA evidence admitted at trial was not inconsistent with Banks' defense. (PCR/8 1146)

Trial Testimony

James M. Pollock. Jr. was called as a witness by the State. (R/X 455 - 519) He testified in the capacity of a senior crime laboratory analyst in the biology section of the Florida Department of Law Enforcement. He had been employed in that capacity for nearly twenty-nine years by the time he testified at trial. (R/X 456) He was responsible for testing some of the evidence in Banks' case. (R/X 464) He found the presence of blood on a kitchen floor tile, a dining room floor tile, fingernail cuttings, swab from the victim's upper right thigh, genital swab, breast swab, oral swab, knife, 3 stains from the kitchen floor, stain on a phone, a plastic storage bin lid, towel, a Band-Aid box, a washcloth and a used Band-Aid. (R/X 468) He identified semen on the swab from the victim's right thigh, genital swab from the victim, and a vulva vaginal swab. (R/X 470)

As Pollock was being questioned, by the State, about matches of DNA profiles on evidence he tested, Eler objected,

arguing (and relying on a previously-filed motion in limine), among other things, that the State had failed to establish a predicate "regarding population statistics. . . ." Eler specifically referred to the *Brim* case in his argument. He also argued that he was not sure Pollock was qualified to testify to population statistics. The prosecutor countered back, stating that he did not intend to question Pollock about statistics. (R/X 475) The trial judge found that Pollock did, in fact, have the qualifications, as he had testified similarly two weeks prior and the court had heard from him "a lot of times." The trial court allowed the State to proceed with its inquiry. (R/X 474-76)

Pollock testified that the profile from the bloody towel matched that of Banks, as did the Band-Aid box. (R/X 477-78) Specifically, he stated that he developed a DNA profile from the Band-Aid box "at all 13 loci and at the amelogenin marker," matching Banks. (R/X 478) He also developed a partial profile which matched Banks' on the tile cut from the kitchen floor. He testified that he was able to "conclusively determine seven individual loci of 13, plus the gender marker, amelogenin," matched Banks. (R/X 479) Banks was also the major contributor for blood found on a tile cut from the dining room floor and a plastic bin lid. He testified that "ten of the 13 loci," plus the gender marker, amelogenin, from the dining room tile matched

Banks. He was unable to develop a minor contributor, but could not exclude Volum as a possible contributor. (R/X 480, 482) He testified that three of 13 loci, plus amelogenin from the plastic lid matched Banks' profile, as he was the major contributor. He was unable to develop a profile for the minor contributor. (R/X 482-83) Banks' profile matched the blood on a used Band-Aid recovered from the scene. He testified that "12 out of the 13 loci, plus the gender marker, amelogenin," matched Banks' profile. (R/X 481) Banks' semen was located on the genital swab, the vulva vaginal swab and the rectal anal swab, all obtained from the victim. (R/X 484-85)

On cross-examination, Eler inquired about statistics. Pollock testified, in general, as to how he obtains statistics. (R/X 497-98, 505-06)

Evidentiary Hearing Testimony

Eler testified that he had objected, at trial, to the State's DNA expert because he had an issue with their population geneticist. (PCR/11 1751) He wanted to give the State a "hard time" because they were not going to call Martin Tracey, to testify to the population statistics. (PCR/11 1752) However, he recalled that the witness the State did present, Mr. Pollock, had previously been qualified in other cases. He also did not want the population statistics of one in 56 quadrillion before the jury because that number was "phenomenal." He was concerned

that a juror would be left with no doubt as to Bank's guilt after hearing that statistic. (PCR/11 1881)

Nonetheless, he was not too concerned about the DNA evidence because Banks had admitted being in the victim's home, having sex with her and cutting himself while there. (PCR/11 1753) He was not contesting the DNA and did not expect to prevail on keeping that evidence from the jury. (PCR/11 1754-56)

He did not consider the State's argument that a mixture of both Banks' and the victim's DNA was found was harmful to his case. (PCR/11 1757) He felt that he could argue sloppy investigative work because law enforcement failed to analyze hairs and fibers found at the scene; he also felt he could argue lack of evidence because of the unknown prints, unknown DNA, and an unmatched shoeprint located at the scene. (PCR/11 1758) His theory was a lack of evidence - law enforcement did not follow up on forensic evidence and there were other potential suspects, whom they did not investigate thoroughly. (PCR/11 1776-77, 1828) For instance, Mr. Greenfield was owed \$500.00 by Volum and declined to provide a DNA sample. (PCR/11 1776-77) Eler argued that someone else committed the murder. (PCR/11 1778, 1790)

The DNA had no bearing or would not have changed the fact that Banks' fingerprints and footprints were found at the scene. (PCR/11 1881)

Trial Court's Ruling

The trial court found that Eler was not ineffective because had he objected, there is no possibility that it would have resulted in a different trial outcome. First, the State's expert testified at the evidentiary hearing that he was qualified to render such statistics, statistics had been calculated as to most of the evidence, and he could have calculated the rest of them within thirty minutes of being asked. Thus, the trial court reasoned that had an objection been made, the statistics would have simply been submitted. Second, the trial court found that Eler's decision not to object to the lack of statistics was good trial strategy. He knew that the statistic of 1 in 56 quadrillion was an overwhelming statistic for the jury to hear. Furthermore, the defense did not contest the fact that Banks had been in Volum's home, thus DNA evidence reflecting his presence was not inconsistent with the defense. (PCR/8 1146)

Analysis

Eler's decision not to pursue his previously-filed Motion in Limine and objection raised at trial was based on sound trial strategy. As he testified at the evidentiary hearing, Banks' defense was not that he was never at Volum's home; quite the contrary - he agreed that he had not only been in her home and had sex with her on the day she was killed, but also that he cut

himself and bled in her home. Since the defense did not contest what the DNA tended to prove, an objection was pointless.

Banks argues that prejudice resulted because the DNA revealed a mixture of Banks' and Volum's blood. However, Eler, at the evidentiary hearing, testified that the mixture did not concern him. His goal was to demonstrate to the jury that law enforcement's investigation and collection of evidence was sloppy. This was reasonable trial strategy. "Strategic decisions do not constitute ineffective assistance of counsel if alternative courses have been considered and rejected and counsel's decision was reasonable under the norms of professional conduct." *Occhicone v. State*, 768 So.2d 1037, 1048 (Fla. 2000). See also *Brown v. State*, 894 So.2d 137, 147 (Fla. 2004); *Howell v. State*, 877 So.2d 697, 703 (Fla. 2004). "The test has nothing to do with what the best lawyers would have done. Nor is the test even what most good lawyers would have done. We ask only whether some reasonable lawyer at the trial could have acted, in the circumstances, as defense counsel acted at trial." *White v. Singletary*, 972 F.2d 1218, 1220 (11th Cir. 1992) The State submits that Eler's conduct constitutes reasonable trial strategy.

In *Brim v. State*, 695 So.2d 268 (Fla. 1997) and *Butler v. State*, 842 So.2d 817 (Fla. 2003), this Court noted that DNA testing requires a two-step process, one biochemical and other

statistical. The first step uses principles of molecular biology and chemistry to determine that two DNA samples look alike. The second step uses statistics to estimate the frequency of the profile in the population. This Court ruled that both steps must satisfy the *Frye* test. *Id.*

Contrary to Banks' argument, this Court's decisions in *Brim* and *Butler* did not create a new *per se* rule for the admissibility of DNA evidence, nor does this Court's opinion in *Brim* and *Butler* mandate exclusion of DNA evidence if the State does not elicit population frequency evidence from its DNA expert.

In suggesting that they do, Banks focuses on certain dicta in *Brim* which suggests that population frequency evidence is necessary to give significance to testimony that the defendant's DNA is a "match" for DNA found at the scene of the crime. *Brim*, 695 So.2d at 269. This Court noted that, "[i]t is important to recognize, though, that DNA testing is a two-step process. The fact that a match is found in the first step of the DNA testing process may be "meaningless" without qualitative or quantitative estimates demonstrating the significance of the match." *Id.* at 271.

This Court has never extended *Brim* and *Butler* to exclude DNA test results if the State does not offer "qualitative or quantitative estimates demonstrating the significance of the

match."

Even if this Court had expanded *Brim* and *Butler* as Banks suggests, Banks is still not entitled to relief. The State in this case did not simply elicit testimony that Banks' DNA "matched" DNA found at the murder scene.

Instead, Mr. Pollock testified that STR testing examines 13 particular locations (loci) on a DNA sample. In addition to 13 loci, a gender marker is also examined. (R/X 460)

He told the jury that on two items found at the murder scene (a bloody towel and Band-Aid box), a full profile was developed. DNA found matched Banks' DNA at the gender marker and all 13 loci. (R/X 477-78)

On other items, Mr. Pollock was able to develop a partial profile. He testified a profile was developed from a tile cut from the dining room floor at 10 out of 13 loci. That DNA profile matched the DNA profile from Banks. (R/X 480) On a used Band-Aid recovered from the scene, Mr. Pollock was able to develop a profile at 12 of 13 loci. The profile matched Banks at all 12 loci. (R/X 481) On a plastic lid recovered from the scene, Mr. Pollock developed a profile at 3 of out 13 loci. That profile matched Banks. (R/X 482-83)

Mr. Pollock's testimony did not leave jurors without any expert guidance of the significance of the DNA evidence found at the scene of Volum's murder.

Banks is also unable to prove prejudice. As the trial court found, had trial counsel raised an objection during Mr. Pollock's testimony, it would have been overruled and the evidence admitted. (PCR/8 1146) Furthermore, had the DNA evidence been excluded, the weight of the remaining evidence proving Banks' guilt was overwhelming. Consequently, the trial court decision to deny this claim should be affirmed.

ISSUE IV

WHETHER THE TRIAL COURT ERRED IN FINDING THAT GUILT PHASE COUNSEL WAS NOT INEFFECTIVE WHEN HE ELICITED TESTIMONY DURING SUDIE JOHNSON'S CROSS-EXAMINATION CONCERNING A SURVEILLANCE VIDEO SHE VIEWED, WHICH DEPICTED BANKS STABBING ANOTHER INDIVIDUAL (RESTATED)

Banks submits that the trial court erred in finding that trial counsel was not ineffective when he elicited testimony from State witness, Sudie Johnson, on cross-examination, regarding a surveillance video she had seen, which depicted Banks stabbing another individual. As the trial court found, trial counsel was not deficient because Johnson uttered the statement while he was attempting to impeach her with her feelings of betrayal. Eler was trying to get Johnson to admit that she had and was continuing to cooperate with the State to exact revenge on her former boyfriend, whom she had learned had been sleeping with Volum. The trial court also conducted a voir dire of the jury and issued a curative instruction regarding the statement after Eler moved for a mistrial. Finally, the trial

court relied on Banks' own testimony that he was a nine-time convicted felon in reaching its decision that counsel was not deficient. (PCR/8 1147)

Trial Testimony

Sudie Johnson testified on behalf of the State. (R/IX 346-389)

She testified as to what she witnessed on the morning following Volum's murder, as well as statements Banks made to her. (R/IX 348-60)

As Eler questioned Johnson about her not being able to accept that Banks was capable of murder, the following exchange occurred:

ELER: And isn't it true, ma'am, to this day you don't believe Donald Banks did this?

JOHNSON: (Inaudible.)

COURT REPORTER: I'm sorry. I didn't hear you.

JOHNSON: He was capable. I believe he was capable.

ELER: But for a whole year into it, while you were communicating with him in the jail, you felt he wasn't?

JOHNSON: No.

ELER: Did you change your mind?

JOHNSON: Yes.

ELER: Change your mind because you found out that he and Ms. Volum had sex?

JOHNSON: No, that wasn't the reason. The reason was from the previous - I supported Mr. Banks all the way

up until I seen the tape of him stabbing Mr. William Johnson from the first -

(R/IX 378)

Johnson's answer was interrupted by Eler's objection, which was argued sidebar. Eler moved for a mistrial based on Johnson's testimony about another case and the trial court denied that motion, finding that the comment was invited by Eler himself. The court advised it would issue a curative instruction instead. (R/IX 378-81)

Evidentiary Hearing Testimony

Eler testified that he recalled speaking with the prosecutor, Mizrahi, before trial and was assured that Ms. Johnson understood she was not to discuss the video depicting who was argued to be Banks stabbing someone during an unrelated robbery. (PCR/11 1759) Thus, he did not anticipate she would testify to it during his cross-examination. Consequently, after she mentioned it in response to a question he asked, he moved for a mistrial, which was denied. (PCR/11 1758) The following day, Judge Carithers, questioned each individual juror as to whether they could disregard Ms. Johnson's statement and proceed with impartiality. (PCR/11 1760)

He asked Johnson whether she thought Banks was capable of committing this murder because she had repeatedly told him that she did not believe he could have. (PCR/11 1762) He conceded that Johnson's statement was prejudicial to Banks and that he

probably should not have asked her the question as he did.
(PCR/11 1763)

Nonetheless, the State, during the penalty phase, played the video of the robbery to the jury, despite his efforts to preclude it. (PCR/11 1882, 1878)

Trial Court's Ruling

The trial court found that Banks did not establish any prejudice as he had been convicted of nine prior felonies, which the jury heard about directly from Banks. Furthermore, the trial court relied on the Florida Supreme Court's decision in affirming his conviction and death sentence, on direct appeal, when it held that trial court's handling of the testimony, including giving a curative instruction and conducting a voir dire of the jury, was proper. Lastly, the trial court found that the question trial counsel asked of Johnson was a matter of reasonable trial strategy, as he attempted to portray Johnson as a scorned woman who was seeking to exact revenge on Banks by testifying against him. Eler was successful in, at a minimum, implying as much through his cross-examination of Johnson.
(PCR/8 1147)

Analysis

The trial court's well-reasoned order, particularly on this issue, merits affirmance. As the trial court found, Eler's cross-examination of Johnson constituted reasonable trial

strategy. He was attempting to present testimony from Johnson that she was upset with Banks, a scorned lover and was trying to exact revenge on him with her allegations. He believed, based on his prior discussions with the prosecutor, that Johnson had been instructed not to testify about the video. He was not expecting that response, as demonstrated by his argument at sidebar after his motion for a mistrial. Reasonable trial strategy is not a basis on which to allege ineffective assistance. There was no deficient performance.

Banks is unable to show how he was prejudiced by the mention of the video. He, himself, testified about his nine felony convictions during his direct examination. The jury was well aware of his criminal past. Furthermore, the trial court conducted a voir dire of the jury and issued a curative instruction, which was expressly approved by this Court on direct appeal. Lastly, the jury had the opportunity to view the video themselves during the penalty phase.

Banks bears the burden of rebutting the strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance, and he has fallen woefully short.

ISSUE V

WHETHER THE TRIAL COURT ERRED IN FINDING THAT GUILT
PHASE COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO
IMPEACH STATE WITNESSES, SUDIE JOHNSON AND DETECTIVE
BODINE (RESTATED)

Banks submits that the trial court erred in finding that trial counsel was not ineffective when he failed to impeach State witnesses, Sudie Johnson and Detective Bodine. As the trial court found, trial counsel was not deficient in not attempting to further impeach Johnson because those attempts would have been based on inadmissible hearsay.⁴ The trial court also found that any attempts to impeach Detective Bodine would likewise have been based on inadmissible hearsay and that Eler's failure to impeach him constituted reasonable trial strategy; Eler's goal was to highlight for the jury, during his cross-examination of Detective Bodine, what he and law enforcement did not do during their investigation, thus he stayed away from questions which would lead to testimony about what he did do. (PCR/8 1160-61)

Trial Testimony

During his cross-examination of Johnson, Eler inquired of her felony convictions. She admitted that she had been convicted of at least one felony. (R/IX 369)

Eler, in his closing argument, referred to Johnson's felony

⁴ While both Banks' initial brief and the trial court's order denying his 3.851 motion indicate that Johnson could have been, but was not impeached with her sole felony conviction, the record actually reflects that Eler did inquire of her conviction and she readily admitted that she believed she had one. (R/IX 369)

conviction. (R/XI 722)

Detective Bodine testified at the evidentiary hearing about people he had been made aware of that may have had a relationship with Volum. In response to a question about whether he recalled who Tony Romisher was, Detective Bodine stated that he had contacted him, after learning that he had a physical relationship with Volum. He requested that Romisher provide a cheek swab and Romisher did so. (PCR/12 2030-31) He also learned of Scott Greenfield, who told him that he had a friendship with Volum and had loaned her money in the past, of which she still owed him half, \$500.00. (PCR/12 2031) He also discovered information concerning Mark Barnett, who was a prior boyfriend of Volum's. (PCR/12 2033) He spoke to him as well. (PCR/12 2035)

Evidentiary Hearing Testimony

Eler asked Johnson how many times she had been convicted of a felony and she replied, once, which was accurate. (PCR/11 1891)

Eler chose not to admit Johnson's letters to Banks, in which she claims to have been pressured into agreeing to searches of her home, at trial because they contained damaging information, such as the fact that Banks dealt drugs. He also preferred the fluidity of live testimony as opposed to what had been restricted to paper. (PCR/11 1888)

His approach in cross-examining Detective Bodine was to

highlight what was not done during the investigation. His handwritten notes reflected that he also questioned Bodine about other possible suspects and his interview of Kayana Smith. (PCR/11 1841-42)

Trial Court's Ruling

The trial court found that aside from impeaching Johnson with her one prior felony conviction, the other bases on which to impeach her as set forth in the 3.851 motion, were based on hearsay and thus impermissible. The trial court also determined that the substance of Johnson's testimony was clearly based on information Banks provided to her, which she could not have known otherwise, making impeachment a less valuable tool to the defense. (PCR/8 1160-61)

As for impeachment of Detective Bodine, the trial court found that it, too, would have been based on hearsay and improper. The trial court also noted that Eler's cross-examination of Bodine was based on sound trial strategy; he highlighted what Bodine did not do as part of his investigation. Consequently, inquiring of Bodine concerning what he did do would not have been beneficial to his case. (PCR/8 1161)

Analysis

Contrary to Banks' assertion, Johnson was impeached with her sole felony conviction, as reflected by the record. Thus,

any argument that trial counsel failed to impeach her with same is meritless. Eler was not deficient as he did exactly what Banks is complaining he failed to do.

Banks also submits that Johnson should have been impeached with the fact that she had been threatened with imprisonment if she did not implicate Banks. This assertion is refuted by the record. Throughout her statements to law enforcement, her two depositions and trial testimony, Johnson maintained that law enforcement warned her that they could obtain a search warrant in the event she refused to provide consent to search. She specifically denied being threatened by law enforcement during her October 27, 2006 deposition. Detective Bodine also testified that Johnson was never threatened with arrest or imprisonment and stated that Johnson was very cooperative. Thus, there would have been no need for threats. The first mention of such a threat appeared at the evidentiary hearing, some nine years after Volum's murder. And at that hearing, Johnson conceded that her recollection of the events was better in the past, after which less time had elapsed between Volum's murder and her statements. Because Johnson had never made an allegation of threats of being incarcerated by the time of trial, Eler did not possess that information and consequently, could not impeach her with it. He cannot be said to have been

ineffective for failing to impeach a witness with information that did not exist at the time.

Lastly, Banks takes issue with Eler's alleged failure to impeach Johnson with the fact that she was angry with Banks at the time she gave her sworn statement. The record refutes this allegation, as Eler did attempt to cross-examine her on this very issue, which led her to mention the surveillance video which caught Banks committing a robbery. During that cross-examination, Johnson categorically denied that she was upset with Banks.

Banks also complains that Eler should have impeached Detective Bodine on cross-examination about other potential suspects. He avers that Eler should have conducted a more thorough cross-examination regarding these potential suspects. At the evidentiary hearing, Detective Bodine was asked about the three potential suspects; he identified them and testified as to their relationships with Volum and his interactions with each of them.

The trial court's findings and rulings concerning this claim should be affirmed. As the lower court found, Eler's strategy in not further cross-examining Johnson and Detective Bodine was reasonable. Further, Banks has failed to demonstrate any reasonable possibility of a different outcome at trial had

Eler asked different questions on cross-examination of the two State witnesses.

ISSUE VI

WHETHER THE TRIAL COURT ERRED IN FINDING THAT GUILT PHASE COUNSEL WAS NOT DEFICIENT WHEN HE FAILED TO CALL KEYANA SMITH AS A WITNESS IN BANKS' DEFENSE (RESTATED)

Banks submits that the trial court erred in finding that trial counsel was not ineffective for failing to call Keyana Smith, a Winn-Dixie employee, who conducted a sales transaction for Volum and Banks on the day of her murder. As the trial court found, trial counsel was not deficient because Banks had failed to establish any reasonable probability of a different outcome at trial had Smith testified. In fact, the trial court reasoned that Smith's testimony could have only bolstered the State's theory that the killing was a murder payoff for money owed to Banks by Volum.

Trial Testimony

Banks testified during the guilt phase and addressed the transaction at Winn-Dixie. He told the jury that he and Volum traveled to Winn-Dixie in her vehicle on the afternoon of March 9, 2005. (R/XI 637, 639) They purchased a pack of Philly Cheroot blunts and a four-pack of Steele Reserve 211 beer. (R/XI 639) He also told the jury that Volum was "kind of drunk" and had a hard time trying to access cash from her card. (R/XI 640)

Detective Bodine's testimony corroborated the transaction

at Winn-Dixie. (R/IX 258,262)

Evidentiary Hearing Testimony

Eler testified that Smith's testimony established that Volum and Banks were in line together at Winn-Dixie within twenty-four hours of her death. (PCR/11 1782) Her testimony was not necessarily something he would present in his case, since Banks' story was that they knew each other. (PCR/11 1782) He viewed her as a neutral witness, but was not sure what she might say while on the stand, like Johnson. (PCR/11 1783) He did not agree with the contention that putting Smith on would have established that Banks did not rape or kill Volum because the two were hanging out within twenty-four hours of her death; an argument could have been made that he had her there against her will to obtain money. (PCR/11 1783-84) He would not put a witness on the stand to testify about seeing someone with the victim at an ATM while the victim took money out. Such testimony caused him concern in that it would later be argued by the State as pecuniary gain. He wanted to stay away from that. (PCR/11 1784, 1885) He also shouldered a concern that Smith would testify that Volum appeared very stressed about her inability to withdraw money from the ATM. (PCR/11 1885) He did not feel as if Smith's testimony helped or hurt the defense. (PCR/11 1785) He opined that the less the jury heard that Banks and Volum were together, the better for Banks. (PCR/11 1787)

Additionally, the State, in its opening statement, conceded that Banks and Volum were seen together on the date of her murder. (PCR/11 1885)

Keyana Smith testified at the evidentiary hearing that she worked as a cashier at Winn-Dixie in 2005 and sold beer to Banks and an older, white female companion. (PCR/12 2113-14) The woman purchased the beer and attempted to obtain cash back as part of her transaction, which was declined. (PCR/12 2114) She did not recall that the woman became upset or irritated at the fact that she could not obtain cash. (PCR/12 2114-15, 2118) She also testified that someone, whom she believed may have been law enforcement, but did not present a badge, interviewed her about this transaction in 2005. (PCR/12 2115, 2119-2120) She appeared to experience difficulty recalling having spoken with the prosecutor, Mizrahi, about this incident over the telephone on 2005, until he questioned her further about it. (PCR/12 2117, 2119) She also failed to recall that the purchase included cigars. (PCR/12 2117)

Trial Court's Ruling

The trial court had difficulty in understanding how Smith's testimony would have been helpful at trial. At the evidentiary hearing, she merely established that Volum and Banks were friendly with each other, that Volum attempted to get cash back during her transaction and that such attempt was declined. In

fact, the trial court reasoned that such testimony would have been beneficial to the State's allegation that the killing was a murder payback. Because there was evidence that Volum may have owed Banks money, Smith's testimony could have only added to the State's theory in that Volum could not access money to repay him. The trial court found that Banks had failed to establish any reasonable probability of a different outcome at trial had Smith testified. (PCR/8 1159)

Analysis

The evidence of Volum and Banks appearing friendly with each other while purchasing beer from Winn-Dixie, if presented during trial, would demonstrate only just that. Banks' testimony established that much and the jury was never presented with any evidence indicating that the two had been seen fighting or were on the outs just before Volum's murder. Thus, the value of Smith's testimony was at best minimal; the lack of said testimony cannot be said to have prejudicially impacted or undermined confidence in the outcome of the guilt phase. Thus, Banks has failed to demonstrate deficient performance, as well as prejudice.

ISSUE VII

WHETHER THE TRIAL COURT ERRED IN FINDING THAT TRIAL COUNSEL WAS NOT INEFFECTIVE WHEN HE FAILED TO OBJECT TO ALLEGED IMPROPER STATEMENTS MADE BY THE PROSECUTOR (RESTATED)

Banks submits that the trial court erred in finding that trial counsel was not ineffective for failing to object to statements he argues constitute prosecutorial misconduct. As the trial court found, trial counsel was not deficient because the comments were not improper, it was trial counsel's strategy not to object and prejudice was not demonstrated in light of the jury instructions given and trial counsel's closing argument.

Trial Testimony

The trial court instructed the jury prior to opening statements. In particular, the court instructed the jury that "what the lawyers say is not evidence." (R/IX 218)

During the State's opening statement, ASA Mizrahi stated,

There is no evidence, other than her bleeding, dead corpse, there is no other evidence that shows that the semen found on Linda Volum's body was not consensual. **The State cannot prove to you beyond a reasonable doubt that this was a sexual battery. And they may have had consensual sex. . . .**

(R/IX 233)

Immediately following the State's opening, trial counsel asked for permission to approach and moved for a mistrial based on comments made by the State. The trial judge, relying on his initial instructions to the jury, denied the motion for mistrial. (R/IX 235-36)

Banks testified on his own behalf. During his direct examination, the following exchange occurred:

ELER: Sir, you sat through the course of the trial this week.

BANKS: Yes.

ELER: And you head [sic] each and every witness testify.

BANKS: Yes.

ELER: Even Sudie Johnson.

BANKS: Yes.

ELER: Why is Sudie Johnson coming in here and lying?

BANKS: Okay.

. . .

ELER: Well, sir, here's my question: Why did Sudie come to court and look these jurors in the face and lie to them? Why would she say that?

BANKS: It's a money thing, like, okay, as I can say, I came from what? A poor family, you can say. I moved down to Florida, I met a girl, we living good. Furniture from Badcock [sic], got big screen TV's. I got my own computer in the house. I mean I had to -- truck and stuff like that, plus I'm getting high, you know what I mean, so I'm messing up. I'm not giving her the money she wanted. I'm not really -- I'm really being bad, but I'm not giving her -- I've saving -- I'm saving my money, too, because basically we fell out. So it's like if I don't pay this then I mean I can't -- I can't have sex, you not doing this, I'm doing -- I'm doing -- I can't really describe how our really relationship. It's not complex, but I mean I was messing up on my part, you know, but it's just about the money because I wouldn't give it to her. I mean I wouldn't -- I wouldn't give it to her. I wouldn't help my girlfriend. I fell out with her. I felt distrusted her, I felt distrusted about her and I was supposed to leave, go to my uncle's house and separate, stuff like that. I'm sorry.

(R/XI 652-53)

Thereafter, the defense concluded its direct of Banks and the State commenced to cross-examine him with the following exchange:

STATE: Mr. Banks, isn't it true that you have the greatest interest in the outcome of this case versus all the other witnesses that have testified?

BANKS: I do not understand.

STATE: Isn't it true that you have the greatest interest in how this case is decided by this jury?

BANKS: Um-huh.

STATE: Do you want this jury to convict you of this crime?

BANKS: Nobody would want that if you sitting -- if you're accused.

STATE: So you have an interest, wouldn't you say, since you are the accused, you have an interest in how this case is decided by this jury?

BANKS: I believe so. I'm telling the truth, yeah.

STATE: You do have an interest in how this case is decided, correct?

BANKS: Okay.

STATE: And you have the greatest interest, in fact, because you are the only on trial, correct?

BANKS: Yes.

STATE: And you've seen the evidence that has been brought in before you, the nature of these 97 exhibits, correct?

BANKS: Um-huh.

STATE: And you got there and you were provided during the course of this case police reports and depositions and witness statements and all those things, correct?

BANKS: Yeah.

STATE: And your testimony you have provided here today, correct? That's your story?

BANKS: That's -- it's not a story. I just -- it's just there's no time and date, I'm just explaining what I believe what happened. I don't really remember.

. . .

STATE: Mr. Banks, isn't it true that you don't want to be convicted?

BANKS: I'm not asking to be convicted.

STATE: But you don't want to be, right?

BANKS: I'm not asking to.

. . .

STATE: Mr. Banks, would you say -- would you lie to this jury if you thought it would prevent your conviction?

BANKS: Say that again.

STATE: Would you lie to --

BANKS: To --

STATE: To this jury if you thought it would get you out of being convicted? If it would save your life?

BANKS: My DNA is not on the knife.

. . .

STATE: Let me go back to my question. Do you -- would you lie to this jury?

BANKS: Why should I?

. . .

STATE: I'm not tricking you, Mr. Banks.

BANKS: I'm not, you understand what I'm saying. I'm not trying to argue with you.

STATE: Would you lie to this jury if you thought it would get you out of trouble. That's my question. Would you lie to them if you thought it would get you out of trouble?

BANKS: No, I don't need to lie to them.

(R/XI 656-58)

. . .

STATE: And so Sudie Johnson lied when she said she saw you come home in the early morning hours driving that car? That was not true?

BANKS: No, I walk home.

STATE: And she lied when she said that you were carrying a green pillowcase with bloody clothes in it?

BANKS: Yeah.

STATE: And she lied when she said that you gave her a computer that early morning hours?

BANKS: Yes.

(R/XI 673)

. . .

STATE: And she lied when she said that you murdered somebody?

BANKS: Yes.

STATE: And she lied when she said this was a murder pay-back?

BANKS: I need for you to explain to me what that is.

(R/XI 674)

. . .

STATE: Well, very early on these cases you received sworn statements that Sudie Johnson gave?

BANKS: Oh, okay.

STATE: That said you confessed to these crimes, right?

BANKS: She says - that's what she's saying, yes.

(R/XI 675)

. . .

STATE: And that was pretty early in the case?

BANKS: Yes.

STATE: Maybe April. You knew that by April, is that fair?

BANKS: Yes.

STATE: Okay. And you knew that Sudie Johnson was saying that you murdered somebody, correct?

BANKS: That's what she was saying.

STATE: And you still were calling her on the telephone after that point, right?

BANKS: Yes.

STATE: And writing her letters?

BANKS: We wrote each other.

STATE: Love letters, right?

BANKS: Sent me money, too.

STATE: She sent you money?

BANKS: Um-huh.

STATE: She'd visit you in the jail?

BANKS: Um-huh.

STATE: Correct?

BANKS: Yes.

STATE: And after all that stuff, you got a tattoo of her on your neck, right?

BANKS: Yes.

(R/XI 675-76)

During the guilt phase, before closing arguments, the trial court instructed the jury that "what the lawyers say is not evidence." (R/XI 690) The trial court also instructed the jury that the "case must be decided only upon the evidence that you have heard from the testimony of the witnesses and have seen in the form of the exhibits in evidence and upon these instructions." (R/XI 773) "[Y]our verdict should not be influenced by feelings of prejudice, bias or sympathy. Your verdict must be based on the evidence and on the law contained in these instructions. (R/XI 774)

During his closing argument, Eler reminded the jury, "[w]hat I say is not evidence, what the State says and is about to say when I sit down is not evidence." (R/XI 701) He also referred to the sexual activity which occurred between Volum and Banks as "consensual." (R/XI 711)

During the State's second guilt phase closing, the following remarks were made:

I want to go through some -- a little bit more subtle ways to analyze this case. The victim is found naked, therefore it is more likely that the killer had sex with her. It's a logical deduction from the evidence. The victim was found completely naked on her floor. Therefore, the killer may -- was likely to have sex with her. Some people do sleep naked. It's a possibility. People do sleep naked. However, remember the defendant's testimony. And his testimony is that I was there with somebody else. We had sex way earlier and then I left. Is it logical to think that Linda Volum was hanging out with this guy "Bo" and the defendant completely naked and then "Bo" killed her when she was completely naked? Because we know "Bo" didn't have sex with her because we didn't find any "Bo" DNA. We only found one sperm. The defendant. And the fact that she's completely naked and his sperm is all over her shows that there was recent sex involved in her death and, mind you, the only way we can prove whether it's consensual or not is that nine-time convicted felon's word it was consensual. That's the only way. There was evidence it wasn't consensual in that she's dead lying naked on the foot of her bed. But that's not what we're here to determine whether it was consensual or not. That's not what the defendant's charged with. The victim was found naked, therefore it's more likely to be killed.

(R/XI 734-35)

Just before the parties presented their penalty phase closing arguments, the trial court, once again, instructed the jury, specifically stating, "Remember what the lawyers say is not evidence." (R/XIV 921)

During the State's penalty phase closing, the following comments were made:

This was an aggravated murder because this defendant brutally murdered a human being for money and took the meager possessions of a poor woman as his bounty. This was an aggravated murder because with cold, calculated determination that man plunged a knife through hands, arms, wrists, skin, muscle and bone

until he made sure that she was dead.
What happened in March of 2005 was shockingly evil.
What happened May 30th, 2008 was justice, justice that
you created for Linda Volum from our system of laws
when you convicted this defendant as he was charged.
We did not present any new evidence today about the
murder of Linda Volum and you heard some other
testimony, psychological and whatnot, but I want -- I
doubt it's possible, but I want everyone to remember
what this case is all about and what this man did to
Linda Volum and left her on the floor of her own home.
That is how she died. You have created justice by your
verdicts but that justice is not complete. It is only
partial justice. This is not a comfortable, everyday
exercise that we're doing here today. It's not often
that we debate whether a man should live or die and
it's not something that anyone's comfortable doing. I
don't expect you to be comfortable doing it.

(R/XIV 922-23)

. . .

The law gives you the tools to make this a just
decision, not an emotional decision. No one should
make a recommendation for death or for life based on
sympathy or emotion, and we are not asking you to
recommend the death sentence because Linda Volum died
so heinously. We're not asking it for emotion. We're
asking you to follow the law. It's legal and it's just
to recommend the death sentence in this case.

(R/XIV 923)

. . .

I'm not asking you to take the easy way out and feel
sympathy or emotion. I'm not asking you to measure
this man with emotion or revenge. Measure this man by
his actions. Measure this man by how he testified
before you not only in May but here today. Measure
this man by his inability to tell you the truth over
and over and over again similar to a person that we
call a sociopath as Dr. Krop testified to.

(R/XIV 935)

Evidentiary Hearing Testimony

Eler was questioned about some of the remarks made during the State's penalty phase closing.

He felt as if the comment about Banks being a nine-time convicted felon was a "fair comment" on facts in evidence. (PCR/11 1795) When viewing it in totality, as opposed to viewing it in isolation, it was a fair comment. (PCR/11 1796) He also felt that objecting too much leads the jury to think you are hiding something. (PCR/11 1796)

The following comment, by the prosecutor, "I'm not asking you to take the easy way out and feel sympathy or emotion. Measure this man by his inability to tell you the truth over and over again, similar to the person who we call a sociopath, as Dr. Krop testified to," bothered Eler a bit. He opined that one will always be able to find case law holding that a specific comment is improper when the comment is viewed in isolation. (PCR/11 1798) He also explained that often he does not object because he can use that comment in his rebuttal, turning the argument around on the State. (PCR/11 1799) He would not have objected to this comment if he were penalty phase counsel. (PCR/11 1800)

Eler was also asked about the following comment: "You have created justice by your verdicts but that justice is not complete. It is only partial justice. This is not a comfortable,

everyday exercise that we're doing here today." He stopped short of agreeing that the comment actually suggested which penalty to recommend. (PCR/11 1800) He viewed the comment as referring to reaching a verdict in the guilt phase as a part of their duty and recommending a sentence in the penalty phase was completing their duty. (PCR/11 1800-01)

His general philosophy is "that if you object, either in opening, witnesses, or closing, the jury thinks you're hiding something, and if it's not fundamental, if it's not cumulative, if it's not something that is going to make you or break your case, why object?" (PCR/11 1801-02) He stated that oftentimes, you have to be present at the time the allegedly improper comment is made, to see and feel the jury, see how the inflection occurs, see how the witness talks on the stand, see whether it flies over the jury or whether you can make something with it and use it to your advantage. If he feels that jumping up and down and preserving the record every five minutes is going to result in an adverse verdict, he won't object, feeling as if he's doing his client a disservice. (PCR/11 1803) He feels as if you have to use your professional judgment at the time the evidence is heard and how the jury reacts to it, to determine whether to object. (PCR/11 1805)

Penalty phase counsel, Edwards, was also queried about the State's penalty phase closing. It was his responsibility to

object during the penalty closing argument. (PCR/12 2076)

He felt that the comment about Banks' inability to tell the truth was a comment on the facts in evidence or a reasonable inference from the evidence and was not concerned that it could be interpreted as asking the jury to vote for death because Banks was a liar. (PCR/12 2078)

He did not believe that the State's comment about justice not being complete was objectionable in light of its context and the flow of the statement. (PCR/12 2076-77)

Likewise, he did not think that the comment about asking the jury to not take the easy way out was objectionable because of its context and the circumstances under which it was stated. (PCR/12 2077)

Trial Court's Ruling

The trial court first noted that the alleged improper statements must be viewed in context and not in isolation as presented by Banks in his 3.851 motion. In reviewing them in context, the trial court found that counsel was not ineffective for failing to object to the comments.

The first statement was a comment implying that Banks had committed a sexual battery upon Volum. The defense presented evidence that the two had consensual sex, thus the trial court viewed the State's comment that it had been nonconsensual as fair game. Additionally, the State did concede that there was no

actual proof of a sexual battery. (PCR/8 1148)

The second comment concerned Banks being a nine-time convicted felon. The trial court found that this comment was proper because it was based on the evidence and pertained to Banks' credibility as a witness. (PCR/8 1149)

Banks also complained of the State's cross-examination of him during the guilt phase. Specifically, Banks took issue with a line of questioning concerning his interest in the outcome of the trial, whether he lied to the jury, and whether Johnson lied when he testified that his version of events, which disagreed with Johnson's, was the truth. The trial court found that Eler's failure to object was part of sound trial strategy, thus he was not ineffective for failing to object. (PCR/8 1147)

Finally, the trial court addressed the comments made by the State during the penalty phase closing. (PCR/8 1153-58) The trial court once again noted that the excerpts in Banks' 3.851 motion were taken out of context. The court further noted that the prosecutor stressed to the jury that it should not make a recommendation based on emotion but rather by following the law. The trial court cited Edwards' postconviction testimony regarding his opinion that the statements were not objectionable. (PCR/8 1153-54) The lower court ultimately ruled that trial counsel was not ineffective for failing to object to the State's comments made during its penalty phase closing

because they were not improper. The court found that Banks had failed to demonstrate deficiency in light of the fact that the comments were proper and failed to demonstrate prejudice in light of the jury instructions given, trial counsel's argument, and the "enormously weighty aggravation." PCR/8 1157)

Analysis

In order to prevail on an ineffective assistance claim for failing to object to comments made during closing argument, a defendant "must first show that the comments were improper or objectionable and that there was no tactical reason for failing to object." *Hildwin v. State*, 84 So.3d 180, 191 (Fla. 2011) (quoting *Stephens v. State*, 975 So.2d 405, 420 (Fla. 2007)). The State submits that the comments complained of were not improper, nor did they affect Banks' right to a fair trial.

It should be noted, at the outset, that only portions of the comments at issue in Banks' initial brief were cited, leading the reader to reach the immediate conclusion that they are improper. However, when read in context, the apparent prejudicial nature quickly dissipates.

First, Banks claims the prosecutor improperly alleged that Banks had committed a sexual battery on Volum and that Edwards should have objected. As recited earlier in this Answer Brief, the comments, in their entirety, establish that the State did not possess evidence to prove that a sexual battery occurred

and that the State told the jury this much. (R/IX 233) Trial counsel argued that the sex had been consensual and the State properly argued that it could have been otherwise. As the trial court found, the sexual relationship between Banks and Volum was fair game for comment by the State. The parties' sexual relationship and particularly, what occurred on the night of Volum's murder, was inextricably intertwined with her murder. (PCR/8 1148) As a result, the comments were proper. *McGirth v. State*, 48 So.3d 777, 786-87 (Fla. 2010). Finally, the court instructed the jury that what the attorneys say during their arguments was not evidence, thus no prejudice was established. Because the statements of counsel are not evidence, the trial court "may rectify improper prosecutorial statements by instructing the jury that only the evidence in the case is to be considered." *United States v. Jacoby*, 955 F.2d 1527, 1541 (11th Cir. 1992)

Second, Banks complains of certain questions posed during his cross-examination by the State. He avers that asking Banks whether he and Johnson were lying was improper and Edwards should have objected. Banks put his credibility at issue when he took the stand. He disputed many of things Johnson testified to, thereby putting Johnson's credibility at issue. Thus, he invited the State's questioning of him concerning whether he and Johnson were lying. There was no legitimate basis on which to object to

this line of questioning, thus trial counsel cannot be deemed ineffective. Counsel is not expected to raise meritless objections. *Darling v. State*, 966 So.2d 366, 383 (Fla. 2007) (holding counsel was not ineffective for failing to raise a meritless objection). Further, as the trial court found, Eler's failure to object to this line of questioning constituted reasonable trial strategy and thus, cannot form the basis for an ineffectiveness claim. (PCR/8 1147)

Third, Banks takes issue with the fact that the State referred to his nine felony convictions in its closing. Banks testified to his convictions almost immediately after taking the stand. A witness, including the defendant, may be impeached with felony convictions. Arguing his credibility via his felony convictions was proper and constituted comments on facts in evidence, thus any objection would have been meritless. In closing argument, counsel is permitted to review the evidence and fairly discuss and comment upon properly admitted testimony and logical inferences from that evidence. *Conahan v. State*, 844 So.2d 629, 640 (Fla. 2003), *citing Mann v. State*, 603 So.2d 1141, 1143 (Fla. 1992). *See Merck v. State*, 975 So.2d 1054, 1064 (Fla. 2007) (finding that prosecutor's comments were not improper when based on the facts in evidence and common-sense inferences from those facts); *Frances v. State*, 143 So.3d 340, 352 (Fla. 2014) (concluding that the trial court's finding that

defense counsel's failure to object was part of an overall defense strategy based on competent substantial evidence which Frances cannot now complain of). As the Eleventh Circuit has observed, the Supreme Court has never held that a prosecutor's closing arguments were so unfair as to violate due process. *Reese v. Sec'y, Fla. Dep't of Corr.*, 675 F.3d 1277, 1287 (11th Cir. 2012) (finding prosecutor's comments did not violate due process even under *de novo* review); *Darden v. Wainwright*, 477 U.S. 168, 106 S.Ct. 2464, 91 L.Ed.2d 144 (1986) (finding that prosecutor's references to the defendant as an "animal" who should be on the end of "a leash," and that he wished someone had "blown away" the defendant with a shotgun did not violate due process). Banks testified to his nine felony convictions. Consequently, trial counsel was not ineffective for failing to object. See *Gonzalez v. State*, 990 So.2d 1017, 1028-29 (Fla. 2008) ("[T]he proper exercise of closing argument is to review the evidence and to explicate those inferences which may reasonably be drawn from the evidence.") (quoting *Bertolotti v. State*, 476 So.2d 130, 134 (Fla.1985)); *Gore v. State*, 719 So.2d 1197, 1200 (Fla. 1998) (recognizing that attorneys are permitted wide latitude in closing argument, but that latitude does not extend to allow improper argument); *Lugo v. State*, 845 So.2d 74, 107-08 (Fla. 2003) (holding that where the evidence substantially proved the defendant's deceitful actions, the

prosecutor's remarks calling into question the defendant's veracity were nothing more than appropriate comments on the evidence).

Fourth, Banks contends that the prosecutor presented "easy way out" arguments in closing, prohibited by *Urbini v. State*, 714 So.2d 411, 421 (Fla. 1998). Banks' reliance on this case is misplaced. In *Urbini*, the prosecutor implied that the jury was required by law to return a verdict of death. In Banks' case, the prosecutor simply advised the jury to consider both the mitigating and aggravating circumstances before making a recommendation.

Counsel is not ineffective for making a tactical decision not to object to statements introduced during the State's closing arguments when those statements were not improper. *Stephens v. State*, 975 So.2d 405, 416-17 (Fla. 2007); see *Mungin v. State*, 932 So.2d 986 (Fla.2006). "A permissible argument, no matter how 'prejudicial' or 'persuasive,' can never be unconstitutional." *Reese v. Sec'y, Fla. Dep't of Corr.*, 675 F.3d 1277, 1291 (11th Cir. 2012).

Edwards testified that he did not deem any of the comments now complained of objectionable and thus, did not object. Eler, although not penalty phase counsel, was questioned about the comments as well. Eler testified that his use of objections was strategic. He did not find every comment that has been addressed

in Banks' brief objectionable, thus would not have objected. Other times, he simply chose not to object because did not want to offend the jury or lead them to believe that he was hiding something from them with numerous objections. He also added that he welcomed some of the comments so he could twist them and use them against the State in rebuttal. See *Ferguson v. State*, 593 So.2d 508, 511 (Fla. 1992) (holding that counsel adopted a reasonable strategy not to object to the prosecutor's comments, and the choice not to object to a prosecutor's closing statements can be a tactical decision despite the fact that some of the comments were indeed objectionable. As long as the prosecutor did not dwell upon the comments and they were not severely inflammatory or damaging, defense counsel remains effective.)

Lastly, this Court has previously found that a defendant is "not prejudiced by the improper statements of the prosecutors [where] the juries were given the proper instructions for analyzing aggravating and mitigating circumstances." *Anderson v. State*, 18 So.3d 501, 517 (Fla. 2009). The record clearly reflects that the jury was properly instructed. (R/XIV 921)

In short, Banks has failed to show that trial counsel's decision not to object to the alleged improper statements was deficient. Moreover, Banks cannot demonstrate any prejudice. Given the ratio of mitigation to aggravation, Banks cannot

establish that the jury's verdict could not have been obtained without the alleged improper closing comments. Simply stated, the State's comments were insufficient to undermine confidence in the outcome. As a result, the trial court's denial of this claim should be affirmed.

ISSUE VIII

WHETHER THE ALLEGED CUMULATIVE ERRORS COMMITTED DURING BANKS' TRIAL CONSTITUTE A VIOLATION OF HIS RIGHT TO A FAIR TRIAL (RESTATED)

Banks submits that the cumulative errors committed during his trial constitute a violation of his right to a fair trial and require a reversal of his guilt and penalty phase. As the trial court found, because Banks has failed to demonstrate that trial counsel was deficient on any individual basis, his claim alleging ineffectiveness on a cumulative basis fails. (PCR/8 1168)

Analysis

Although this issue is presented as an independent basis for relief, Banks does not identify any purported errors beyond the ones already addressed in his brief. He simply asserts that the effect of the errors must be considered cumulatively. Furthermore, because Banks' individual claims are without merit, his cumulative error claim must fail. *See Griffin v. State*, 866 So.2d 1, 22 (Fla. 2003) ("[W]here individual claims of error alleged are either procedurally barred or

without merit, the claim of cumulative error must fail."); *Vining v. State*, 827 So.2d 201, 219 (Fla. 2002) (holding that where alleged individual errors are without merit, the contention of cumulative error is similarly without merit); *Downs v. State*, 740 So.2d 506, 509 (Fla. 1999) (concluding that where allegations of individual error do not warrant relief, a cumulative error argument based thereon is without merit); *Patrick v. State*, 104 So.3d 1046, 1063-64 (Fla. 2012) (recognizing that a cumulative error claim must necessarily be rejected when the underlying errors are either procedurally barred or without merit); *Schoenwetter v. State*, 46 So.3d 535, 562 (Fla. 2010) (because each of the appellant's claims of error fails individually, he is entitled to no relief for cumulative error).

Accordingly Banks is not entitled to relief on this claim.

CONCLUSION

Based on the foregoing discussions, the State respectfully requests this Honorable Court affirm the trial court's denial of Banks' Amended Motion to Vacate Judgment of Conviction and Sentence.

CERTIFICATE OF SERVICE

I certify that a copy hereof has been furnished via email to Rick Sichta, Esquire, 301 W. Bay Street, Suite 14124, Jacksonville, FL 32202, rick@sichtalaw.com on the 29th day of April, 2015.

CERTIFICATE OF COMPLIANCE

I certify that this brief was computer generated using Courier New 12 point font.

Respectfully submitted,

PAMELA JO BONDI
ATTORNEY GENERAL

/s/ Carine L. Emplit

CARINE L. EMPLIT
ASSISTANT ATTORNEY GENERAL
Florida Bar No.: 0011943
PL-01, The Capitol
Tallahassee, FL 32399-1050
carine.emplit@myfloridalegal.com
capapp@myfloridalegal.com
Phone: (850) 414-3580
Attorney for Respondent