IN THE SUPREME COURT OF FLORIDA

PAUL ANTHONY BROWN,
Appellant,

v.

CASE NO. SC01-1275

STATE OF FLORIDA,
Appellee.
_____/

ON APPEAL FROM THE SEVENTH JUDICIAL CIRCUIT
IN AND FOR ORANGE COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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STATEMENT OF THE CASE AND FACTS

On November 6, 1992, Roger Hensley ("Hensley") was found dead on the bedroom floor of an apartment in Ormond Beach, Florida. He had been stabbed multiple times and his throat had been slashed. The police found two steak knives on the floor in the living room, one of which was covered in blood. Investigators documented blood spatter in several areas of the victim's bedroom and bathroom, as well as fingerprints and bloody shoe prints inside the apartment. Investigators also discovered several empty beer bottles and a bag of a substance presumed to be marijuana. Missing were the victim's white Nissan pick-up truck and keys thereto.

In October of 1992, Brown traveled from Tennessee to Daytona Beach where he met Scott Jason McGuire ("McGuire"). McGuire moved into Brown's motel room and the two spent the next two weeks consuming alcoholic beverages and smoking crack cocaine. At some point Brown decided to return to Tennessee. According to McGuire, Brown offered him $1000 to drive Brown to Tennessee but McGuire's vehicle did not work.

Thereafter, on November 5, Brown and McGuire approached Roger Hensley outside of a bar and, with Hensley driving, accompanied him to his apartment. McGuire testified that during the drive, Brown held a gun behind Hensley's seat. McGuire also claimed that during before (sic) entering Hensley's apartment, Brown whispered, "How would you like to do it?," to which McGuire made no response. Inside, the three men each drank a bottle of beer, shared half of a marijuana cigarette, and talked about various things, including employment possibilities. Hensley invited Brown and McGuire to spend the night. However, before retiring to his bedroom, Hensley dropped a few dollars on the table and stated, "I don't know what you guys' game is. If you've come here to rob me, this is all the money I have. You can take it." McGuire assured Hensley that they were not there to rob him and Hensley went to bed.

After Hensley left the room, Brown told McGuire he was going to shoot Hensley and steal his truck.

McGuire objected to the use of the gun because of the noise. Appearing angry at McGuire's response, Brown walked to the kitchen and got two steak knives, handing one to McGuire. McGuire threw the knife to the ground and denounced any intention of taking part in murder. Brown said he would take care of it himself and, in a symbolic gesture, dragged his hand across his throat.

Brown told McGuire to stand by the door to block Hensley's escape and he entered the bedroom where Hensley was lying on the bed. McGuire then heard what he thought were stabbing sounds and heard the victim say "no." Upon hearing something hit the floor, McGuire approached the bedroom where he noticed Hensley lying on the floor covered in blood and "making sounds" as if he was "struggling to breathe." Brown was rummaging through the victim's bedroom looking for car keys. He found the victim's wallet and removed a twenty-dollar bill. Brown, who had blood on his hands, arms, and pants, then tried to wash it off. McGuire did not have any blood on him, but attempted to wipe his fingerprints from everything in the apartment that he had touched.

Ten or fifteen minutes later, the two left the victim's apartment in Hensley's truck, stopped at their motel room to collect their belongings, and drove to Tennessee. There, Brown burned his bloody pants in a stove and McGuire departed on foot a day or two later. Brown was arrested on November 8 at a farmhouse in Tennessee by agents from the Federal Bureau of Investigation (F.B.I.) on unrelated charges.

While in the custody of the F.B.I., Brown stated, "I'm a murderer, not only a bank robber", and declared that he and another man named "Scott" killed "a white male" in Daytona Beach and stole his truck. Brown explained how the two met the victim and went back to the victim's "motel room", where they smoked "crack" cocaine and then stabbed and killed the victim. Brown claimed that it was McGuire's suggestion that they find someone who owned a car, steal the car, and kill the owner. He also claimed that he stabbed the victim several times in the chest and once in the back but that McGuire slit the victim's throat. Brown's

> statements to the FBI were admitted in evidence at trial.
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> Brown also testified at trial and denied any involvement in the homicide, claiming instead that McGuire killed Hensley while Brown was asleep as a result of smoking marijuana. Brown testified that he awoke to find Hensley standing over him with a bloodied knife. He claimed that McGuire had stabbed Hensley once in the back and was attempting to slit his throat. Brown also claimed that after they left the apartment, McGuire threatened to frame him for the murder if Brown told anyone about it.
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> The jury found Brown guilty of first-degree premeditated murder and first-degree felony murder. After a penalty phase proceeding, the jury recommended a sentence of death by a vote of twelve to zero. The trial court followed the jury's recommendation and sentenced Brown to death. The trial court found four aggravating factors and two non-statutory mitigating factors.
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> Brown raises five issues on appeal, all of which pertain to the penalty phase of the trial. Although Brown does not contest the sufficiency of the evidence for his conviction of first-degree murder, we must, nevertheless, make an independent determination that the evidence is adequate. *See* § 921.141(4), *Fla. Stat*. (1997); *Fla. R.App. Pro*. 9.140(h); *see also Reese v. State*, 694 So.2d 678, 684 (Fla.1997); *Christian v. State*, 550 So.2d 450, 451 (Fla.1989). Based upon our review, we find that there is competent, substantial evidence to support the verdict. That evidence has been outlined in detail above.

(footnote omitted) *Brown v. State*, 721 So. 2d 274 (Fla. 1998).

On November 3, 2000, Brown filed his Florida Rule of Criminal Procedure 3.850 motion for postconviction relief. (R 457). He filed his amended 3.850 motion on February 12, 2001,

(R 494), and filed a second amended motion on April 26, 2001. (R 582). An evidentiary hearing was held on April 26-30, 2001 before the Honorable R. Michael Hutcheson.(R 1). Several witnesses testified.

Trial prosecutor, Edwin Davis, testified that he would have responded in writing to any discovery demand made in the case. (R 28, 30). He believed that he gave a copy of a taped interview of co-perpetrator, Scott Jason McGuire, conducted by FDLE Agent Steven Miller on February 15, 1993, to Brown's trial counsel, Peyton Quarles. (R 30). He listed two tapes, identified as conversations with McGuire, in a supplemental discovery list he filed on September 16, 1996. (R 32).

Mr. Davis opined that the time to trial in Brown's case was comparatively short, but that the pace was not surprising to him. (R 34-35). "Brown was insisting on having his trial under the detainer rules," and "[f]rom the time he was brought back in the detainer, . . . it was less than six months." (R 34). Brown's case was not more or less difficult than other similar cases he was familiar with. (R 36). He was not surprised at the pace at which the trial progressed. (R 35). Mr. Davis recalled that the trial moved forward at the pace it did due to Brown's insistence. (R 40-41). In fact, Mr. Quarles had sought a continuance which Brown opposed. (R 40). This happened more

than once. (R 40).

At the time of the hearing, Mr. Davis had no specific recall of any objections Mr. Quarles made at the trial. (R 36). Neither did he recall speaking with McGuire since the trial. (R 37). He did not know the number of depositions that were taken, but had no reason to dispute the record. (R 45-46).

Asked if he recalled "asking numerous leading questions which trial counsel didn't object to," Mr. Davis replied: "No, . . . I think from reading the motion that your definition of leading questions is a much more liberal definition than I would have, because my understanding of leading questions is, it's a question which suggests the answer, and no, I don't recall that." (R 36). Mr. Davis added: ". . . I love it when defense attorneys continually object at trial, because the jury sits there and becomes alienated after a certain point . . .." (R 36).

Defense Counsel asked whether the existence of footprints other than Brown's at the crime scene was evidence that did not corroborate Brown's confession. (R 47). He replied negatively, and explained that same was "certainly not inconsistent" with Brown's confession, as "other people were present. There was the maid who discovered the body, there were police officers there, there were other people." (R 47). Thus, other footprints

at the scene in “no way diminishes the statement” Brown made.

Mr. Davis opined that the strengths of the case included Brown’s confession and corroborating physical evidence which tied him to the murder. (R 41). Brown possessed the victim’s truck when he was arrested, and he confessed to the FBI in detail. (R 41). The details were consistent with the physical evidence recovered from the crime scene. (R 41). For instance, he told the FBI agents that he stabbed Mr. Hensley numerous times, had fled the scene in Mr. Hensley’s truck with Mr. McGuire, and had left McGuire’s ID at a gas station on the trip to Tennessee where he was eventually arrested. (R 40-41). At the time of his arrest, he was in possession of a gun.[1] (R 42). Brown’s confession was given to the FBI agents **prior** to McGuire’s arrest and before the FBI agents knew anything about the murder in Florida. (R 41-42).

Mr. Davis recalled that at trial, Brown testified that he fell asleep in Mr. Hensley’s apartment and did not know about the murder until McGuire woke him up holding a knife with blood all over him. (R 43). Brown claimed he never made the statements

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[1] At trial, McGuire testified that Brown held a gun behind the truck seat where Mr. Hensley sat on the drive to his apartment, took it into the apartment and said that he planned to use it to kill Mr. Hensley. (RDA 861). "RDA" refers to the record on direct appeal.

testified to by the FBI agents. (R 43-44).

Davis agreed that if Brown was present and saw McGuire stab Mr. Hensley, he would have specific knowledge of the crime. (R 48). He recalled that upon his arrest, Brown had tried to focus blame for the murder on McGuire, stating that although he had stabbed Mr. Hensley, it was McGuire who slit his throat. (R 49). However, Davis recalled, that at trial, Brown denied ever saying he was at all involved in the murder, and testified that it was all done by McGuire. (R 49). He also claimed "that the statements made that were attributed to him by the FBI in Tennessee were never made by him, that was fabricated by the FBI" agents, who did not even know of the occurrence of the murder at the time, much less any factual details. (R 43-44). In Mr. Davis' estimation, Brown convicted himself "[t]o a large extent . . .." (R 44). The story he told the jury was unbelievable. (R 44-45).

The State then put on the record at the evidentiary hearing that it understood that Brown would call McGuire to testify at the hearing, and wanted it clear that McGuire was not being represented by Brown's counsel and that the State was not giving McGuire any immunity. (R 50-51). Moreover, should he testify differently than he did at trial, he likely would face the death penalty himself. (R 52-53). The State said McGuire should be

made aware of his right to representation and to remain silent and of the potential consequences if he did not do so. (R 51).

The postconviction judge suggested that the public defender be notified. (R 59). An Assistant Public Defender, Larry Powers, told the court that it would be his advice to McGuire that he take the Fifth Amendment on some issues. (R 64). Mr. McGuire was then called to testify at the hearing. (R 66).

McGuire admitted that Mr. Powers had advised him to take the Fifth, and he did so in regard to crimes in Ohio as well as an escape charge. (R 66-67, 71). However, when asked whether he had pled to certain crimes in connection with Mr. Hensley's murder, he said that he had. (R 68). He pled to second degree murder and was given a sentence of forty years in prison. (R 68). He was uncertain whether probation was to follow the prison time.[2] (R 68-69). The witness felt that he had received "an astronomical amount" of prison time on this case. (R 83).

Mr. McGuire said that the State agreed not to charge him with robbery or grand theft in exchange for his plea in the instant case. (R 70). He took the Fifth when asked whether he

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[2] He also admitted to a felony conviction in Jacksonville for possession of heroin. (R 73).

had a felony conviction in Ohio for an aggravated battery in 1986. (R 71). He did likewise when asked if he had escaped from prison on February 15, 1989 and was an escaped convict from Ohio at the time of Mr. Hensley's murder. (R 71). He admitted using some other names, but took the Fifth when asked if he had gone by the name "Scott Kenan." (R 71-72). In terms of Florida crimes, McGuire recalled two felony convictions, but agreed that there might have been three. (R 73). Mr. McGuire said that he gave FDLE Agent Miller a tape-recorded statement about Mr. Hensley's murder on February 15, 1993. (R 75). At that time, Detective Corporal Henry Ostercamp was present. (R 76). An audio tape was played, and McGuire said the "second voice" sounded like his. (R 76). He identified his voice on the second tape as well. (R 82). The tapes were entered into evidence at the hearing. (R 82).

The witness said that he believed he had resided at 507 Earl Street in Daytona Beach. (R 74). He had given his identification card with that address on it to Brown. (R 75).

McGuire testified that he did not stab Mr. Hensley. (R 84). He also denied framing Brown for Mr. Hensley's murder. (R 84).

Trial counsel, Peyton Quarles, testified next. (R 87). Mr. Quarles had some twenty-six years of experience in criminal defense. (R 189). He had worked as a public defender, doing

work at both the trial and appellate levels. (R 189). "From '81 to about '83," he "handled the first-degree murder capital cases and other murder cases . . .," including doing at least one penalty phase alone. (R 189). He went into private practice in approximately 1987. (R 189). He handled "six to eight capital cases" after 1987, trying five of them.[3] (R 190). In addition, he had "handled three or four first-degree murder cases on appeal," one of which "was a capital appeal." (R 190). The total number of felony cases he had handled was estimated at 75-100. (R 190-91).

Mr. Quarles had reviewed the 3.850 motions (original and amended). (R 89). He had reviewed depositions, an autopsy report, police reports, and had met with Brown on numerous occasions in preparing for trial. (R 93). He could not then recall whether he had, or had heard, the two February 15, 1993 taped conversations between McGuire and Agent Miller. However, he remembered seeing transcripts of the interviews. (R 222-23). He could not recall whether he used any of those statements made by McGuire to cross examine or impeach him at trial. (R 225).

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[3] In fact, recent to the evidentiary hearing, Mr. Quarles had tried the "longest criminal trial in Volusia County, seven weeks." (R 190). His client had been charged with first-degree murder, and the death penalty was being sought. His client "was convicted of three third degree felonies." (R 190).

Mr. Quarles could not recall having received information that McGuire was an escaped convict. (R 97). However, he remembered reviewing plea information on the deal McGuire made with the State prior to trial. (R 98).

Mr. Quarles did not know what the two tapes on the State's Supplemental Discovery Witness List referred to. (R 98-99). He admitted that he could not recall cross-examining McGuire regarding: 1) aliases, 2) prison sentence, 3) terms of plea which omitted restitution, 4) being sentenced under pre-1994 sentencing guidelines, 5) State not charging armed robbery and grant theft, 6) terms of plea not requiring payment of costs, 7) could have gotten a life sentence under the plea, 8) if trial testimony differed from what had previously told State, State could withdraw the plea agreement, and, 9) an ID card entered into evidence at trial. Also, he did not cross examine McGuire about his permanent address on Earl Street. (R 105). Neither did he inquire about McGuire discarding the clothing he had been wearing at the time Mr. Hensley was murdered. (R 105).

Moreover, Mr. Quarles could not recall asking him about various inconsistent statements. (R 107-115). He objected to an instruction on burglary, but did not object to comments made in the opening statements. (R 116).

Mr. Quarles testified that he would have objected to any

hearsay statements of Mr. Hensley testified to by Mr. McGuire had he "thought that they were damaging to my case . . .." (R 155). He did not regard the job offer statement as damaging. (R 155). Regarding the statements about homosexual and bisexual orientation, he did not feel that it was of "any import" and consistent with his non-confrontational lawyering style, he did not object as a matter of trial tactics. (R 204).

In regard to his opening statement, Mr. Quarles testified that he spoke about Brown's lifestyle to prepare the jurors for evidence he expected, hoping that "getting that out in front . . . [would] make them believe that Mr. Brown had not committed murder." (R 117). Mr. Quarles felt he should not mislead the jury about Brown "being a murderer or not." (R 134).

Mr. Quarles testified that given Brown's detailed confessions to the FBI, he was convinced that if the jury believed what Brown said in the statements, he was going to be convicted of first-degree murder. (R 213). He saw the only question in the case as the death penalty, and so, the trial became "penalty phase oriented . . . based on the evidence against Mr. Brown." (R 213). Brown insisted on testifying, and consequently, his nine prior felonies would come out. (R 214). Moreover, Brown had just been convicted of "a brutal knifing and slaying of a man for his truck. They knew he wasn't a nice guy

. . ..” (R 215-16).

Attempting to save Brown’s life, Mr. Quarles used a well known defense tactic of trying to soften the blow of the bad character information. (R 215). He felt he had no other way to go, once, as the prosecutor put it, Brown “decided he had to tell his fairy tale on the stand.” (R 215). Mr. Quarles conceded that Brown was not raised in an “Ozzie and Harriet” home, and that due to the bad influence of others, he had turned to the bad side. (R 215). He hoped to convince the jury that Brown had screwed up, but it was not really his fault. (R 216).

Mr. Quarles did not object when the prosecutor gave personal opinion type statements regarding Brown because he felt it would not affect the verdict and the law was not then very well-developed in regard to whether attorneys could give such opinions in opening and closing statements. (R 119). Moreover, he did not regard it significant that the testimony was that the blood on Brown’s shoes matched Mr. Hensley’s blood, as opposed to stating that that blood was “consistent with” Mr. Hensley’s blood, because the defense had never claimed that Brown was not present. (R 131). Being lead by Defense Counsel, Mr. Quarles said it “might have” helped Brown’s case to argue that there were a lot of unidentified footprints at the scene. (R 133).

Mr. Quarles remembered asking Agent Childs whether Brown was given alcohol after his arrest. (R 149). He had hoped to get information which he could use to indicate that Brown was under the influence of alcohol when he made the statement and/or that he was bribed into confessing. (R 149).

Mr. Quarles was asked about the statements which McGuire testified to at trial as having been made by Mr. Hensley. He would have objected to any of those statement which he considered damaging to his case. (R 155).

He did not remember whether the State used leading questions throughout its direct examination of its witnesses. (R 161). It was not his practice to object to leading questions because the subject matter would be rephrased, and the same information would come before the jury. (R 164). He said there would sometimes come a point when he would object to the use of such questions, but it was a "know it when you see it" kind of thing that was hard to put into words. (R 164). He also expressed concern that the more times an attorney objects and the evidence that is so obviously being sought gets to the jury anyway, it is detrimental to the defense, especially where a pattern results. (R 170).

Mr. Quarles used "a popular method or tactic in penalty phase proceedings" which includes showing "how miserable a

person has become due to their circumstances." (R 182). It was this method he was using when he told the jury that Brown had been influenced by others and had "turned bad" because of that. (R 182).

Mr. Quarles did not ask the judge to appoint another attorney to help him in this case. (R 178). He had been a practicing attorney for twenty-six years, and had an extensive background in criminal law. (R 188-191). He opined that he had provided competent, effective assistance to Brown. (R 186). He did not render deficient representation to his client. (R 221).

Upon appointment, Mr. Quarles was made aware that Brown had demanded a speedy trial. (R 193). He told Brown that he wanted to delay the case, but Brown refused. (R 218). Although he does not normally discuss every tactical matter with his client, he did on this issue and did what his client asked and what the law indicated he had to do. (R 220). Since the case was a simple one, Mr. Quarles went along with the accelerated time frame. (R 193, 195).

One of the first things he did was file the motions to suppress the confessions and to limit testimony of Brown's criminal history, including the bank robberies in Tennessee. (R 195-196). Mr. Quarles spoke with McGuire, the medical examiners, and the investigating officers. (R 196). McGuire

made it clear to him that Brown “was dead set on killing the man to make sure that he couldn’t identify him for stealing the truck.” (R 198).

The strongest evidence against Brown was, in Mr. Quarles’ opinion, Brown’s statements and McGuire’s testimony. (R 201). Trial counsel acknowledged that Brown had tried to lay a lot of the blame for the murder on McGuire, claiming that McGuire had slit Mr. Hensley’s throat. (R 201). At trial, however, Brown changed and said that he had been sleeping until McGuire woke him and said he had murdered Mr. Hensley. (R 202). Mr. Quarles did not recall whether he argued McGuire was the real killer at the trial. (R 238). Mr. Quarles opined that giving that testimony at trial was what caused the jury to recommend the death penalty. (R 203).

Regarding prosecutorial statements in closing argument, Mr. Quarles testified that he did not perceive there to be anything wrong with argument by either attorney which used “I think.” (R 207-08). Since he had himself repeatedly used that phrase in both his opening and closing statements, he would not have objected to the prosecutor’s use of it because that would have seriously undermined his credibility with the jury. (R 208). Moreover, he did not feel that the use of that phrase was detrimental to Brown’s case. (R 208). Mr. Quarles' philosophy

about closing argument was that “unless it reaches a level where I believe that it is certainly clearly detrimental to my client’s case, even though it may be somewhat incorrect or improper, I don’t object.” (R 209). This is a strategic decision made after weighing the cost benefits of objecting and potentially alienating the jury against the prejudice from any comments made. (R 209).

During the penalty phase, Mr. Quarles called several of Brown’s relatives to testify about his childhood and upbringing. (R 244-45). He argued that this case was not a “most aggravated” murder and did not present a unique situation for which the death penalty was intended. (R 245).

Brown was the next witness. He said he did not consent to Mr. Quarles saying that he and McGuire “don’t play golf together . . . They do things like consume a lot of alcohol . . . crack cocaine . . . hang out on the Boardwalk area, unemployed.” (R 256). He denied having hung out on the Boardwalk and claimed to have only recently met McGuire. (R 256-57). Neither did he agree to Mr. Quarles saying that he had not grown up in “Ozzie and Harriet’s house,” or that he “did not have a good upbringing and it’s clear that he was influenced by others and that he turned bad.” (R 258-59).

He had known McGuire for a short time, but the man had not

told him of any prior felony convictions he had. (R 260). He did not tell Mr. Quarles not to ask McGuire what happened to his clothes, whether he had used aliases, or about the terms of the plea. (R 260-61). Neither did he instruct Mr. Quarles not to argue that Mr. Hensley's license and phone card were found near McGuire's residence on Earl Street, not to object when McGuire told the jury he was being truthful, or not to object to his confession. (R 263, 265, 273). Neither did he give him permission to tell the jury that the blood found on his sneaker was Mr. Hensley's blood, that he and McGuire were convicted felons, or that he could ask Agent Chiles about his being given alcohol. (R 263-64).

Brown was not happy with Mr. Quarles' representation and thought that he could have done a better job himself. (R 269, 278). He opined that Mr. Quarles did not put much effort into representing him. (R 269). He could only recall one time that Mr. Quarles objected to the State's leading questions. (R 268). He concluded that Mr. Quarles "framed" him. (R 279).

He said that had Mr. Quarles objected more, he "can't say" whether he would have decided to testify. (R 279). Despite claiming not to know how to make an objection, he opined that had he represented himself, he would have made a lot more objections than Mr. Quarles did. (R 279). He did not expect to

be responsible for telling his attorney what to object to and what not to. (R 275).

Brown admitted that Mr. Quarles had discussed a potential plea bargain with him several times. (R 271). He decided not to take any kind of plea offer. (R 271, 284). He also admitted to discussing with Mr. Quarles his desire to force the case to trial and his determination to testify. (R 285). He said that he forced his case to go to trial over Mr. Quarles' objection. (R 284).

Despite signing a sworn statement that he had read the entire motion, and it was all true, Brown admitted on cross that he had not read all of it. (R 282).

Brown could not remember if he testified at trial to his nine prior felonies. (R 274). He claimed he could not "really remember" whether he wanted to testify at trial. (R 285). He admitted that he had a "rather spotty memory of the trial," despite having testified in detail on direct exam to many specific instances of action or inaction of his attorney. (R 285).

On April 30, 2001, the postconviction judge, the Honorable R. Michael Hutcheson, entered his Order Denying Defendant's Second Amended Motion for Post-Conviction Relief. (R 726). Brown appeals therefrom.

SUMMARY OF THE ARGUMENTS

Argument I: The trial court correctly denied Brown's numerous and assorted claims of ineffective assistance of trial counsel. He utterly failed to establish deficient performance by his trial attorney. Moreover, any deficiency in performance did not prejudice him within the meaning of *Strickland*. Having failed to carry his burden to establish deficient performance which prejudiced him under *Strickland*, his ineffective assistance claim fails.

Argument II: The trial court properly denied Brown's claim of newly discovered evidence. This claim is procedurally barred. Moreover, Brown did not show that his attorney could not have found the evidence with the exercise of due diligence. Neither did Brown prove the relevancy or admissibility of the evidence. Finally, any error was harmless as the evidence would have had no affect on the outcome of the proceedings.

Argument III: The trial court properly denied the cumulative error claim. Brown failed to establish any error, and so, there was nothing to cumulate. Moreover, due to the overwhelming evidence of Brown's guilt of the crimes and suitability for the death penalty, there is no possibility that any cumulated error(s) affected the outcome of the proceedings.

Brown is entitled to no relief.

POINTS ON APPEAL

ARGUMENT I

BROWN HAS NOT CARRIED HIS BURDEN TO PROVE THAT HIS TRIAL COUNSEL RENDERED HIM INEFFECTIVE ASSISTANCE OF COUNSEL IN VIOLATION OF STRICKLAND.

The general standard of review of ineffective assistance of trial counsel claims is *de novo*, although the factual findings of the postconviction court are controlling. *Stephens v. State*, 748 So. 2d 1028, 1033 (Fla. 1999). *See Cherry v. State*, 781 So. 2d 1040, 1048 (Fla. 2000), *cert. denied*, 122 S.Ct. 179 (2001)[appellate court defers to trial court's factfinding]. However, where an evidentiary hearing has been held, this Court will review the Circuit Court's denial of a Florida Rules of Criminal Procedure 3.850 motion to see whether it is supported by competent, substantial evidence. *Blanco v. State*, 702 So. 2d 1250, 1252 (Fla. 1997). The lower court's judgment on "questions of fact . . . credibility of the witnesses . . . [and] the weight to be given to the evidence . . ." prevail. *Id*. The instant claims were denied after an evidentiary hearing on trial counsel's alleged ineffectiveness, and therefore, the competent, substantial evidence standard applies to this claim.

It is Brown's burden to prove that his counsel rendered him ineffective assistance under *Strickland v. Washington*, 466 U.S. 668 (1984). *Robinson v. State*, 707 So. 2d 688, 695 (Fla. 1998);

Kennedy v. State, 547 So. 2d 912, 913 (Fla. 1989); *Smith v. State*, 445 So. 2d 323, 325 (Fla. 1983), *cert. denied*, 467 U.S. 1220 (1984). To meet that burden, Brown must show "that his counsel's performance was deficient," and "the deficient performance prejudiced the defense." *Sweet v. State*, 27 Fla. L. Weekly S113, S114 (Fla. Jan. 31, 2002). If he fails to establish one prong, "it is not necessary to delve into whether he has made a showing as to the other prong." *Waterhouse v. State*, 792 So. 2d 1176, 1182 (Fla. 2001).

Deficient performance is that which falls outside the wide range of reasonable professional assistance and includes both acts and omissions. *See Robinson*, 707 So. 2d at 695; *Kennedy*, 547 So. 2d at 913. It is Brown's burden to establish same. *Kennedy*. There is a strong presumption that counsel rendered effective assistance. *Id*. The distorting effects of hindsight must be eliminated and the action, or inaction, must be evaluated from counsel's perspective at the time. *Id*. See *Strickland v. Washington*, 466 U.S. 668, 690 (1984). To prove prejudice, he must establish that the deficiency so adversely prejudiced him that there is a reasonable probability that except for the deficient performance, the result would have been different. *Id*.; *Gorham v. State*, 521 So. 2d 1067, 1069 (Fla.

1988)(*citing Strickland*, 466 U.S. at 687). Moreover, where the evidence of guilt is overwhelming, deficient performance does not merit relief because “there is no reasonable probability that the results would have been different . . .." *Harris v. Dugger*, 874 F. 2d 756, 761 n.4 (11th Cir. 1989), *cert. denied*, 493 U.S. 1011 (1989).

Reasonable strategic decisions of trial counsel will not be second-guessed. *Haliburton v. Singletary*, 691 So. 2d 466 (Fla. 1997). "'Strategic decisions do not constitute ineffective assistance if alternative courses of action have been considered and rejected.'" *Rutherford v. State*, 727 So. 2d 216 (Fla. 1998)(*quoting, State v. Bolender*, 503 So. 2d 1247, 1250 (Fla. 1987)), *cert. denied*, 484 U.S. 873 (1987). "To hold that counsel was not ineffective[,] we need not find that he made the best possible choice, but that he made a reasonable one." *Byrd v. Armontrout*, 880 F.2d 1, 6 (8th Cir. 1989), *cert. denied*, 494 U.S. 1019 (1990). Trial counsel "cannot be faulted simply because he did not succeed." *Alford v. Wainwright*, 725 F.2d 1282, 1289 (11th Cir.), *modified*, 731 F.2d 1486, *cert. denied*, 469 U.S. 956 (1984). A defendant is "not entitled to perfect or error-free counsel, only to reasonably effective counsel." *Waterhouse v. State*, 522 So. 2d 341, 343 (Fla. 1988).

1. Brown did not prove that Trial Counsel's performance was ineffective in the use of cross-examination for impeachment of Co-perpetrator McGuire.

Brown complains that his trial attorney, Mr. Quarles, "failed to execute his duty to attack the credibility of . . . McGuire." (IB 31). Specifically, he claims that Mr. Quarles "had discovery evidence of prior inconsistent statements which he did not use." (IB 31). He further adds that his attorney "should have tested McGuire's capacity or opportunity to remember and recount the matters surrounding the death of Roger Hensley." (IB 32).

In *Robinson v. State*, 707 So. 2d 688, 697-98, 700 n.12 (Fla. 1998), the defendant complained that his trial attorney was "deficient handling . . . the main witness against" him and did "a poor cross examination and impeachment" of that witness at trial. This Court affirmed the trial court's holding that this claim was procedurally barred because it could have been raised on direct appeal, and in a 3.850 motion, the defendant "was improperly attempting 'to relitigate substantive matters under the guise of ineffective assistance.'" *Id*. The same is true in Brown's case; thus, the claim is procedurally barred.

Even if not defaulted, Brown is entitled to no relief because the claim has no merit. Brown identifies the statements he believes are inconsistent. He says that at trial McGuire

testified that "walking to Hensley's apartment," Brown said, "'How would you like to do it?'" (IB 33). He charges that Mr. Quarles knew that McGuire had earlier stated to Agent Miller that Brown asked him, "'what I thought, you know, we should do.'" (IB 33). According to Brown, this question "was concerning a job offer by Hensley," and was not about "how they were going to 'rip' off Hensley." (IB 33). He claims that Mr. Quarles "should have impeached McGuire on this point." (IB 33).

First, the State points out that McGuire did not testify at trial that Brown did not ask him the question Brown claims is inconsistent with McGuire's trial testimony. Neither is there anything on the record that indicates that having asked any question about the job, Brown could not have also asked the other one, i.e., "how would you like to do it?" Thus, Brown has not established that McGuire's statement to the agents that Brown asked him what they should do in reference to a job offer is inconsistent with McGuire's trial testimony that Brown asked him how he would like to do it in reference to the subject crimes.

In fact, the conversation on the walk to the building and then up two flights of stairs[4] may have begun with an inquiry

[4] *See* RDA 708.

about how to handle the job offer, and thereafter, resulted in a decision by Brown that he would take care of it by going ahead with his plan to commit the crimes against Mr. Hensley, prompting his follow-up question of McGuire as how to do it. Thus, Brown has failed to establish any inconsistency.

Moreover, any inconsistency was relatively insignificant. Where "inconsistencies in the witnesses' previous versions of events were relatively insignificant and the reliability of the trial would not have been increased had the witnesses been further impeached," a claim of inadequate impeachment merits no relief. *Asay v. State*, 769 So. 2d 974, 984 (Fla. 2000). *See Ventura v. State*, 794 So. 2d 553, 566-67 (Fla. 2001)[claim that "cross would have been more effective if counsel had made specific reference to a transcript of an interview between Arview and a Volusia County detective" insufficient for relief].

When the prior statement Brown relies on is considered, it is clear that a decision not to reference that prior statement was the correct one. McGuire was interrupted when he skipped over conversation between he and Brown on the way up to Mr. Hensley's apartment, and was asked if Mr. Hensley had offered him a job on the ride. (Exhibit 3 at 9). Mr. McGuire responded affirmatively, explaining that "in the tense situation that we were in and he [Brown] had his pistol, I couldn't really, um,

agree to work for him, but I had second thoughts about, uh, staying with Paul . . ..” *Id*. The interviewer then asks if he and Brown had “any conversation at all about this” - with “this” clearly referring to the job offer. *Id*.

McGuire responded that Brown asked him what to do about it, and he indicated to Brown that he was thinking about “asking the guy to work for him.” *Id*. McGuire adds that Brown “didn’t want to hear that so uh, he wanted uh, wanted me as a partner so he said on this trip back to Tennessee. . . ..” *Id*. Had Mr. Quarles brought up this allegedly inconsistent statement, the State could have brought out that McGuire told Brown he wanted to work for the man, and Brown was firmly against that because he wanted McGuire to do his bidding. To keep McGuire available to him, Brown decided to go ahead with his plan to kill Mr. Hensley. Thus, such a tactic, had it been tried by Mr. Quarles, would have provided another motive for Brown to kill Mr. Hensley, and would have highlighted that McGuire did not want to do so because he wanted the job Mr. Hensley had offered. Clearly, Mr. Quarles did not render deficient performance in staying away from this subject at trial.

Brown next complains that Mr. Quarles should have cross examined McGuire on a statement in the transcript of McGuire’s interview with Agent Miller to the effect that Brown “was dead

set against killing the guy." (IB 35). Without specifying the specific inconsistent statement at trial, apparently, he claims this prior statement was inconsistent with Mr. McGuire's trial testimony that Brown planned to kill Mr. Hensley.

It is clear from the questions and answers in the pages preceding the subject statement that McGuire maintained that it was Brown's plan to kill Mr. Hensley. Moreover, as Brown admits in his brief, McGuire had previously made a similar mistake and corrected it after it was called to his attention. (IB 35). At the evidentiary hearing, Mr. Quarles was asked why he corrected the deposition statement, asking: "[O]kay, you actually meant he was dead set on killing him." (R 147). He responded: "So that he wouldn't correct himself later on in a more crucial time. I wanted to be clear as to what he meant." (R 147). What McGuire meant was Brown was "dead set on" killing Mr. Hensley. (R 147).

On cross-examination at the evidentiary hearing, this matter was further explored. The prosecutor asked: "Doesn't he [McGuire] make it clear that what he intended to say was that he was dead set on killing the man to make sure that he couldn't identify him for stealing the truck?" (R 198). Mr. Quarles replied: "Yes, sir." (R 198). Moreover, the "dead set against" statement in the Miller interview with McGuire is what gave rise

to Mr. Quarles' questioning on the subject at the deposition. (R 199). Having read the entire Miller interview, Mr. Quarles felt, in context, it was pretty clear that McGuire meant to say that Brown was dead set on killing Mr. Hensley, but just in case that was not the way of it, he clarified it at the deposition. (R 199-200). Indeed, Mr. Quarles testified at the evidentiary hearing that had he tried to make an inconsistent statement out of this situation, the State would have been able to get into the substance of Mr. McGuire's statement which was consistent with his testimony at trial. (R 200). Trial counsel's performance can hardly be deficient in regard to his handling of this matter.

Brown's next claim is that Mr. McGuire testified that Brown held a gun behind the seat where Mr. Hensley sat while driving to his apartment with the three men. (IB 35). He says that in his Miller interview, McGuire said Brown "'never did anything with the gun except, uh, keep it hid.'" (IB 36).

The transcript of the Miller interview again shows the frivolous nature of Brown's claims in regard to these alleged inconsistent statements. It is clear therefrom that Mr. McGuire related, as he did at trial, that Brown took the gun from his waistband without Mr. Hensley seeing it and "hid his arm behind the driver with the pistol between the seat and the uh, back of

the truck bed." (Exhibit 3 at 7). Mr. McGuire thought "he was just going to flash the gun in front of the guy's face and tell him to get out of the truck . . . but um, he never did anything with the gun except uh, keep it hid and . . . drove the man around for about twenty minutes . . .." *Id*. Thus, it is clear that the statement is in complete accord with the testimony. Had Mr. Quarles tried to claim that the part of the statement which indicated Brown "never did anything with the gun except uh, keep it hid" was inconsistent with his trial testimony that Brown held the gun at Hensley's back behind the truck seat, the entire context would have been presented, and it would have been painfully obvious to the jury that the defense had tried to mislead them in such a bold and frivolous manner as to completely destroy the defense's credibility.

Brown complains that McGuire testified at trial that Brown "handed him a knife and McGuire took it and threw it down on the ground, floor." (IB 36). He claims that McGuire told Agent Miller in his transcribed statement that "after he took the knife from Appellant, McGuire immediately set it down on the table." (IB 36). The testimony established two times when McGuire handled the knife given to him by Brown. The first time, Brown had just returned from the kitchen with two steak knives, and he handed one to Mr. McGuire. McGuire took it, and

either threw it to the floor, or set it on a table. In any event, he did not keep it, nor did he use it. When Mr. McGuire saw that Brown had stabbed Mr. Hensley to death, he remembered touching the knife Brown had handed him, and he returned to it, picked it up, and wiped his fingerprints from it. He left it in the apartment.

The knife was found in Mr. Hensley's living room, and was clean. (RDA 803). However, a bloodied, second knife was found stuck in some clothes under a cushion. (RDA 810, 998, 1006). The bloodied knife had Mr. Hensley's blood on it and was the murder weapon. (See RDA 1067, 1071, 1085). Thus, Mr. McGuire clearly held the knife in his hands twice,[5] and one time he threw it to the floor, and the other time he placed it on a table. Assuming that he got the disposition of the knife mixed-up, pointing out that extremely minor discrepancy would hardly have established that Mr. McGuire could not recall the details of the matters about which he testified. Afterall, McGuire's trial testimony was corroborated by Brown's own statement to the FBI Agents - given before McGuire gave his statement. That he mixed up which time he laid the knife on the table and which time he threw it to the floor - even could Mr. Quarles have

[5] A fact which Brown concedes in his brief. (*See* IB 37).

established that - would have had no impact whatsoever on any material matter. Mr. Quarles can hardly be ineffective for not having raised it.

The next alleged great inconsistency which Mr. Quarles did not call to the jury's attention is that Mr. McGuire testified at trial that when he walked over to the doorway of Mr. Hensley's bedroom, he saw Mr. Hensley "on the floor, bloodied," but in a deposition, he said that as he stood by the door "he saw the man half on the bed, half on the floor, blood all over the place." (IB 38). Again, Brown tells half the truth. In the deposition, Mr. McGuire said he approached the bedroom and "just stood right by the door and I saw the man half on the bed, half on the floor, blood all over the place, ..." (R 731.28).[6] Mr. McGuire stands there, watching Brown go through Mr. Hensley's possessions looking for his truck keys. *Id*. at 28-29. After he rummages around and washes up in the bathroom, Brown finds the keys and some money. By this time, McGuire is "standing right there by the door looking in and I'm kind of like in a state of shock now because this man is down on the floor. He's all bloody." *Id*. at 29. Mr. Hensley is "barely breathing, taking

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[6] The deposition is not assigned record page numbers. However, the cover page is designated page 731, and the pages of the deposition are cited herein by a decimal and the page number after record page 731.

his last breath." *Id*. Thus, it is clear that the deposition does not conflict with the trial testimony.

As the medical examiner and crime scene reconstructors testified at trial, Mr. Hensley moved around a lot trying to escape Brown's savage blows. He was half on and half off the bed when McGuire first looked in, but was onto the floor by the time Brown got through ransacking the room. Thus, in testifying that he saw Mr. Hensley on the floor, Mr. McGuire may have omitted at trial that he first saw him half on the floor and half on the bed, but it is clear that the statement that he saw him on the floor, bloodied, is not inconsistent with anything he said in his deposition. Moreover, competent defense counsel would not have wanted to bring out that Mr. Hensley was half on and half off the bed when Mr. McGuire first saw him, and at some point thereafter, he wriggled off the bed and into the floor, because that would have further supported the HAC aggravator which the State sought, and the trial judge found.

Brown's next complaint is that Mr. McGuire said at trial that Mr. Hensley mentioned he was a "homosexual." (IB 38). He claims that at deposition, Mr. McGuire said "he thought Hensley said he was bisexual." (IB 39). That is what McGuire said; it happened as follows:

[Mr. Quarles]: And all the reports say something

about he asked you about your sexual preference. Did that conversation take place?

[McGuire]: Yeah, he asked Paul his sexual preference.

[Mr. Quarles]: What did Paul say?

[McGuire]: He told him he was bisexual.

[Mr. Quarles]: What did Hensley say that he was?

[McGuire]: I think Hensley said he was bisexual.

[Mr. Quarles]: Is it possible he said he was homosexual?

[McGuire]: It's possible, yeah, he might have said that. I really wasn't paying attention.

(R 731.24).

Apparently in some unidentified "reports," Mr. Hensley's sexual preference had been referred to as homosexual. Thus, Mr. Quarles was being reasonable and prudent when he sought clarification on that point. As he said at the evidentiary hearing, it is clearly better to clear up facts, which are likely to be placed before the jury, before trial. Such a reasonable, tactical decision should not be second-guessed.

Moreover, there is no possibility that Brown was prejudiced within the meaning of *Strickland* by Mr. Quarles' decision not to try to present the subject deposition testimony as an inconsistent statement. Mr. Quarles significantly impeached Mr. McGuire at trial, and the little, additional value, if any, of

McGuire's having said "I think" he said bisexual at deposition and trial testimony that he said homosexual would hardly have affected the outcome of this case where Brown's guilt was overwhelmingly established.[7]

Brown next complains that at trial, Mr. McGuire said "he sold Appellant a state ID he had," while at deposition, he said "Appellant gave him some crack for it." (IB 39). This claim is also frivolous. So, McGuire sold his ID for crack. The testimony at trial was that the two men had been doing crack; McGuire did not testify at trial that he sold the ID and received money in return. Selling the ID for crack is just as much a sale as selling it for money. Had Mr. Quarles tried to make the "sold" it to Brown into an inconsistent statement, he would have been introducing into evidence at the guilt phase that Brown had the means to motivate McGuire to action through the sale of cocaine. Moreover, since selling cocaine is a crime, active criminal conduct by Brown near in time to the murder, but separate from it, would have been brought before the jury.[8] Brown has not met, and can not meet, his burden under

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[7] Mr. Quarles said that it did not seem "of any import to me" that he said homosexual rather than bisexual. (R 204).

[8] That Brown was here selling drugs would have undermined Brown's already incredible testimony at trial to the effect that he was

Strickland.

Finally, Brown leaves the alleged inconsistent statements involving either the Miller Interview or McGuire's Deposition and charges that Mr. Quarles' performance was deficient because he failed to establish, on cross, certain things Collateral Counsel deems important. He complains that Mr. Quarles "did not question McGuire at trial about his use of aliases." (IB 41). He says this would have shown "the jury that the identity of McGuire was questionable." (IB 41). The State wonders: To what end?

McGuire admitted being present, and he admitted to the two prior convictions. The allegations about a third felony conviction from Ohio and an escape status are just that - allegations, unproved after an evidentiary hearing. Certainly, there was no reason at trial for Mr. Quarles to prove Mr. McGuire's identity or to question it. Thus, this claim is legally insufficient and without merit. Brown has failed to carry his burden of pleading, much less proof, under *Strickland*.

Brown next complains that Mr. Quarles did not ask Mr. McGuire if he lived at and was familiar with the area in which Mr. Hensley's driver's license and phone card was found. (IB

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just here on vacation.

41). However, he admits that the ID of McGuire which was introduced into evidence at trial listed the Earl Street address as McGuire's residence. (IB 41). Moreover, he speculates that had Mr. Quarles asked the question of McGuire, McGuire would have denied it. (IB 42). His real complaint is that Mr. Quarles should have "emphasized" that information to the jury. (IB 42). "[O]ne may always identify shortcomings," *Cape v. Francis*, 741 F. 2d 1287, 1302 (11th Cir. 1984), *cert. denied*, 474 U.S. 911 (1985), and "representation by the most competent lawyer is no guarantee that all colorable issues will be raised." *Harmon v. Barton*, 894 F.2d 1268, 1275 (11th Cir. 1990), *cert. denied*, 11 S.Ct. 96 (1990).

Brown also complains that Mr. Quarles "did not question McGuire about exactly what he received from the State in return for his plea." (IB 42). He thinks Mr. Quarles was deficient in not questioning McGuire about:

(1) Receiving "a forty year sentence instead of a life sentence for second degree murder;"

(2) State dropping "armed robbery and grand theft charges arising out of . . . the Hensley murder;"

(3) "[N]ot having to pay state attorney costs, law enforcement costs and restitution;"

(4) That the deal could be set aside and "he could face

something other than a forty year sentence (death)."
(IB 43).

At trial, Mr. Quarles substantially impeached Mr. McGuire. He elicited that McGuire had his first degree murder charge reduced to second degree and that he received a 40 year prison sentence therefor. McGuire admitted that a requirement of that deal was that he testify truthfully at Brown's trial. Mr. McGuire also testified that as part of the deal, he got "the third knocked off . . ." and admitted that he had had three years to think about his testimony. (RDA 883, 891-92). Mr. Quarles also brought out on cross that Mr. McGuire did not get the $1,000 Brown had promised him for driving him to Tennessee and was not happy that Brown had given his ID to the gas station attendant. (RDA 893). He also got Mr. McGuire to admit that at the time of trial, he was still trying to get his sentence reduced or changed. (R 893).

At the evidentiary hearing, Mr. Quarles testified that he did not regard the costs of investigation or prosecution, totaling some $400, as significant, especially when he had a 40 year sentence to talk about. (R 210-11). Moreover, had he talked about an absence of probation, the State would have likely come back with testimony that the 40 years was a hefty upward departure from what McGuire qualified for under the

sentencing guidelines. (R 211). Moreover, Mr. Quarles was successful in showing that the State had reduced the term of imprisonment from 50 to 40 years, and had the State come back with what a substantial upward departure 40 years was, the value of the reduction from 50 to 40 years would have suffered. Moreover, Mr. Quarles felt "[t]o be perfectly honest with you, if, in fact, the jury believed Mr. McGuire regarding his participation in the crime, I thought Mr. McGuire was getting an extremely severe sentence . . .," and he did not want to risk dwelling on it too long. Regarding Collateral Counsel's charge that Mr. Quarles should have made the jury aware that McGuire could have gotten life for second degree murder (also a hefty upward departure), Mr. Quarles said the jury was made aware that he was charged with first degree murder and could have gotten the death penalty for that. (R 212-13).

Brown has utterly failed to show that Mr. Quarles was deficient in his questioning of Mr. McGuire. Thus, he has not carried his burden under *Strickland*.

Brown next complains that Mr. Quarles should have brought out in cross of McGuire that his statement to Agent Miller "was not made until Miller had interviewed McGuire for approximately two and a half to three hours." (IB 44). He admits that Mr. Quarles knew about that. (IB 44). He does not explain how that

failure to bring out that information prejudiced him. Brown has not alleged that the agents coerced McGuire into giving the recorded statement, or that they primed him, or that anything at all inappropriate occurred. Neither has he alleged that McGuire gave a different version of events during the unrecorded interview. Thus, his claim is pure speculation and is legally insufficient to support relief. *See Maharaj v. State*, 778 So. 2d 944, 951 (Fla. 2000), *cert. denied*, 1215 S.Ct. 2563 (2001).

Finally, Brown complains that Mr. Quarles "did not question McGuire concerning the shoes McGuire was wearing at the time of Hensley's death" and that his "clothes . . . were 'lost.'" (IB 49). He claims the value of this information is that the trial evidence established "there were at least twelve other shoe tracks at the scene . . .." (IB 45). Mr. McGuire admitted at trial that he was present. He also admitted that he stood in the doorway of Mr. Hensley's bedroom. The value of any shoe prints was to prove that the person was there. The shoe prints in Mr. Hensley's blood were consistent with those worn by Brown (and bore the "distinctive tennis shoe pattern" of the shoes Brown was wearing when arrested) and would not have been consistent with those McGuire wore.[9] (R 195). Mr. Quarles did

[9] Mr. McGuire said in the Miller Interview that he was wearing "casual loafer type shoes . . . almost dressy." (Exhibit 3 at

not need to ask Mr. McGuire about his shoes or clothes where Mr. McGuire admitted his presence and movement within the apartment. No information of value to Brown would have been supplied had Mr. Quarles asked the subject questions. Thus, again, Brown has utterly failed to satisfy his burden under *Strickland*.

That Mr. Quarles chose not to ask meaningless or baseless questions or make half-true or out-of-context arguments does not render his performance deficient. Twenty-six year veteran defender, Mr. Quarles, testified that based upon his years of experience and his understanding of the law of ineffective assistance of counsel, he did not believe that he had rendered deficient performance to Brown. (R 221). Neither did he believe that any of the allegations in the 3.850 motion, had they been established as deficient performance, would have caused a different result. (R 221). Brown's confession and the other overwhelming evidence of his guilt convicted him, and in Mr. Quarles' opinion, Brown's "trial testimony . . . is what caused the jury to recommend the death penalty" by a vote of 12 to 0. (R 213, 203). In the end, the evidence against Brown was simply so utterly overwhelming that he can not possibly meet the second prong of the *Strickland* ineffective assistance of counsel

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18). The soles had "some kind of tread . . . some kind of grip." *Id*.

standard. He is entitled to no relief.

2. Brown did not prove that Trial Counsel's performance was ineffective in that he failed to object to allegedly improper comments of the prosecutor during closing argument.

Brown complains that Trial Counsel Quarles "failed to object to the State's numerous comments in closing argument: of personal opinion or belief; mocking Appellant's testimony and/or the defense and which were inflammatory . . .." (IB 45-46). He claims that these comments "constituted fundamental error," (IB 47), thus permitting the issue to be raised on direct appeal. In so doing, he has conceded that this claim is procedurally barred. It has long been held that claims which could have been raised on direct appeal are procedurally barred in a postconviction Rule 3.850 motion. *Floyd v. State*, 27 Fla. L. Weekly S75, S78 n.9 (Fla. Jan. 17, 2002)[prosecutorial misconduct claim procedurally barred because could have been raised on direct appeal]; *Atwater v. State*, 788 So. 2d 223, 228-29 n.5 (Fla. 2001)[claim alleging prosecutor made inflammatory and improper comments and arguments procedurally barred because could have been raised on direct appeal].

Moreover, the claim is without merit. The law is clear that "attorneys are granted wide latitude in closing argument." *Ford v. State*, 802 So. 2d 1121, 1132 (Fla. 2001). *See Thomas v. State*, 748 So. 2d 970, 984 (Fla. 1999). "Logical inferences may

be drawn, and counsel is allowed to advance all legitimate arguments." *Thomas*, 748 So. 2d at 984. Control of comments made to a jury is a matter within the trial court's discretion. *Ford*, 802 So. 2d at 1132; *Occhicone v. State*, 570 So. 2d 902, 904 (Fla. 1990).

Brown complains that "[t]he prosecutor was mocking" him when he repeated Brown's trial testimony that he tried to comfort the victim, and he "'went down and asked him if he was okay.'" (IB 48). The State submits that the prosecutor's comment was entirely appropriate as it was a mere repetition of what Brown, himself, testified to at trial. Moreover, the prosecutor was merely comparing the wealth of evidence establishing that Brown savagely stabbed Mr. Hensley to death to the defense testimony that Brown was concerned for Mr. Hensley, tried to comfort him, and inquired whether the man he had just repeatedly stabbed with numerous ferocious blows from a knife plunged several inches into the victim's heart was "okay." The prosecutor is entitled to comment on the evidence, and that includes the evidence from the defendant's mouth from the witness stand at trial. There was no improper comment here.

Neither did the prosecutor ask the jury to consider him a "thirteenth juror." (IB 48-49). Allegedly improper comments must be viewed in context. *Muhammad v. State*, 782 So. 2d 343,

360 (Fla. 2001). *See Card v. State*, 803 So. 2d 613, 622 (Fla. 2001)[“We do not examine allegedly improper comments in isolation.”]. The prosecutor’s use of “we” and “us” in addressing the jury was not to place himself in league with the jurors; rather, the “we” and “us” clearly referenced all of those persons who had heard the evidence, and, in particular, Brown’s testimony from the witness stand. Thus, the comment was not improper.

Brown next complains that the prosecutor commented “that the victim was ‘gurgling’” and claims that statement “was not supported by the record.” (IB 49). Clearly, trial counsel does not agree with collateral counsel. In his rebuttal argument, trial counsel told the jury:

> And the prosecutor can stand up here and talk about gasping and gurgling and gasping and gurgling and gasping and gurgling to make everything just sound horrible when Paul Brown is on trial. There is no doubt that all of that happened. . . .

(RDA 1264).

Moreover, as this Court recited in its opinion of October 19, 1998, Witness McGuire testified that he saw the victim “lying on the floor covered in blood and ‘making sounds’ as if he was ‘struggling to breathe.’” *Brown*, 721 So. 2d at 276. Further, the medical examiner testified that the stab wounds went “through the chest wall and punctures (sic) the lung.”

(RDA 1083). The doctor explained that Mr. Hensley suffered "bleeding into the chest cavity and has had 600 or 700 cc's of blood in his chest cavity from that stab wound." *Id*. This was "certainly" consistent with Mr. Hensley lying on the floor, gasping for breath, and breathing heavily" during the last few minutes of his life. (RDA 1088). Clearly, the prosecutor's comment that the victim was gurgling was a reasonable inference from the evidence, and therefore, a fair comment on it. *See Robinson v. Moore*, 773 So. 2d 1, 6 (Fla. 2000)["prosecutor's remarks as to what the victims said did not materially depart from what the witness actually testified to or were proper inferences from the witness's testimony."].

Brown goes on to take exception to the prosecutor telling the jury that Brown's testimony "wasn't true," claiming this invaded their province. (IB 49). However, in context, it is clear that the "prosecutor is merely submitting to the jury a conclusion that he is arguing can be drawn from the evidence." *Craig v. State*, 510 So. 2d 857, 865 (Fla. 1987), *cert. denied*, 484 U. S. 1020 (1988). Such does not invade the province of the jury, but leaves it free "to decide what evidence and testimony was worthy of belief . . .." *Id*. The prosecutor is permitted to submit "his view of the evidence to them for consideration." *Id*.

Brown complains that the prosecutor gave his personal

opinion on the evidence on numerous occasions. (IB 49-58). For the most part, whenever the prosecutor used the term "I think" or "I don't think," he is accused of giving his personal opinion. *Id*. However, when the specific comments are evaluated in context, it is apparent that the prosecutor was merely arguing to the jury the conclusion that he, as the representative of the State, felt could be drawn from the evidence. As in *Craig*, he was "merely submitting his view of the evidence to them for consideration." 510 So. 2d at 865.

For example, when the prosecutor said "I think if someone is to be feared, they would not stand for that being done to them," he is commenting on the defense theory that McGuire was the real killer and Brown was afraid of him. The State's view of the evidence is that if Brown was afraid of McGuire, he would not have given the gas station attendant McGuire's ID when he left the station without paying. Certainly, this is a conclusion that could be drawn from the evidence presented at trial, and the application of common sense. Such argument is not improper.[10] *Craig*.

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[10] Neither is this argument a violation of the golden rule as Brown claims at page 52 of his initial brief. The golden rule is an invitation to the jury to put itself in the place of **the victim**, not in the defendant's place.

Brown complains that the prosecutor told the jury that he was not going talk "much about . . . the testimony of Mr. Brown here in court, because it's worthless" (IB 53) does not merit relief. The prosecutor was arguing Brown's credibility - or more accurately, his lack thereof - to the jury. Clearly, he is entitled to do so. *See generally, Henyard v. State*, 689 So. 2d 239, 250 (Fla. 1996)[prosecutor may comment on defendant's truthfulness or lack thereof and on his claims of innocence].

Moreover, in *Craig*, this Court said that even when the prosecutor refers to the defendant "as being a 'liar,'" it is permissible where "it is understood from the context that the charge is made with reference to testimony given by the person thus characterized, the prosecutor is merely submitting to the jury a conclusion that he is arguing can be drawn from the evidence." 510 So. 2d at 865.

In *Shellito v. State*, 701 So. 2d 837, 841 (Fla. 1997), *cert. denied*, 523 U.S. 1084 (1998), the defendant complained about comments made in guilt phase closing argument. According to him, "the prosecutor improperly referred to Shellito's motion as 'either an extremely distraught concerned mother or ... a blatant liar.'" 701 So. 2d at 841. Pointing out that the mother testified at trial and that another witness "testified to the contrary," this Court found that the comments were not

erroneous. *Id*. Rather, given the contradiction in the testimony, the prosecutor's comments were made "in the context of allowing the jury to determine her credibility." *Id*. The same can be said of many of the complained-of comments made in regard to Brown and his trial testimony.

Continuing with his long list of complaints about the prosecutor's closing argument, Brown quotes several more "I think" comments. Most are fair comments on the evidence; they are the prosecutor's submission to the jury of conclusions that could be drawn from the evidence. Same are appropriate under *Craig*. Moreover, to the extent that the prosecutor argues that McGuire should be believed over Brown, that is a credibility argument permissible under *Shellito*.[11] *See* 701 So. 2d at 841.

Brown then complains that the prosecutor told the jury that only one verdict was really appropriate "'and that is the top box guilty of both types of first-degree murder.'" (IB 57). This comment was made in explaining the verdict form to the jury. (RDA 1260-62). It comes near the end of the prosecutor's argument, and it is clear from the context that the prosecutor is submitting that the State's view of the evidence meets the

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[11] Moreover, the prosecutor makes it clear to the jury that the determination of credibility is their choice, i.e., "what you've got here is a choice . . .." (RDA 1250).

criteria of only one of the choices on that form - that of first degree murder. Such argument merely states the prosecutor's view of the evidence and submits that the charge has been proved based on that evidence. *See Craig*, 510 So. 2d at 865[prosecutor submitting his view of the evidence is permissible]. It is not unlike a "punishment must fit the crime" argument found to be a "simple and fair representation of the law" in *Ford v. State*, 802 So. 2d 1121, 1132 (Fla. 2001).

Brown next complains about the prosecutor's comments that the jury should return a verdict "'for the highest offense that has been proved beyond a reasonable doubt.'" (IB 57). This, too, is permissible as a "punishment must fit the crime" argument. *Ford*, 802 So. 2d at 1132.

Brown complains that the prosecutor told the jury "'[t]his is a premeditated, first-degree and first-degree felony murder case.'" (IB 57-58). Again, the prosecutor is allowed to argue his view of the evidence and submit that he has proved his case. *See Craig*, 510 So. 2d at 865.

Brown's next complaint is that the prosecutor argued to the jury that Brown "'was proud to be a murderer.'" (IB 58). This is undoubtedly a comment on the evidence at trial that after being arrested for the Tennessee bank robbery, Brown volunteered that he had murdered a man in Florida and added, "I'm a

murderer, not only a bank robber." (RDA 754-59). In fact, the next statement out of the prosecutor's mouth clarifies this; he said: "And Mr. Brown was proud to be a murderer. And he so stated." (RDA 1262). He also identified the date Brown made the statement, November 9, 1992, the day he made this statement to the FBI. *Id*. Thus, the prosecutor's argument was a fair inference from the evidence, and was, therefore, permissible. *See Craig*, 510 So. 2d at 860.

Finally, Brown complains that the prosecutor asked the jury to "'follow the law,'" and "'applying the evidence to the law, . . . announce through your verdict yes, that's right, Mr. Brown you are a murderer.'" (IB 58-59). This is a continuation of the previous argument, and was, alone and in conjunction with the previous argument, a reasonable reference to the evidence that Brown informed the FBI that he was not just a bank robber, but was also a murderer. Viewed in context, this comment was not a "send a message" argument, at all. Moreover, had it been such a comment, it did not amount to error. *See Freeman v. State*, 761 So. 2d 1055, 1069-70 (Fla. 2000).

The failure of trial counsel to object to the complained-of comments was not deficient performance for the reasons stated above. Moreover, at the evidentiary hearing, Mr. Quarles testified that he did not perceive there to be anything wrong

with argument by either attorney which used "I think." (R 207-08). In fact, since Mr. Quarles had repeatedly used that phrase in both his opening and closing statements, he felt that to have objected to the prosecutor's use of it would have seriously undermined his credibility with the jury. (R 208). Moreover, he did not feel that the use of that phrase was detrimental to Brown's case. (R 208). Seasoned defender Quarles testified that his philosophy about closing argument was that "unless it reaches a level where I believe that it is certainly clearly detrimental to my client's case, even though it may be somewhat incorrect or improper, I don't object." (R 209). This is a strategic decision made after many years of experience in weighing the cost benefits of objecting and potentially alienating the jury against the prejudice from any comments made. (R 209). Brown has not carried his burden to prove deficient performance, and thus his claim fails under *Strickland*.

Finally, even if some of the prosecutor's arguments "crossed the line of proper advocacy," none of them were objected to, and the evidence of Brown's guilt of the instant crime was overwhelming. Not only did McGuire testify in detail against him, Brown confessed to the FBI when he was arrested in Tennessee on bank robbery charges unrelated to the Florida

murder. (RDA 754-59). Moreover, when arrested, Brown had possession of the victim's white pickup truck and had a black tool box containing identifying information on Mr. Hensley, including pay stubs.[12] (RDA 742, 743). Also upon arrest, his tennis shoes were taken, and he commented he guessed they were taking "them in for evidence;" the tread on his shoes matched bloody footprints found at the scene. (RDA 749). Shoe prints in blood (from the same pair of shoes) were found on the floor in the hallway of the victim's home and in the bathroom where McGuire testified Brown washed Mr. Hensley's blood from himself after repeatedly stabbing him. (RDA 1008-10). The person making the shoe print "was present at the time of bloodshed . . .." (RDA 1021). The expert in "footwear impression analysis" testified that the shoes taken from Brown upon arrest were "positively" those that left the bloody shoe prints at the crime scene. (RDA 1036, 1040-41, 1045-47). Another expert established that Mr. Hensley's blood was present on Brown's shoes.[13] (RDA 1051, 1052-54). Finally, in his testimony at trial, Brown

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[12] Mr. McGuire had parted from Brown the day before, so desperate to leave that he took off on foot. (RDA 876).

[13] Only 1.5% of the Caucasian population would have Mr. Hensley's blood type. (RDA 1054).

admitted being present at the scene of Mr. Hensley's murder when it occurred. (RDA 1117-22). In fact, the evidence of guilt was so overwhelming that not a single guilt phase issue was raised on direct appeal (although five penalty phase issues were raised), and this Court, conducting its own sufficiency of the evidence review, upheld the conviction based on the evidence of Brown's guilt of Mr. Hensley's murder. *Brown v. State*, 721 So. 2d 274, 277 (Fla. 1998). Thus, the closing argument errors, if any, did not compromise the integrity of the judicial process and did not deprive Brown of a fair trial. *See Card v. State*, 803 So. 2d 613, 622 (Fla. 2001)[penalty phase closing argument]. Brown has not carried his burden to prove prejudice affecting the outcome of the guilt phase of his trial,[14] and thus his claim fails under *Strickland*.

He is entitled to no relief.

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[14] Although Brown insufficiently pled any deficient performance or prejudice in regard to the penalty phase from the closing argument made at the guilt phase, had he done so, he could not have met his burden to prove either. The jury issued a unanimous recommendation of death, and the trial court found four aggravators, including CCP and HAC, "two of the 'most serious aggravators . . ..'" *Card v. State*, 803 So. 2d 613, 623 (Fla. 2001), and only two nonstatutory mitigators. *Brown v. State*, 721 So. 2d 274, 277 (Fla. 1998). The complained-of comments, even if erroneous, clearly did not affect the outcome of the penalty phase proceeding, and therefore, no relief would be appropriate. *See Card*, 803 So. 2d at S622.

3. Brown did not prove that Trial Counsel's performance was ineffective in that he opened the door to testimony of an armed standoff after which Brown was arrested.

Brown complains that Trial Counsel Quarles opened the door to permit the State to introduce evidence that Brown had been engaged in a two-hour armed standoff with the FBI before being arrested in Tennessee. (IB 60). Mr. Quarles had asked Agent Childs if the FBI had given Brown alcohol to drink after arrest. (IB 60). According to Brown, his attorney had "no reason to get into the subject of . . . alcohol on the date of Appellant's arrest . . .." (IB 61).

At the evidentiary hearing, Mr. Quarles testified that he asked the question, knowing the answer would be that the FBI agent had given Brown whiskey to drink at the time of arrest. (R 181). He did so because he "was trying to indicate that he [Brown] was under the influence of alcohol or was bribed in some manner in order to obtain the statement." (R 149).

In *Dennis v. State*, 27 Fla. L. Weekly S101, S104 (Fla. Jan. 31, 2002), this Court reiterated the evidentiary concept of opening the door which "allows the admission of otherwise inadmissible testimony to 'qualify, explain, or limit' testimony or evidence previously admitted." (*quoting Rodriguez v. State*, 753 So. 2d 29, 42 (Fla. 2000)). *See Overton v. State*, 801 So. 2d 877, 900-01 (Fla. 2001). "The notion of 'opening the door' is

premised on 'considerations of fairness and the truth-seeking function of a trial.'" *Overton*, 801 So. 2d at 900. Moreover, the improper admission of evidence based upon a ruling that the door had been opened is subject to harmless error analysis. *Dennis*, 27 Fla. L. Weekly at S104.

In *Overton v. State*, trial counsel questioned a detective about a complaint filed against him by Overton "to bolster the defense's position that the detective was biased against the defendant and therefore had a motive to plant the evidence." 801 So. 2d at 901. The detective was permitted to testify to the facts underlying the complaint so as to explain why he had continued to hold Overton's vehicle because to have denied him the opportunity to do so "would have given rise to a false implication (i.e., that the detective continued to hold the vehicle because of some bias or improper motive against Mr. Overton and not because it was part of an ongoing criminal investigation)."[15] *Id*. This Court held that the trial judge did not abuse his discretion in permitting the detective's explanation pursuant to the "opening the door" principle. *Id*.

In the instant case, Brown sought to present evidence that

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[15] The "ongoing criminal investigation" was another murder case in which Overton was the chief suspect.

the FBI had given him alcohol to drink in connection with his arrest. Brown's counsel had a very specific purpose in seeking admission of that evidence and was seeking to cast doubt on the voluntariness and/or accuracy of the damaging statements Brown gave. Certainly, it was a highly unusual thing for any law enforcement agency to give a criminal defendant alcohol to drink, and without being permitted to explain why the agency had done so, the evidence would have given rise to the false implication that the alcohol affected Brown's admissions in some inappropriate manner. Thus, the trial judge did not abuse his discretion in permitting the agent to explain why the agency had given Brown alcohol to drink. *Overton*.

Finally, Brown's claim that "even if the jury did not apply this evidence towards the elements of the crime charged it used . . . [it] in its finding that Appellant should be sentenced to death" is wholly speculative, and therefore, legally insufficient. "Postconviction relief cannot be based on speculation or possibility." *Maharaj v. State*, 778 So. 2d 944, 951 (Fla. 2000). Moreover, any error was harmless in view of the overwhelming evidence of guilt and the strong aggravation compared with the weak mitigation. As the postconviction judge repeatedly pointed out, the single most damaging evidence, and the evidence that convicted Brown, was his own "oral and written

confession" which "was so detailed" and "dovetailed in with the physical facts," and the statement McGuire later gave. (R 439-40).

Moreover, any error was harmless due to the overwhelming evidence of Brown's guilt. Thus, he cannot show that any deficiency affected the outcome of the proceedings.

Having failed to show either deficient performance or prejudice, Brown has not carried his burden to prove that his trial counsel rendered him ineffective assistance. The trial court's denial of relief on this claim should be upheld.

4. Brown did not prove that Trial Counsel's performance was ineffective when he argued in the penalty phase that Brown had "turned bad."

Brown complains that Trial Counsel Quarles told the penalty phase jury that he "didn't grow up in Ozzie and Harriet's house," and "he was influenced by others and that he turned bad." (IB 62). He claims that this "was indirectly telling the jury that defendant deserved to be executed because he was a "'bad person.'" (IB 62).

At the evidentiary hearing, Mr. Quarles testified on this issue. He said that given Brown's detailed confessions to the FBI, he was convinced that if the jury believed what Brown said in the statements, he was going to be convicted of first-degree murder. (R 213). He saw the only question in the case as the

death penalty, and so, the trial became "penalty phase oriented . . . based on the evidence against Mr. Brown." (R 213). Brown insisted on testifying, and so, his nine prior felonies would come out. (R 214). Moreover, he had just been convicted of "a brutal knifing and slaying of a man for his truck. They knew he wasn't a nice guy . . .." (R 215-16).

So, to try to save Brown's life, Mr. Quarles used a well known defense tactic of trying to soften the blow of the bad character information the jury had, and would, hear. (R 215). He felt he had no other way to go, once, as the prosecutor put it, Brown "decided he had to tell his fairy tale on the stand." (R 215). He admitted that Brown was not raised in an ideal home, but in a bad one, and that the influence of others in his life had been bad, resulting in many bad characteristics. (R 215). This was done in an attempt to save Brown's life by being up-front with the jury that Brown had screwed up, but it was not really his fault. (R 216).

The State submits that this was a reasonable trial tactic, especially considering that Brown refused to permit Mr. Quarles to obtain any type of delay to further investigate and prepare. (R 217, 218, 219). It was also reasonable in light of the overwhelming evidence that Brown obviously had turned bad, at least in the context of the argument - the crimes against Mr.

Hensley. Thus, Mr. Quarles' performance was not deficient in this regard, and therefore, Brown has not met his burden under *Strickland*.

Case law well supports this conclusion. In *Atwater v. State*, 788 So. 2d 223, 229-31 (Fla. 2001), the defendant complained that during closing arguments, his attorney "forcefully argued in favor of second-degree murder, displayed gruesome crime scene photographs to the jury, argued the crime was one of malice, and rejected any consideration of manslaughter because the facts supported a more serious offense." In short, Atwater contended, his attorney acted "more like . . . a prosecutor than a defense attorney." 788 So. 2d at 229. Defense Counsel testified that "as an experienced attorney of seventeen years with five or six capital trials and over a hundred criminal trials, he did not believe Atwater had a chance at getting an acquittal. His strategy was to save Atwater's life." (emphasis added) *Id*. at 230.

This Court recognized that "[s]ometimes concession of guilt to some of the prosecutor's claims is good trial strategy and within defense counsel's discretion in order to gain credibility and acceptance of the jury." *Id*. at 230. Moreover,

> When faced with the duty of attempting to avoid the consequences of overwhelming evidence of the commission of an atrocious crime, such as a

> deliberate, considered killing without the remotest legal justification or excuse, it is commonly considered a good trial strategy for a defense counsel to make some halfway concessions to the truth in order to give the appearance of reasonableness and candor and to thereby gain credibility and jury acceptance of some more important position.

Id. This Court held that Atwater's trial counsel made a reasonable strategic decision, and "properly attempted to maintain credibility with the jury by being candid . . .." *Id*.

In the instant case, Mr. Quarles had some twenty-six years of experience in criminal defense. (R 189). He had worked as a public defender, doing work at both the trial and appellate levels. (R 189). "From '81 to about '83," he "handled the first-degree murder capital cases and other murder cases . . .," including doing at least one penalty phase alone. (R 189). He went into private practice in approximately 1987. (R 189). He handled "six to eight capital cases" after 1987, trying five of them.[16] (R 190). In addition, he had "handled three or four first-degree murder cases on appeal," one of which "was a capital appeal." (R 190). The total number of felony cases he has handled was estimated at 75-100. (R 190-91).

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[16] In fact, recent to the evidentiary hearing, Mr. Quarles had tried the "longest criminal trial in Volusia County, seven weeks." (R 190). His client had been charged with first-degree murder, and the death penalty was being sought. His client "was convicted of three third degree felonies." (R 190).

Mr. Quarles testified that he made these arguments to be “up front . . . about what kind of person he is,” hoping that he would build credibility with the jury for later arguments on less clear issues. (R 134). The trial judge found that the "Ozzie and Harriet" comment as well as the "turned bad" one were reasonable trial tactics in which Mr. Quarles “was just being honest with the jury.” (R 449, 450). Such trial tactics are legitimate modes of criminal defense. *See Ventura v. State*, 794 So. 2d 553, 567-68 (Fla. 2001). *See Johnson v. State*, 769 So. 2d 990, 1001 (Fla. 2000)[“Counsel’s strategic decisions will not be second-guessed on collateral attack.”].

Moreover, even had the performance been deficient, “there was no reasonable probability that the verdict would have otherwise been different.” (R 450). The court’s conclusions are well supported by the record.

When faced with the consequences of overwhelming evidence of guilt, especially including the devastating trial testimony of Brown,[17] Mr. Quarles made a reasonable strategic decision to

[17] Mr. Quarles testified: “I think that the trial testimony of Mr. Brown is what caused the jury to recommend the death penalty.” (R 203). Thus, he went into the penalty phase knowing that saving Brown’s life would be a very difficult thing. His reasonable strategic decision on how best to try to do that should not be second-guessed.

be up front with the jury about Brown's character. (R 203). Given Brown's incredible trial testimony, it was especially important to try to gain credibility with the jury and give the appearance of reasonableness and truth. Mr. Quarles argument was proper and not an abuse of his discretion as trial counsel. *Atwater*.

Moreover, had his performance been deficient in this regard, Brown has not demonstrated that he was prejudiced by that comment. Due to the overwhelming evidence of his guilt, the 12 to 0 jury recommendation of death, and the four strong aggravators, including HAC and CCP, compared to the weak mitigation, there is no possibility that this argument affected the outcome of the proceedings. *See Brown*, 721 So. 2d at 277, 282 n.4.

5. Brown did not prove that Trial Counsel's performance was ineffective when he did not object to the hearsay statements of the victim testified to by Brown's co-perpetrator, McGuire.

Brown complains that Trial Counsel Quarles did not object when McGuire testified to several statements Mr. Hensley made after the three men arrived at Mr. Hensley's apartment and before Brown killed him. (IB 63). They are:

(1) "Hensley started talking about sleeping arrangements." (IB 63). He said Brown could sleep with him in the bedroom, and McGuire could sleep on the couch. (IB 63-64).

(2) Hensley put his money on the table and said he did not know what their game was, but if they planned to rob him, there was his money, and they could have it. (IB 64).

(3) Hensley was a contractor and offered employment to Brown and McGuire.[18] (IB 65).

(4) Hensley said he was homosexual and asked what Brown's and McGuire's sexual preferences were. (IB 65).

(5) It was Hensley's suggestion that the three men go to his apartment. (IB 66).

(6) Hensley said he had to get up early for work. (IB 67).

At the evidentiary hearing, Mr. Quarles testified that he would have objected to any hearsay statements of Mr. Hensley had he "thought that they were damaging to my case . . .." (R 155). He did not regard the job offer statement as damaging. (R 155). Regarding the statements about homosexual and bisexual orientation, he did not feel that it was of "any import" and consistent with his non-confrontational lawyering style,[19] he

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[18] Brown argues this should not have been admitted, yet he argues in Point I that it should have been admitted on the issue of what McGuire discussed with Brown on the way up to Mr. Hensley's apartment.

[19] This style is one where the attorney "doesn't get confrontational and who doesn't object to everything and who doesn't want to look likes (sic) he's hiding anything," a "gentleman lawyer." (R 205). This method was the one Mr. Quarles

did not object as a matter of trial tactics. (R 204). That present counsel disagrees with Mr. Quarles as to the strategy employed does not meet the burden under *Strickland*. *See Cherry v. State*, 659 So. 2d 1069, 1073 (Fla. 1995). The "standard is not how present counsel would have, in hindsight, proceeded." *Id*.

Moreover, in *Blackwood v. State*, 777 So. 2d 399 (Fla. 2000), *cert. denied*, 122 S.Ct. 192 (2001), this Court held that a "witness's statements relaying the victim's comments to appellant were not hearsay." The victim's daughter testified to statements the Defendant made to her which included statements the victim made to him. 777 So. 2d at 407. This Court held that because "the victim's statements were offered to show the effect such statements had on appellant," they were admissible. *Id*. The statements were relevant to the defendant's "state of mind and knowledge" as they "were relevant to show both his motive and intent in committing murder." *Id*.

Brown claims that the "sleep with him in the bedroom" comment "caused the jury to believe that . . . Appellant is the one who stabbed Hensley to death rather than McGuire . . .." (IB 64). The State contends that what caused the jury to believe

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applied in Brown's case. (R 205).

that Brown stabbed Hensley to death was Brown's statements to the FBI, the physical evidence that corroborated same, including the shoe print of Brown's Patrick Ewing tennis shoes in Mr. Hensley's fresh blood, Mr. McGuire's testimony that it was Brown who stabbed Mr. Hensley, and the medical examiner's testimony that the slash to the throat was not fatal, but the stab wounds to the chest and back, which punctured the heart and lungs, were fatal. Thus, even if counsel's performance was deficient in not objecting to the complained-of statement, he was not prejudiced by the admission of the evidence, and therefore, he has not carried his burden to prove that his counsel rendered him ineffective assistance under *Strickland*.

Regarding the offer of money, Brown claims this "led the jury to believe Appellant should not have killed the victim after he offered his money." (IB at 65). Certainly, any reasonable jury would believe that Brown should not have killed Mr. Hensley for the money and the truck regardless of whether he offered the money or not. The State's contention was that Brown killed Hensley for his truck. That Hensley offered them money, but Brown killed him anyway was relevant to prove that Brown's motive in the crimes was to take Hensley's truck from him. This also disproves any claim that taking the truck was an afterthought! Thus, it was admissible evidence. *Blackwood*, 777

So. 2d at 407. *See Peede v. State*, 474 So. 2d 808, 816 (Fla. 1985), *cert. denied*, 477 U.S. 909 (1986)[victim's statements to daughter relevant to element of crime of kidnapping - showed would not voluntarily go with Defendant].

Hensley was a contractor and offered employment to Brown and McGuire. Brown complains that this was not relevant and tended to put the victim in a good light while putting Brown in a poor one. (IB 65). This evidence was relevant to show that Brown was not motivated by simple desperation for money. Had he been, he could have accepted the job and earned what he needed to get back to Tennessee. Rather, Brown's intent the entire time was to kill the man and take his vehicle, and neither the offer of a job, nor cash, would dissuade him from his murderous plan. Because this was relevant evidence, there was no deficiency in failing to object. *See Blackwood*, 777 So. 2d at 407.

Brown also complains that McGuire testified that Mr. Hensley said he was homosexual and asked what Brown's and McGuire's sexual preferences were. He adds that this "led the jury to believe that Appellant killed Hensley because he was a homosexual." (IB 66). However, Brown admits that "there was no evidence at trial that Appellant had any animosity, bias or prejudice against homosexuals." (IB 66). In fact, the evidence was to the contrary. Mr. McGuire testified that while he liked

to hang out at a popular biker bar, Brown preferred the gay bar. (RDA 859). Moreover, when Mr. Hensley asked the men what their sexual preferences were, Brown said he was "bisexual." (RDA 865). Thus, defense counsel may have decided not to object to this testimony to show that Brown did not have a motive to kill Mr. Hensley because of any dislike of homosexuals - just in case that lurked in some juror's mind.

More importantly, however, trial counsel did not object to any of the sexual orientation statements because, as he testified at the evidentiary hearing, he did not regard it to be of "any import" and consistent with his non-confrontational lawyering style, he did not object as a matter of trial tactics. (R 204). The same would apply to the statement that it was Mr. Hensley's suggestion that the three men go to his apartment and that he retired early because he had to get up early for work. By not objecting to such meaningless matters, Mr. Quarles gained badly needed credibility with the jury, so when he did object, the jury would sit up and take notice because it was a noteworthy event. This is a sound tactical reason, and the trial court did not err in ruling that Brown did not carry his burden under *Strickland* to establish deficient performance. Moreover, even if counsel's performance was deficient, he was not prejudiced by the admission of the evidence, and therefore,

he has not carried his burden to prove that his counsel rendered him ineffective assistance under *Strickland*.

Finally, the State notes Brown's claim that "but for this statement and the other hearsay statements, he may not have felt compelled to testify." (IB 67). Apparently, this is his attempt to demonstrate prejudice from the statements. Brown testified at the evidentiary hearing, and he did not testify that he would not have testified at trial had these alleged hearsay statements of Mr. Hensley not been admitted. (R 266-71). Having failed to present it below, he cannot now make such a representation in this Honorable Court - at least not with any more credibility than he had after testifying at his trial. He is entitled to no relief.

6. Brown did not prove that Trial Counsel's performance was ineffective when he did not object to the State's alleged use of leading questions on direct exam throughout the trial.

Brown complains that Trial Counsel Quarles "only objected one time to the States (sic) use of leading questions." (IB 68). He says that the use of such questions occurred "from the beginning to the end of trial . . .." (IB 68).

In *Robinson v. State*, 707 So. 2d 688, 700 (Fla. 1998), this Court rejected a "claim regarding leading questions" in a 3.850 proceeding like the instant one. In *Robinson*, this Court held the claim procedurally barred because it could have been raised

on direct appeal. The leading questions claim was "a substantive claim improperly recast in ineffective assistance language as a second appeal." 707 So. 2d at 697-98, 700 n.12.

The same is true of Brown's instant complaint. It is, therefore, procedurally barred. *Robinson*.

In the alternative, on the merits, it is clear from Mr. Quarles "one" objection that he had made an intentional decision to be "lenient" in regard to the State's use of leading questions. (IB 68). It is reasonable to assume that Mr. Quarles was aware of the leading questions, if they continued, and again decided not to object. Certainly, Brown has not carried his burden to prove otherwise.

In any event, "[p]ostconviction relief cannot be based on speculation or possibility." *Maharaj v. State*, 778 So. 2d 944, 951 (Fla. 2000). Moreover, any error in regard to the use of leading questions was harmless in view of the overwhelming evidence of guilt and the strong aggravation compared with the weak mitigation. As the postconviction judge repeatedly pointed out, the single most damaging evidence, and the evidence that convicted Brown, was his own "oral and written confession" which "was so detailed" and "dovetailed in with the physical facts," and the statement McGuire later gave. (R 439-40).

Having failed to show either deficient performance or

prejudice, Brown has not carried his burden to prove that his trial counsel rendered him ineffective assistance. The trial court's denial of relief on this claim should be upheld.

7. Brown did not prove that Trial Counsel's performance was ineffective when he did not object to the co-perpetrator's testimony that he was telling the truth.

Brown complains that Trial Counsel Quarles did not object when the State asked McGuire if he was telling the truth. (IB 73). He claims this was improper "bolstering the credibility" of the State's witness. (IB 73).

This claim is procedurally barred because it could have been raised on direct appeal. *See Overton v. State*, 801 So. 2d 877, 900-01 (Fla. 2001)[claim of improper bolstering of credibility of witness raised on direct appeal]; *Pomeranz v. State*, 703 So. 2d 465, 467, 474 n.1 (Fla. 1997)[same]; *Sims v. State*, 681 So. 2d 1112, 1116 (Fla. 1986)[same]. Is an improper attempt to have a second appeal under the guise of an ineffective assistance claim. *See Freeman v. State*, 761 So. 2d 1055, 1067 (Fla. 2000)[claim raised on direct appeal not appropriate in 3.850]; *Robinson v. State*, 707 So. 2d 688, 697-98 (Fla. 1988)[attempt to litigate substantive matters on 3.850 procedurally barred].

Had it been raised, however, it would not have merited relief. The evidence at issue was relevant and material to the jury's determination of McGuire's credibility. McGuire had given

inconsistent statements to law enforcement. The jury needed to observe McGuire as he explained which version was true in order to determine which testimony to believe and how much to credit it.

McGuire was asked whether he told the truth to the investigators when he was first asked about the murder. (RDA 878). He said he "told them the story that left me out of the motel where this took place altogether." (RDA 878). The prosecutor asked, "after they told you they didn't believe you, did you then tell them what occurred?" (RDA 878). McGuire responded, "Yes," and said he gave a truthful statement, adding ". . . I told them the truth . . .." (RDA 878). The prosecutor then asked: "And you're telling the truth here today?" (RDA 879). To which McGuire replied: "Yes, I am." (RDA 879).

On cross examination, Mr. Quarles got McGuire to admit he had lied to the detectives upon first report, and changed his story when they scared him. (RDA 889-90). He then went into the deal for McGuire's testimony against Brown. (RDA 891-92).

Unquestionably, the matter of McGuire's credibility was a matter for the jury. "All witnesses who testify during a trial place their credibility in issue." *Chandler v. State*, 702 So. 2d 186, 195 (Fla. 1997), *cert. denied*, 523 U.S. 1083 (1998). Thus, matters relevant to truthfulness of the witness' testimony may

be brought out at trial. *Id*. The State was entitled to bring out the evidence relevant to McGuire's credibility for the jury's determination. *See Brown v. State*, 721 So. 2d 274, 282 (Fla. 1998)[whether co-perpetrator is credible and weight to give his testimony is jury issue].

The version of events which McGuire told after being scared and coming clean was corroborated by the initial confession Brown gave to the FBI - a confession made before the FBI knew of any murder in Florida, much less any details, and before McGuire was arrested and gave any statement of any kind. Thus, that the second statement of McGuire was truthful would follow from the first statement of Brown. The failure to object to McGuire's testimony that his second statement was the truthful one did not constitute deficient performance, as an objection would only have underscored the inescapable conclusion which the content and order of the statements given by the co-perpetrators compelled.

Finally, had his attorney's performance been deficient in not objecting to McGuire's subject testimony, Brown has not demonstrated that he was prejudiced by same. Due to the overwhelming evidence of his guilt, the 12 to 0 jury recommendation of death, and the four strong aggravators, including HAC and CCP, compared to the weak mitigation, there is

no possibility that McGuire's testimony that he was being truthful affected the outcome of the proceedings. *See Brown*, 721 So. 2d at 277, 282 n.4.

This claim is without merit.

8. Brown did not prove that Trial Counsel's performance was ineffective when he commented in opening statement on Brown's "not a good life" lifestyle.

Brown complains that Trial Counsel Quarles should not have told his jury that he and McGuire "didn't play golf, he drank alcohol, did crack cocaine, that it was not a good life" and not "something . . . any of us would do." (IB 74). Collateral Counsel admits that this may have been an attempt by Mr. Quarles "to be 'honest' with the jury to establish some credibility." (IB 75). However, he believes that Mr. Quarles could have accomplished that goal with a slightly different argument and one which would not have made the jury believe that Brown "must be a bad person." (IB 75). He further complains that Mr. Quarles' statement regarding the lifestyle being something he would not do was "distancing himself from his own client . . .." (IB at 75).

Brown himself made it quite clear that he was a bad person when he bragged to the FBI in his initial statement that he was not only an armed robber, but also a murderer. Mr. Quarles' up-front admission of that fact to the jury did not unduly

prejudice Brown. In fact, any claim that this trial tactic prejudiced Brown in any way is entirely speculative. Relief on any such claim "cannot be based on speculation or possibility." *Maharaj v. State*, 778 So. 2d 944, 951 (Fla. 2000).

At the evidentiary hearing, Mr. Quarles made it clear that he was employing a well known and widely used defense trial tactic when he made these statements to the jury. This is a valid basis to reject any claim of deficient performance. See, Argument I, Sub-claim 4, *supra*, at 52-57. Moreover, the comments about not having lived a good life were part of the mitigation the defense ultimately tried to establish at penalty phase. That Mr. Quarles introduced this concept to the jury early on is not a knock against the well-experienced trial counsel. Rather, he hoped to build on this as the proceedings progressed - to gain much needed credibility - credibility which Brown shattered when he took the stand and testified to the "fairy tale" - as the postconviction hearing prosecutor referred to it. This was a legitimate trial tactic. *See Shere v. State*, 742 So. 2d 215, 220-21 (Fla. 1999). Present counsel's disagreement with Mr. Quarles' strategy does not meet the burden under *Strickland*. *See Cherry v. State*, 659 So. 2d at 1073.

Moreover, any error in the use of leading questions was harmless due to the overwhelming evidence of guilt and the

strong aggravation compared with the weak mitigation. As in *Ponticelli*, "there is no reasonable possibility that the verdict was affected by any improper bolstering of the witness' credibility which may have resulted from this line of questioning." *Ponticelli v. State*, 593 So. 2d 483, 489 (Fla. 1991), *vacated on other grounds*, 506 U.S. 802 (1992). As the postconviction judge repeatedly pointed out, the single most damaging evidence, and the evidence that convicted Brown, was his own "oral and written confession" which "was so detailed" and "dovetailed in with the physical facts," and the statement McGuire later gave. (R 439-40).

Having failed to show either deficient performance or prejudice, Brown has not carried his burden to prove that his trial counsel rendered him ineffective assistance. The trial court's denial of relief on this claim should be upheld.

9. Brown did not prove that Trial Counsel's performance was ineffective when he failed to make certain arguments to the jury.

Brown complains that Trial Counsel Quarles should have:

1. Argued that Mr. Hensley's ID card was found near McGuire's residence;

2. Argued that the blood on Brown's shoe was "consistent with" as opposed to "matched" the blood of the victim;

3. Counsel should not have argued that Brown got some

blood on his shoes;

4. Counsel should not have argued that Brown and McGuire "are not wonderful people by any means;"

5. Counsel should have cross-examined McGuire about the requirement that he testify "the way he did at trial . . .;"

6. Counsel should have brought out, and argued, that McGuire lost the clothes he was wearing on the night of the murder;

7. Counsel should have brought out, and argued, that McGuire's tape-recorded statements to law enforcement were not made "until Miller had interviewed McGuire for approximately two and one-half to three hours;"

8. Argued that the gun Brown had in his possession upon arrest was not introduced into evidence at trial;

9. Argued that "there were far more footprints at the scene of the crime that were not identified with Appellant" than were shown to be his;

10. Argued the same statements of McGuire which Brown contends were inconsistent in Argument I, Sub-claim 1, *supra*, at 21-38.

Most of this claim is redundant to other claims raised. In this Sub-claim 9, however, Brown turns them on their head and says not only was trial counsel ineffective for not objecting to

or presenting the various items of evidence, he was also ineffective for not making closing arguments on that unpresented, or unobjected to, evidence. The claim that counsel's performance was deficient for failing to argue these meritless matters is defeated by the arguments presented in the other areas. This is especially true in regard to claims 5 and 10 hereof - which were previously argued in Argument I, Sub-claim 1, *supra*, at 21-38.

Further, the State submits that trial counsel's performance can not be deficient for failing to argue matters not in evidence. Thus, claims 1, 6, and 7, which Brown avers in his initial brief were not established at trial, were not appropriate matters for closing argument.[20]

Brown's complaint that Mr. Quarles should have argued that the blood on Brown's shoe "matched" that of the victim, instead of that it was "consistent with" Mr. Hensley's blood, is inconsistent with his claim that Mr. Quarles should not have

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[20] Moreover, regarding the claim about Mr. Hensley's ID being found near Mr. McGuire's residence , Mr. Quarles regarded that as "[n]ot very" relevant. Indeed, the evidence at trial was that Brown had been living with Mr. McGuire for two weeks, (RDA 1114), and both men left the crime scene together in Mr. Hensley's truck after he was killed, and "collected our personal belongings and we left town." (RDA 875). Thus, the claim is also without merit.

argued that Brown got blood on his shoes - period. Moreover, such a distinction is meaningless in this case. Brown admitted that he was present at the scene of Mr. Hensley's murder and that there was blood all over the place. Other evidence also clearly established both. Thus, that the blood on Brown's shoes was Mr. Hensley's blood was overwhelmingly proved by the testimony of the expert, Ms. Tabor, that the blood on the shoe was consistent with Mr. Hensley's blood, by Brown's confessions that he was present at, and participated in, Mr. Hensley's murder, by the shoe imprints matching Brown's distinctive shoe pattern found in Mr. Hensley's fresh blood at the scene, and by Mr. McGuire's testimony regarding Brown's actions in Mr. Hensley's apartment. Mr. Quarles' argument which referred to the blood on Brown's shoe matching Mr. Hensley's instead of being "consistent with" the victim's blood was entirely supported by the evidence, and the fact that the Defense "were never claiming that Mr. Brown wasn't there, and there was blood all over the place, so he walked through the blood and there were prints of his." (R 131). In fact, Brown still admits that he "was at the scene of the crime . . .." (IB 81). Under these circumstances, counsel was not deficient in making the argument.

Moreover, that collateral counsel would have made a

different argument does not render trial counsel's argument deficient. *See Cherry v. State*, 659 So. 2d 1069, 1073 (Fla. 1995)[That present counsel disagrees as to the strategy employed does not meet the burden under *Strickland*; the "standard is not how present counsel would have, in hindsight, proceeded."]; *Card v. State*, 497 So. 2d 1169, 1176 (Fla. 1986), *cert. denied*, 481 U.S. 1059 (1987)[counsel not ineffective for failure to obtain and use certain evidence where some of it was presented "just not in the manner appellate counsel feels was most effective."]. Indeed, impeachment evidence which would be largely cumulative does not provide a basis for an ineffective assistance claim. *See Ventura v. State*, 794 So. 2d 553, 567 (Fla. 2001). Further, due to the overwhelming evidence establishing that the blood on Brown's shoe was Mr. Hensley's blood, Brown can show no prejudice in regard to this allegedly deficient argument. Thus, he has not met the *Strickland* standard.

Neither does Brown's complaint that his counsel distanced himself from him and lessened the burden of proof with his argument merit relief. He objects that Mr. Quarles told the jury that Brown and McGuire "are not wonderful people." (IB 78). Clearly, the facts of the case had well established that point, and more! Counsel's attempt to take some of the punch from the overwhelming evidence of just how "not wonderful" these

people were by being “up front” with the jury was a trial tactic which should not be second-guessed by this Court.[21] (R 434). See Argument I, Sub-claim 4, *supra*, at 52-57.

Moreover, even assuming that the performance was deficient in making this argument, Brown has not shown any prejudice meriting relief. Due to the overwhelming evidence of his guilt, the jury’s 12 to 0 death recommendation, and the four strong aggravators, including HAC and CCP, weighed against scant non-statutory mitigation, there is no possibility that any deficient performance affected the outcome. Therefore, Brown is entitled to no relief. *See Thompson v. Haley*, 255 F. 3d 1292, 1303-04 (11th Cir. 2001)[claim that trial counsel’s closing argument distanced himself from client and dehumanized him before the jury insufficient to merit relief under *Strickland* because “in view of the entire record,” there was “no reasonable probability that Counsel’s performance affected either the jury’s verdict . . . or recommendation of death.”].

Brown’s complaint that Mr. Quarles did not sufficiently argue the prejudicial effect of Mr. McGuire’s deal with the

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[21] Mr. Quarles specifically considered the potential effect of such statements - that they might distance him from his client, but made a tactical decision that the potential benefit to Brown in being “honest with the jury” and getting the lifestyle it was unfamiliar with “out in the open” was worth the risk. (R 117).

State is likewise without merit. See Argument I, Sub-claim 1, *supra*, at 34-36. The record is clear that Mr. Quarles well established the plea agreement with the State. Mr. Quarles' vigorous cross-examination of Mr. McGuire on this issue was more than sufficient to meet the threshold of professional performance.

Moreover, even if the performance was deficient, Brown has failed to, and cannot, show any prejudice. There is no reasonable possibility, much less a probability, that the outcome would have been different if Mr. Quarles had gone into the complained-of specifics of the deal. Accordingly, Brown has failed to carry his burden under *Strickland*, and the trial court's rejection of this claim of ineffective assistance of counsel should be affirmed.

Brown complains that trial counsel failed to argue that the gun he had when arrested was not introduced into evidence. (IB 81). He claims that somehow this would have "affected the credibility of the FBI agents who testified" to Brown's confession. (IB 81). The State is at a loss to understand how pointing out that the gun (which was not the murder weapon) was not entered into evidence in this case undermined, or affected, the Agents' credibility? Certainly, any deficiency in performance for failure to make such an argument would not have

affected the outcome. Brown has failed to adequately plead, much less prove his claim under *Strickland*.

In a claim similar to the preceding, Brown complains that trial counsel failed to argue that "there were far more footprints at the scene of the crime that were not identified with Appellant." (IB 81). He never specifies what prejudice this "omission" caused him, but alleges that although he was at the crime scene, "so was McGuire." (IB 81-82). That Mr. McGuire was present was never in question; thus, the State is at a loss to understand how pointing out that the unidentified footprints at the scene might have been McGuire's would have benefited Brown. Neither would the fact that other unidentified footprints were present have produced any type of reasonable doubt that Brown was not guilty of this heinous murder to which he so specifically confessed. Certainly, any deficiency in performance for failure to make such an argument would not have affected the outcome. Brown has failed to adequately plead, much less prove his claim under Strickland.

Finally, in claim 5, Brown complains that Mr. Quarles did not go into the specifics of the plea bargain with McGuire which he claims included that if McGuire failed to testify "the way he did at trial . . ., the State would set aside his plea . . . and try him . . .." (IB 79). The record does not support that

claim. At trial, the State explained that the deal was that McGuire would testify truthfully, and that the State

> would have the ability to set aside the plea, if his testimony at trial would be substantially different. I'm talking a 180-degree turnaround from what he has already admitted to in his statements to police, as well as what his proffer would be today."

(RDA 710). Clearly, the State did not reserve any right to prosecute McGuire for any differences, but only in the event of a complete "180-degree turnaround" from what he had previously identified as the truth. Thus, to claim, as Brown does, that the State would set aside McGuire's plea if he did not testify "the way he did at trial" is incorrect.

The record is clear that Mr. Quarles did establish McGuire's motive to lie. He detailed the deal with the State and secured admissions from McGuire that he was unhappy with Brown for not paying him the money he had promised and for giving McGuire's ID to the gas station attendant. See Argument I, Sub-claim 1, *supra*, at 34-36. Brown has not carried his burden to prove deficient performance, much less prejudice under *Strickland*. *See Robinson v. State*, 707 So. 2d 688, 699-700 (Fla. 1998)[claim that trial counsel was ineffective because he did not highlight and detail the co-perpetrator's deal with the State insufficient, where counsel did establish the existence of a deal furnishing a motive to lie]. He is entitled to no relief.

10. Brown did not prove that Trial Counsel's performance was ineffective when he allegedly conceded in rebuttal argument that the victim "was gurgling" on his own blood.

Brown complains that Trial Counsel Quarles should not have told the jury, on rebuttal closing argument, that Mr. Hensley "was 'gurgling' on his own blood.'" (IB 82). He claims this was wrong because "the evidence at trial did not support this statement . . .." (IB 82). The State responds that the evidence at trial overwhelmingly supported this statement. Collateral Counsel's claim to the contrary is frivolous!

At trial, McGuire described the horrific scene that met his eyes when he looked into Mr. Hensley's bedroom after hearing "stabbing sounds" coming from there. Blood was everywhere, and he saw Mr. Hensley making sounds "like he was struggling to breathe, gasping his last breaths." (RDA 871). The Medical Examiner testified that Mr. Hensley moved around a lot while being stabbed some 9 or 10 times. (RDA 1087, 1088). He did not "become unconscious or die for a couple of minutes." (RDA 1088). Moreover, the doctor opined that "gasping for breath, and breathing heavily" was "certainly" consistent with the last few minutes of Mr. Hensley's life. (R 1088). Certainly, the prosecutor was entitled to argue to the jury that a reasonable inference from this evidence included that Mr. Hensley was "gurgling." *Craig*.

Mr. Quarles' complained-of comment was in response to the prosecutor's argument that Mr. Hensley was gurgling. Mr. Quarles was attempting to denigrate the prosecutor's argument, trying to paint the comment on the evidence as an attempt to inflame the jury by bringing such facts before them. (R 142). He said: "and the prosecutor can stand up here and talk about gasping and gurgling and gasping and gurgling to make everything just sound horrible . . .." (IB 83). Certainly, Mr. Quarles could not legitimately argue with the facts, so he tried to distract the jury from those facts by accusing the State of being overly dramatic. As he put it, "I made the statement . . . in an attempt to indicate to the jury that prosecution was having to use inflammatory language because they didn't have that good of a factual case." (R 142). Such a tactic is a reasonable, strategic one which should not be second-guessed by this Court. *See Johnson v. State*, 769 So. 2d 990, 1001 (Fla. 2000)["Counsel's strategic decisions will not be second-guessed on collateral attack."].

Moreover, even if Mr. Quarles' comment was deficient performance, Brown has not carried his burden to establish that he was prejudiced from the deficiency. In his brief, he claims that the prejudice is that "the statements of the prosecutor were not supported by the record and were highly inflammatory"

and “were made only to inflame the passions of the jury.” (IB 83). It is obvious that what Mr. Quarles was doing was trying to diffuse any such attempt by the prosecutor. It is Mr. Quarles’ comment, not the prosecutor’s, which is the subject of this claim. Thus, Brown has not alleged, much less demonstrated, that he was prejudiced by Mr. Quarles’ comment in rebuttal closing argument.

Having utterly failed to carry his burden of proof under *Strickland*, Brown is entitled to no relief.

11. Brown did not prove that Trial Counsel’s performance was ineffective when he failed to object to allegedly irrelevant and prejudicial testimony relating to the condition of the victim.

Brown complains that Trial Counsel Quarles should have objected when a State witness, who was identifying the victim, commented on the “condition of the victim.” (IB 84). Mr. Schlaupitz was asked if the person in the photo was Mr. Hensley, and he replied: “In slightly worse condition then I have ever seen him. But yes, it is. Yes, sir.” (IB 84). Brown claims that this evidence should not have been admitted because it is irrelevant. (IB 84).

The State submits that this issue is procedurally barred as it could have been raised on direct appeal. *See Rose v. State*, 787 So. 2d 786, 799 (Fla. 2001)[extraneous comments of State witnesses considered on direct appeal]. Raising it here is an

attempt to have another appeal under the guise of ineffective assistance of counsel. "[I]nterjecting allegations of ineffective assistance of counsel . . . to overcome a procedural bar" is inappropriate, and claims which should have been raised on direct appeal will not be entertained in a 3.850 motion recasting them in terms of ineffective trial counsel. *Ventura v. State*, 794 So. 2d 553, 559 n.6 (Fla. 2001); *Arbelaez v. State*, 775 So. 2d 909, 915 (Fla. 2001)[Defendant "may not relitigate procedurally barred claims by couching them in terms of ineffective assistance of counsel."].

Even if the claim is not procedurally barred, it lacks merit. The single comment was not sufficient to inflame the passions of the jury, but if it were, that would provide a very good reason for trial counsel not to object. He would not want to emphasize the comment, or draw the jury's attention to it.

A trial judge's ruling admitting photographic evidence will be upheld unless the defendant shows a clear abuse of judicial discretion in admitting the photo. *Jones v. Moore*, 794 So. 2d 579, 587 (Fla. 2001). "[A]utopsy photographs are relevant to show the manner of death, location of wounds, and identity of the victim . . .."[22] *Id*. Moreover, "[p]hotos that are relevant

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[22] According to collateral counsel, the photo in this instance was apparently one from the crime scene, not the autopsy. (R 179).

are admissible so long as their shocking nature does not defeat their relevance." *Id*.

It cannot be seriously contended that the State was not permitted to establish the identity of the victim. Clearly, that is what it did through the testimony of Mr. Schlaupitz and the photograph. This evidence was relevant.

Despite the implication of the claim on appeal, there is no evidence that the State sought to elicit the complained-of portion of Mr. Schlaupitz's testimony. The State simply asked: "Is that the Roger Hensley you've been testifying about?" (RDA 701). Certainly, the question asked by the State sought relevant, admissible evidence. The answer, while including some extraneous information, answered the question. The trial judge did not abuse his discretion in admitting the evidence, and Brown has not carried his burden to show that Mr. Quarles was deficient in failing to call attention to the extraneous comment.

In fact, Mr. Quarles testified at the evidentiary hearing that he made a tactical decision not to object. Admitting that the complained-of comment was prejudicial, Mr. Quarles explained that although the subject part of the answer may not have been relevant, asking the court to instruct the jury "please

disregard the fact that he said he's in worse shape than he's ever been" would only draw attention to the prejudicial nature of the comment and would do more harm than good. (R 179-80). This Court should not second-guess such decisions. *See Johnson v. State*, 769 So. 2d 990, 1001 (Fla. 2000)["Counsel's strategic decisions will not be second-guessed on collateral attack."].

Moreover, any error in regard to the extraneous comment was harmless. *See Rose*, 787 So. 2d at 799 n.6[harmless error analysis applicable]. In this case, there is no reasonable possibility, much less probability, that this comment affected the outcome. Brown has utterly failed to meet his burden under *Strickland*. See R 446-47. He is entitled to no relief.

12. Brown did not prove that Trial Counsel's performance was ineffective when he failed to object to allegedly improper comments and argument of the prosecutor during opening statement.

Brown complains that Trial Counsel Quarles should have objected to several comments made during opening statement by the prosecutor. (IB 85). He complains about:

(1) "the fact of the matter will be after you hear all the evidence, I'm convinced you'll return a verdict of guilty . . .;"

(2) "I'm convinced when you hear all the evidence-you don't have to find a person guilty of both necessarily-but I'm

convinced you'll find that Mr. Brown is guilty of first-degree murder . . .;"

(3) "there is Mr. Hensley laying there on the floor, bloody mess everywhere;" and,

(4) Mr. Hensley was "laying there gasping for breath, gurgling, choking, basically dying there on the floor."

(IB at 85, 86). Brown claims that the first quoted statements were the personal opinion of the prosecutor as to the guilt of the defendant and were also improper argument, and he complains that the later two were improper argument. (IB at 85-87). Moreover, in regard to the first two comments, he contends that they "constituted fundamental error." (IB 85, 86).

To the extent that Brown argues that the first two comments constituted fundamental error, they clearly should have been raised on direct appeal. They are, therefore, procedurally barred in this proceeding. *See Robinson v. State*, 707 So. 2d 688, 697-98, 700 n. 17, 18 (Fla. 1998)[failure to object to closing argument]. However, as this Court will note in considering the State's response to the petition for writ of habeas corpus filed contemporaneously herewith, the State contends that these statements were not only not fundamental error, they were not error at all. See Case No. SC01-2713, Argument 1, at 4-20. Rather, they were proper comments on the

evidence which the prosecutor reasonably expected to, and did, present at trial. *Id*. "The State clearly is entitled to present its version of the facts in its opening statement." *Rhodes v. State*, 638 So. 2d 920, 925 (Fla. 1994), *cert. denied*, 513 U.S. 1046 (1994).

Moreover, "it is within the trial judge's discretion to determine when an attorney's argument is improper . . .." *Watson v. State*, 651 So. 2d 1159, 1163 (Fla. 1994), *cert. denied*, 516 U.S. 852 (1995). In *Watson*, this Court rejected the claim that the State's opening statement was improper, and in so doing declared that such statement is argument. Argument in an opening statement is not improper - at least not when it is related to the State's version of the facts it expects to present at trial. *Watson*; *Rhodes*. *See also Freeman v. State*, 761 So. 2d. 1055, 1063, 1064 (Fla. 2000)[where the defense's opening comments to the jury were referred to as "opening argument" and "opening statement," interchangeably]. Thus, like comments (1) and (2) above, comments (3) and (4) were proper comments on the evidence, and therefore, were appropriate in opening statement. *Rhodes*, 638 So. 2d at 925.

Brown has utterly failed to carry his burden to prove deficient performance, much less prejudice, under *Strickland*. He is entitled to no relief.

13. Brown did not prove that Trial Counsel's performance was ineffective when he failed to take the deposition of FBI Agent Childs prior to trial.

Brown complains that Trial Counsel Quarles should have taken a pre-trial deposition of FBI Agent Robert Childs, to whom Brown confessed. (IB 87). He claims that had he done so, he would have found out that Brown "was not given any substantial amount of alcohol" upon arrest. (IB 87). He says had Mr. Quarles known that, he "would not have asked the question which opened the door" to evidence of a standoff with authorities. (IB 87).

At trial, Mr. Quarles moved to suppress Brown's statements to the FBI. (RDA 33). At the suppression hearing, Agent Childs testified that he transported Brown from the scene of his arrest in Tennessee to jail. He said that Brown talked on the trip to the jail and at the jail. (RDA 43, 44). His comments included matters relevant to Brown's trial for Mr. Hensley's murder, including that law enforcement would "want my shoes for evidence." (RDA 45). Mr. Quarles inquired what time Brown was arrested on Sunday afternoon, and Agent Childs responded "around 3:00." (RDA 62). He was picked up "at approximately 9:30" the next morning and transported to the FBI office. (RDA 63). At the FBI office, Brown made the detailed statements regarding Mr. Hensley's murder.

Although Agent Childs was not asked about any alcohol at

this hearing, the second agent to testify, Agent Grant, was. On cross, Mr. Quarles asked him if he was aware of any alcohol being provided to Brown upon arrest. (RDA 75). Agent Grant responded: "I was told that the the (sic) farm house . . . when the agents were there to arrest Mr. Brown, as part of the negotiation to get Mr. Brown to surrender peacefully, he was offered a shot of whiskey . . .." (RDA 75). That was given to him. (RDA 75).

Thus, Mr. Quarles had his opportunity to inquire about the alcohol pre-trial, and he did do so. He could have asked anything at the suppression hearing which he could have asked at deposition. Clearly, he could have asked for more detail about the quantity of alcohol given to Brown. In fact, he was told what the quantity was - "a shot" which is a standard measure for liquor. Thus, Mr. Quarles learned, prior to trial, the amount of alcohol given his client as well as the time in which it was ingested and the time of the statements against his interest. Since he had his opportunity to get the same information which Brown now says he should have gotten with a deposition, Brown has failed to carry his burden to prove deficient performance in not taking the deposition of Agent Childs. *Cf. Aldridge v. State*, 425 So. 2d 1132, 1136 (Fla. 1982), *cert. denied*, 461 U.S. 939 (1983)[where no depositions were taken, performance not

deficient where had other sworn statements from the witnesses and nothing showed how depositions would have gotten information affecting the outcome].

Moreover, the State suggests that Mr. Quarles' trial question was not necessarily deficient. Brown was given a measurable amount of alcohol, shortly before he gave the incriminating statement about his shoes being used for evidence against him. The time frame between the taking of the shot of alcohol and the statement about his shoes may have supported an argument that Brown was under the influence when he made the statement.

At the evidentiary hearing, Mr. Quarles testified that he asked the question, knowing the answer would be that the FBI agent had given Brown whiskey to drink at the time of arrest. (R 181). He did so because he “was trying to indicate that he [Brown] was under the influence of alcohol or was bribed in some manner in order to obtain the statement.” (R 149). Additionally, he vaguely recalled having some indication that the combination of alcohol and cocaine which had been given to Brown earlier at his Uncle’s home, had some effect on the giving of the statements. (R 150).

Thus, Brown’s counsel had a very specific purpose in seeking admission of that evidence and was trying to cast doubt on the

voluntariness and/or accuracy of the damaging statements Brown made. Certainly, it was a highly unusual thing for any law enforcement agency to give a criminal defendant alcohol to drink. That the question did not produce the effect envisioned by Mr. Quarles when he asked it does not render his performance deficient. *See Alford v. Wainwright*, 725 F. 2d 1282, 1289 (11th Cir. 1984), *cert. denied*, 469 U.S. 956 (1984)[Trial Counsel "cannot be faulted simply because he did not succeed."]. Neither does collateral counsel's disagreement with Mr. Quarles handling of the defense of Brown provide a basis for such a claim. *See Cherry v. State*, 659 So. 2d 1069, 1073 (Fla. 1995)[Present counsel's disagreement with Mr. Quarles' strategy does not meet the burden under *Strickland*.].

More importantly, however, even if Mr. Quarles' performance was deficient in asking the "alcohol" question, Brown has not carried his burden to prove that the outcome would have been different had the jury not learned that he was arrested after a standoff. The testimony regarding this was very limited by the trial judge, and the State's witness did not exceed the limitations set by the Court. Moreover, there is no allegation that the State improperly used the testimony about the standoff in argument.

In view of the overwhelming evidence of guilt, as set out

by the trial judge below, (R 439-40), and throughout this answer brief above, there is no reasonable probability that the testimony affected the outcome.

14. Brown did not prove that Trial Counsel's performance was ineffective when he failed to bring out that Brown did not confess to some State witnesses.

Brown complains that Trial Counsel Quarles should have elicited testimony from two other law enforcement agents involved in the case that Brown "did not confess to them." (IB 89). According to Collateral Counsel, "this would have been a trial tactic to combat the confession testimony of the FBI agents." (IB 89). Collateral Counsel makes the absurd claim that Mr. Quarles should have asked this of each and every State witness, except the FBI Agents Brown confessed to and Mr. McGuire. (IB 90). He claims this would have made Mr. Quarles' closing argument "about the importance or lack of importance of witnesses even stronger." (IB 90).

This claim is completely devoid of any merit whatsoever. In *Cave v. State*, 529 So. 2d 293, 297 (Fla. 1988), this Court made it clear that the *Strickland* standard for ineffective assistance of trial counsel applies to alleged omissions. The defendant "must first identify the specific omission and show that counsel's performance falls outside the wide range of reasonable assistance." 529 So. 2d at 297. The "distorting

effects of hindsight" must be eliminated "by evaluating the performance from counsel's perspective at the time . . .." *Id*. It is Brown's "burden . . . to show that counsel was ineffective" by omission. *Id*. If he meets that, he must also show "an adverse effect so severe that there is a reasonable probability that the results would have been different except for the inadequate performance." *Id*.

In *Cave*, this Court skipped over the deficient performance prong and went straight to the prejudice requirement, making it clear that in cases of claimed omission, as well as in other cases, if the defendant fails to carry his burden of proof in regard to either prong of *Strickland*, he fails so completely that the other prong need not even be considered. *Id*. As a result, this Court did "not tarry over this claim" in Cave, but went on to the prejudice component. *Id*. In regard thereto, this Court said:

> Appellant gave a detailed confession of the armed robbery, kidnapping, and murder of the victim. The only denial was that he did not personally kill the victim which was irrelevant to the charge. This confession was corroborated by substantial evidence. Even if we were to agree that counsel's performance was inadequate, which we do not, there is no showing of a reasonable probability that the performance contributed to the conviction.

Id.

In Brown's case, Brown gave a detailed confession to FBI

Agents who did not even know of the fact of the Florida murder, much less any details of it. The details Brown gave them precisely matched all of the physical evidence from the scene as well as the later-given statement (and trial testimony) given by co-perpetrator Scott McGuire (with the exception that McGuire denied cutting Mr. Hensley's throat). Moreover, Brown's shoes, which he admitted were evidence against him, were linked to the bloody shoe prints found at the scene of the murder and the testimony established that those shoe prints were made at the time of the murder before the blood had coagulated. Moreover, Brown was found in possession of Mr. Hensley's truck, and McGuire had left the day before on foot. Even at trial, Brown did not deny his presence at the scene, although he recounted a version of events which were so implausible that in the opinion of Mr. Quarles it contributed to his conviction and especially to his death sentence. Thus, as in Cave, there is no need to even consider the sufficiency of the performance, as Brown can in no manner meet the prejudice prong.[23] He is entitled to no

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[23] However, the State contends that Brown has not shown that Mr. Quarles' performance was deficient in regard to not questioning each State witness to elicit that Brown did not confess to them. Neither has he shown that had Mr. Quarles so questioned each witness, they would have said that he did not confess to them. Moreover, even if all had testified that Brown did not confess to them, that would do nothing to lessen the import of the overwhelming evidence of Brown's guilt and the propriety of the

relief.

ARGUMENT II

BROWN HAS NOT CARRIED HIS BURDEN TO PROVE THAT THE TRIAL COURT ERRED IN DENYING HIS CLAIM OF NEWLY DISCOVERED EVIDENCE.

The general standard of review of newly discovered evidence claims is stated in *Rogers v. State*, 783 So. 2d 980 (Fla. 2001).

> As long as the trial court's finding are supported by competent substantial evidence, 'this Court will not substitute its own judgment for that of the trial court on question of fact, likewise of the credibility of the witnesses as well as the weight to be given to the evidence by the trial court.'"

783 So. 2d at 1003-04. Where "the trial court properly applied the law," and the "court's findings are supported by competent substantial evidence," this Court's review ends with an affirmance of the result in the lower court. *Id*.

It is Brown's burden to prove that the subject evidence is newly discovered. He must prove it was "unknown by the trial court, by the party, or by counsel at the time of trial, and it must appear that defendant or his counsel could not have known [of it] by the use of diligence." *Jones v. State*, 591 So. 2d 911, 916 (Fla. 1991)[*quoting Hallman v. State*, 371 So. 2d 482,

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death sentence.

485 (Fla. 1979)]. A newly discovered evidence claim "must be brought within one year of the date such evidence was discovered or could have been discovered through the exercise of due diligence." *Glock v. Moore*, 776 So. 2d 243, 251 (Fla. 2001).

Moreover, newly discovered evidence only warrants relief where it would probably produce an acquittal in the event of a retrial. *Sims v. State*, 754 So. 2d 657, 660 (Fla. 2000). "Assuming the defendant's evidence meets the threshold requirement by qualifying as newly discovered, no relief is warranted if the evidence would not be admissible at trial." *Id*. If it is admissible for impeachment purposes, "the next step would be to . . . compare it with the evidence introduced at trial." *Id*. at 662. Such evidence may still be harmless. *Id*.

It is Brown's burden to prove that the Ohio conviction of Scott Keenum is newly discovered evidence. To do so, he must establish that his trial attorney could not have learned of the Keenum conviction with the exercise of due diligence. He did not carry that burden, and therefore, is entitled to no relief.

Brown identifies the newly discovered evidence as a "Ohio Warrant of Arrest and Hold Order" for Scott Keenum "AKA Scott Jason McGuire . . .." (IB 49; R 695). He concludes based on this document that Scott Jason McGuire involved in the instant case is one and the same as Scott Keenum and "was an escaped

convict" at the time of Mr. Hensley's murder on November 6, 1992. (IB 92). According to Brown's allegations, the escape was from confinement for the crime of burglary, which he claims McGuire was convicted of on December 12, 1986, although the conviction, he concedes, is in the name of Scott Keenum. (IB 92). He further claims that "the state of Ohio placed a hold on Scott Jason McGuire with the Florida Department of Corrections . . .," and he discovered it when looking on the internet website for the Florida DOC. (IB 92-93).

According to the Florida DOC website information attached to the amended motion, (R 687-89), Ohio placed a detainer on Mr. McGuire on February 8, 2000. (R 688). Thus, this information was made a matter of public record at that time, and the one year statute of limitations for the filing of Rule 3.850 relief based on newly discovered evidence began to run. Under that rule, Brown had until February 7, 2001 to file the claim. The instant issue was first raised in the amended 3.850 motion which was filed in the lower court on February 12, 2001. (R 494). Thus, the claim is untimely and procedurally barred. *See Glock*, 776 So. 2d at 251. Moreover, the evidence could have been discovered by the exercise of due diligence had Collateral Counsel checked the website earlier. It could also have been discovered by a simple public records inquiry into the DOC

records on Mr. McGuire. Having failed to carry his burden to prove that the evidence could not have been discovered with the exercise of due diligence, Brown has utterly failed to show that he has any newly discovered evidence.

Finally, assuming that the claim is not procedurally barred, and that it qualifies as newly discovered, it still provides no basis for relief because Brown has failed to establish that it is relevant and admissible for either substantive or impeachment purposes. Brown claims that he has "newly discovered evidence that Scott McGuire had a prior burglary conviction and escape from the state of Ohio." (IB 91). If he does, he utterly failed to present it to the postconviction court. That court denied the claim finding specifically that "the defense has failed to tie that up," referring to the claim that McGuire is the Scott Keenum referred to in the Ohio conviction at issue. (R 427).

Since it is the defendant's burden to establish newly discovered evidence, Brown had to prove that the Ohio burglary conviction and escape notation were relevant. "To be relevant, and therefore, admissible, evidence must prove or tend to prove a fact in issue," and "the person seeking admission of testimony must demonstrate its relevance." *Stano v. State*, 473 So. 2d 1282, 1285 (Fla. 1985). Thus, Brown had to prove that the Ohio conviction and escape were offenses of Jason Scott McGuire of

the instant case. To do so, he had to prove the identity of McGuire as the person convicted in the Ohio proceeding. *See Killingsworth v. State*, 584 So. 2d 647, 648 (Fla. 1st DCA 1991)[where state had to prove a prior felony conviction, it had to prove "the identity of the defendant as the perpetrator."].

To prove the identity of one accused of having been convicted of a prior offense, "the identity . . . must be established by affirmative evidence, mere proof of identity of names being insufficient." *Miller v. State*, 573 So. 2d 405 (Fla. 2d DCA 1991). "[P]roof of identity in addition to similar names" is required to connect one with a prior conviction. *Id*.

Since Mr. McGuire took the Fifth in regard to the issue of whether the Ohio conviction was his, the defense should have called a fingerprint expert to compare the prints on the Ohio conviction to the known prints of McGuire.[24] *See Jackson v. State*, 729 So. 2d 947, 952 (Fla. 1st DCA 1998). Records such as information from a public website, or a copy of an out-of-state

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[24] Certainly, Collateral Counsel, being a former Assistant State Attorney well knows how to prove up such prior convictions. The failure to make a fingerprint comparison under these circumstances, and especially in light of the substantial difference in the birthdate of the defendant in the Ohio case and that of Mr. McGuire, (see Appendix A), supports a reasonable inference that the Ohio conviction at issue does not belong to Mr. McGuire.

conviction, are not sufficient to establish identity. *See Sylvester v. State*, 770 So. 2d 249, 250 (Fla. 5th DCA 2000)[“computerized driving record did not prove the historical fact of the prior convictions, nor did it serve to link Sylvester to the listed convictions.”]; *Killingsworth*, 584 So. 2d at 648 [mere identity of names on a conviction and of the witness at trial does not meet the obligation to prove “they are the same person.”].

In fact, where “the state introduced a certified copy of a prior conviction of ‘Paul O’Neil Stoval’ . . . there was no showing that defendant [Paul O. Stovall] was the Stovall referred to in the judgment of conviction received in evidence.’ *Stovall v. State*, 727 So. 2d 1009 (Fla. 5th DCA 1999). Brown made no showing that the Scott Keenum referred to in the Ohio burglary and escape documents was Jason Scott McGuire of the instant case. Thus, he has wholly failed to establish the identity required by Florida law. As a result, the evidence offered at the evidentiary hearing falls woefully short of proving that “Scott Jason McGuire and Scott Keenum are one and the same person.” (IB 93). Having failed to establish that, the alleged evidence is irrelevant and inadmissible. Having failed to carry his burden to prove that the Ohio conviction is McGuire’s, he has utterly failed to prove his claim of newly

discovered evidence.

Moreover, even if the conviction were McGuire's, no relief is merited because the evidence of three, instead of two, prior felonies would have made no appreciable difference in the impeachment of McGuire. *Cf. Marshall v. State*, 604 So. 2d 799, 805 (Fla. 1992)["in light of Marshall's other nine prior violent felony convictions," the trial court's error in consideration of a prior conviction for escape was harmless]. Further, had defense counsel used the information to show that McGuire lied about the number of convictions, this would not have affected the outcome because McGuire had already admitted to lying when he gave his initial statement. Finally, and most importantly, McGuire's testimony was far from the only evidence, or even the primary evidence, of Brown's guilt. Brown's detailed confession (given to FBI Agents who did not even know of a murder in Daytona Beach at the time and which exactly matched the physical evidence at the crime scene) is what convicted him. Then, his "fairy tale" told at the trial helped net him the 12 to 0 jury recommendation of death. Brown has no one but himself to blame for his current circumstances, and the existence of a third felony for Mr. McGuire would have had no affect whatsoever on the outcome of either phase.

Thus, the trial court applied the right rule of law and its

determination is supported by competent substantial evidence. Having utterly failed to prove his claim of newly discovered evidence, Brown is entitled to no relief.

ARGUMENT III

BROWN HAS NOT CARRIED HIS BURDEN TO PROVE THAT THE TRIAL COURT ERRED IN DENYING HIS CUMULATIVE ERROR CLAIM.

Brown complains that "the cumulative effect of trial counsel's deficient performance denied him effective assistance of counsel. . .." (IB 98). He relies on the alleged performance deficiencies identified in his "grounds 3-5, 7-12, 14, 17, 18, 20 and 21" of the 3.850 motion, which he says are raised in "Issue I, above" as his sole support for this claim. He makes no meaningful argument or even pleads how these alleged deficiencies meet the cumulative error standard, nor does he identify any specific prejudice which these alleged cumulative errors caused. As a result, his instant claim is legally insufficient and should be denied on that basis.

Moreover, as the postconviction judge found and held, there is no merit to this claim. (R 451-52). The general standard of review of ineffective assistance of trial counsel claims is de novo, although the factual findings of the postconviction court are controlling. *Stephens v. State*, 748 So. 2d 1028, 1033 (Fla. 1999). *See Cherry v. State*, 781 So. 2d 1040, 1048 (Fla.

2000)[defer to trial court's factfinding]. Where an evidentiary hearing has been held, the Circuit Court's denial of a 3.850 motion will be upheld if it is supported by competent, substantial evidence. *Blanco v. State*, 702 So. 2d 1250, 1252 (Fla. 1997). The lower court's judgment on "questions of fact . . . credibility of the witnesses . . . [and] the weight to be given to the evidence . . ." prevail. *Id*. The instant claim was denied after an evidentiary hearing on trial counsel's alleged ineffectiveness; therefore, the competent, substantial evidence standard applies.

It is Brown's burden to prove that his counsel rendered ineffective assistance under *Strickland v. Washington*, 466 U.S. 668 (1984). *Robinson v. State*, 707 So. 2d 688, 695 (Fla. 1998); *Kennedy v. State*, 547 So. 2d 912, 913 (Fla. 1989); *Smith v. State*, 445 So. 2d 323, 325 (Fla. 1983). He must show "that his counsel's performance was deficient," and "the deficient performance prejudiced the defense." *Sweet v. State*, 27 Fla. L. Weekly S113, S114 (Fla. Jan. 31, 2002). If he fails to establish one prong, "it is not necessary to delve into whether he has made a showing as to the other prong." Waterhouse v. State, 792 So. 2d 1176, 1182 (Fla. 2001).[25]

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[25] For additional cases, standards, and legal principals

On this issue, the postconviction judge held:

> [N]one of the grounds affected the reasonable probability outcome of the case.
>
> Again, you know, the defendant's confession, both oral and written, was a detailed confession.
>
> It was consistent with the testimony of the medical examiner as to the stab wounds, the location of them, that the stab wound to the chest and the back were the fatal injuries. It was consistent with the other physical facts in the case.
>
> It was even consistent with the co-defendant's testimony . . . other than . . Brown contended that after Mr. Brown stabbed the decedent in the chest three times . . . then once in the back, that . . . McGuire, took a knife and cut the decedent's throat, but note Mr. McGuire, of course, denied that, and the medical examiner indicated the throat injury, however, whomever caused that . . . was not a life-threatening injury.
>
> And also, the defendant's confession, written and oral, was consistent with both premeditated first-degree murder and felony murder, with the underlying felonies being both burglary and robbery.
>
> So, the bottom line, Mr. Brown, on your second amended 3.850, that is denied.

(R 451-52). The State adds that Brown volunteered that his shoes were evidence, and the bloody shoe print left at the scene was consistent with Brown's shoes. Moreover, Brown's detailed confession given to the FBI Agents was made before they even knew of a murder in Florida, much less any of the details thereof. Those details were completely corroborated by the

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applicable to ineffective assistance claims, *see* Argument I, *supra*, at 19-21.

physical evidence at the crime scene and by McGuire's statement and testimony. Brown was found in sole possession of Mr. Hensley's truck when he was captured in Tennessee to where he had fled after the murder.

Thus, even if there were some instances of deficient performance (and the State does not concede same), all of those cumulated together clearly do not rise to a level which would affect the outcome of the proceeding. The evidence of Brown's guilt and the propriety of his sentence of death is simply overwhelming, and as a direct result, no defense attorney could have changed the result in this case. Brown has utterly failed to establish entitlement to relief under *Strickland*. The postconviction court's denial of this claim should be upheld.

Finally, as the State has explained hereinabove, there are no errors to cumulate. Where that is so, a cumulative error claim is clearly without merit. *See Waterhouse v. State*, 792 So. 2d 1l76, 1181, 1196 n.10 (Fla. 2001). *See also Ventura v. State*, 794 So. 2d 553, 560 n.6 (Fla. 2001)[where no merit to individual claims, no cumulative error]. *Downs v. State*, 740 So. 2d 506, 509 (Fla. 1999). Brown is entitled to no relief.

CONCLUSION

Wherefore, based upon the foregoing arguments and authorities, the State submits that Brown's convictions and

sentence of death should be affirmed in all respects.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above has been furnished by U.S. Mail to: **John J. Bonaccorsy**, 1326 S. Ridgewood Ave., Suite 6, Daytona Beach, FL 32114 on this ____ day of March, 2002.

Of Counsel

CERTIFICATE OF COMPLIANCE

This brief is typed in Courier New 12 point.

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