

IN THE SUPREME COURT OF FLORIDA

ALFRED LEWIS FENNIE,

Appellant,

v.

Case No. SC01-2480

Lower Tribunal No. 91-756-CF

STATE OF FLORIDA,

Appellee.

-----/

ON APPEAL FROM THE CIRCUIT COURT
OF THE FIFTH JUDICIAL CIRCUIT,
IN AND FOR HERNANDO COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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SUMMARY OF ARGUMENT

Issue I: After conducting an evidentiary hearing on Appellant's allegation of ineffective assistance of counsel regarding jury selection, the lower court entered a detailed order denying Appellant relief. Appellant alleged that there was racial tension in the community where his trial was conducted and his trial counsel was ineffective for failing to adequately question the venire on racial issues, for failing to move for individual voir dire, and for failing to move for a change of venue. As was demonstrated at the evidentiary hearing and properly found by the lower court, collateral counsel never established that there was any racial tension in the community at the time of Appellant's trial. Thus, his initial premise and basis for this entire claim was never established.

As testified to at the evidentiary hearing, Appellant's trial counsel made a discretionary strategic decision not to question each and every potential juror on racial issues because he did not want to offend the venire and he did not want to interject racial issues during voir dire when the crimes were not racially motivated. In addition, trial counsel did in fact move for individual voir dire, but that request was denied by the trial court. Thus, counsel cannot be deemed ineffective for failing to move for individual voir dire. Finally, collateral

counsel has failed to carry his burden of establishing ineffectiveness based on counsel's failure to move for a change of venue. Trial counsel considered such a motion, but never moved for a change of venue because he was successful in selecting a jury in Hernando County. As the lower court properly found, Appellant failed to carry his burden of establishing deficient performance and prejudice. This Court should affirm the lower court's order denying Appellant relief on this claim.

Issue II: The State submits that the lower court properly found that Appellant failed to meet both prongs of the Strickland test in an attempt to establish ineffective assistance of counsel at the penalty phase of his trial. Collateral counsel failed to establish deficient performance by trial counsel in his preparation of the witnesses' testimony and his failure to call certain witnesses. The insubstantial mitigation evidence presented at the postconviction evidentiary hearing was, in large part, presented at Appellant's trial and found by the trial judge in mitigation. The only notable exception is an allegation that Appellant's mother was physically abusive to her children when they misbehaved. However, even if counsel was deficient in failing to present this evidence, Appellant has failed to establish that he was

prejudiced by this omission. As the lower court found when denying this claim, the jury unanimously recommended death based on the five strong aggravators, and it would have taken incredibly powerful mitigation evidence to change the outcome of the proceedings - something Appellant was unable to establish.

Issue III: Appellant's claim that the postconviction court erred in denying his request to interview the jurors is procedurally barred because Appellant never raised an issue regarding juror misconduct during his direct appeal. Furthermore, Appellant's claim lacks legal support on the merits. Appellant does not allege any specific juror misconduct, but speculates that the jurors may have been affected by an allegedly racial community or by the interracial aspect of the crime. Such speculation is not sufficient to invade the privacy and sanctity of the jury's deliberations. Accordingly, the lower court properly denied Appellant's motion to interview the jurors.

Issue IV: Appellant failed to establish ineffective assistance of trial counsel at the guilt phase based on trial counsel's alleged failure to adequately cross examine certain witnesses and his failure to call certain witnesses, including Appellant himself. The lower court properly noted in its order denying postconviction relief that Appellant failed to carry his

burden of showing deficient performance and prejudice.

Issue V: The postconviction court did not err in summarily denying Appellant's claim of ineffective assistance of counsel based on trial counsel's failure to object to admissible evidence of Appellant engaging in sexual intercourse with the victim prior to her murder. By his own admission to law enforcement officers, Appellant engaged in sexual intercourse with the victim in the backseat of her car. The State introduced evidence that the sexual activity was not consensual. Because the evidence was admissible and inextricably intertwined with the charged offenses, trial counsel had no legal basis to object to the State's questions regarding the sexual activity. Counsel cannot be deemed ineffective for failing to object to admissible evidence.

Issue VI: Appellant failed to present any evidence at the evidentiary hearing to support his claim that his trial attorneys prevented him from testifying on his own behalf or failed to properly inform him of his constitutional rights. Appellant did not testify at the evidentiary hearing and the evidence was unrebutted that Appellant's trial attorneys informed him of his rights and Appellant voluntarily, knowingly, and intelligently made the strategic decision not to testify. Accordingly, this Court should affirm the lower court's denial

of this claim.

ARGUMENT

ISSUE I

THE LOWER COURT PROPERLY DENIED APPELLANT'S
CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL
DURING VOIR DIRE.

Appellant makes a three-fold argument in support of his ineffective assistance of counsel claim regarding trial counsel's performance during voir dire. Appellant first argues that his trial counsel failed to effectively question jurors on the issues of race and racial tensions in the community where his trial was held. Second, Appellant claims that defense counsel failed to request individual voir dire. Third, Appellant argues that his attorney failed to request a change of venue. The State submits that the lower court properly denied these claims based on a finding that Appellant did not carry his burden of proof under Strickland v. Washington, 466 U.S. 668 (1984), of showing deficient performance and prejudice. See Strickland, 466 U.S. at 694 (stating that as a general matter, a defendant alleging a Sixth Amendment violation must demonstrate a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different).

Whether counsel was ineffective under Strickland is reviewed by this Court under the de novo standard of review. Stephens v.

State, 748 So. 2d 1028 (Fla. 1999). Both prongs of the Strickland test, i.e., deficient performance and prejudice, present mixed questions of law and fact reviewed de novo on appeal. Strickland, 466 U.S. at 698 (observing that both the performance and prejudice components of the ineffectiveness inquiry are mixed questions of law and fact).

Collateral counsel argues in his brief that he is entitled to a presumption of prejudice pursuant to the standard enunciated in United States v. Cronic, 466 U.S. 648 (1984). In Cronic, the United States Supreme Court held that there is an exception to the Strickland general rule that spares the defendant of the need to show probable effect on the outcome. Under this standard, the court will presume prejudice where assistance of counsel has been denied entirely or during a critical stage of the proceedings. Cronic, 466 U.S. at 658.

Appellant's assertion that the Cronic standard applies in the instant case lacks factual and legal support. Contrary to collateral counsel's assertions, Appellant's trial attorney was not "functionally and constructively absent" during voir dire. As the lower court found when denying Appellant relief on this claim, Appellant's trial attorney conducted a "very thorough voir dire." (PCR:3615). The court noted that the transcript of the voir dire covered approximately 900 pages and Appellant's

trial counsel certainly did not conduct a cursory examination. (PCR:3615). Because this case does not present an exception to the Strickland standard, this Court should reject Appellant's argument that the Cronic standard should apply. See generally Bell v. Cone, 122 S. Ct. 1843 (2002) (rejecting the application of Cronic standard when defense attorney waived presentation of mitigation evidence and closing argument at penalty phase); Mickens v. Taylor, 122 S. Ct. 1237 (2002) (stating that in order to demonstrate a Sixth Amendment violation where the trial court fails to inquire into a potential conflict of interest about which it knew or should have known, a defendant must establish, at a minimum, that a conflict of interest adversely affected his trial counsel's performance; prejudice will not be presumed under Cronic standard).

A. Racial Issues

The bulk of Appellant's argument on this sub-claim, as well as the other two sub-claims contained in this issue, is based on the erroneous and faulty premise that there was "heated racial animosity" in the Brooksville community at the time of Appellant's trial. As the lower court noted in its order denying relief, collateral counsel took "great pains in trying to paint a picture of racial hostility and turmoil in the Brooksville community at the time of the trial in this matter,"

but counsel never introduced any evidence which "conclusively demonstrate that collateral defense counsel's initial premise is even true." (PCR:3614-15).

In an attempt to establish this alleged hostile racial atmosphere in the community, collateral counsel introduced into evidence some newspaper clippings at the evidentiary hearing which discussed a case that happened *two to three* years before the murder committed by Appellant. (PCR:105). Alan Fanter, one of Appellant's trial attorneys, was the defense attorney for the black, teenaged defendant, John Smith, who was charged with the first degree murder of a white, teenaged victim, Russell Coates. (PCT:20-21). Mr. Fanter testified that the Smith case took place in 1989 or 1990, while Appellant's trial took place in 1992. (PCT:25-26). According to Mr. Fanter, there was "loads and loads of more publicity in the Smith case than there was in Mr. Fennie's case." (PCT:588). Despite the extensive publicity surrounding the Smith case, Mr. Fanter was able to pick a jury in Brooksville without having a change of venue. (PCT:588). Mr. Fanter also ultimately obtained a very satisfactory verdict. Although the State was seeking the death penalty in the Smith case, Mr. Smith was only convicted of the lesser offense of third degree murder. (PCT:588-89).

Despite collateral counsel going to "great pains" to

establish racial hysteria in the community of Brooksville, collateral counsel never conclusively established that there was any racial tension at the time of Appellant's trial. Although there apparently was some racial tension in Brooksville surrounding the Smith case, Appellant never established that this tension carried over to the time of Appellant's trial. It should be noted that all of the defendants in the instant case, as well as the victim, were residents of Hillsborough County. Appellant and his codefendants kidnaped the victim in Hillsborough County and eventually drove up interstate into Hernando County wherein Appellant shot the victim in a remote area. Appellant's trial took place in Hernando County.¹ Thus, this was not a "local" case. Furthermore, as the trial judge noted, it was never determined where the jurors lived in Hernando County; the jurors could have lived in the cities of Brooksville or Spring Hill. (PCR:3615-16).

Admittedly, this was a case where three black defendants² were charged with the murder of a white victim. Although Fanter acknowledged that race was involved to "some degree, I guess,"

¹Hernando County is north of Hillsborough County. In between the two counties is Pasco County.

²Codefendants Michael Frazier and Pamela Colbert both proceeded to jury trials in Brooksville prior to Appellant's trial. (PCT:589-97).

he testified that this was not a racially motivated crime. (PCT:32). Collateral counsel argues that the instant case is "fertile soil for the seeds of racial prejudice." See Robinson v. State, 520 So. 2d 1, 7 (Fla. 1988) (stating that "[t]he situation presented here, involving a black man who is charged with kidnapping, raping, and murdering a white woman, is fertile soil for the seeds of racial prejudice").

While the facts of this case are somewhat similar to those in Robinson and could therefore be considered "fertile soil for the seeds of racial prejudice," there are important factors distinguishing the two cases. First, in Robinson, this Court reversed the defendant's death sentence because the prosecutor insinuated through his questioning of an expert witness that the defendant had a habit of preying on white women. Robinson, 520 So. 2d at 7. Additionally, this Court found the prosecutor's comments reversible error because the comments could have aroused bias and prejudice on the part of the jury. Unlike Robinson, the prosecutor in this case did not insinuate that Appellant preyed on white women, but limited the prosecution to the facts of the case. Although there was evidence presented that Appellant had sexual intercourse with the victim, this in no way affected the outcome of the proceedings. Finally, although there is the inherent possibility of racial bias given

the nature of the crime and the principals involved, Appellant has failed to establish that there was any racial prejudice or bias on the jury's part or that his counsel was somehow ineffective for failing to discover any bias.

Collateral counsel's assertions that Mr. Fanter had no strategy to deal with the racial issues presented in Appellant's case is without merit. In support of his position that Mr. Fanter's voir dire performance was deficient and prejudicial as a matter of law, counsel relies on the opinion testimony of his "legal expert" at the evidentiary hearing, William Salmon. As the postconviction judge tactfully put it, he was "not overly impressed with the opinions" testified to by Mr. Salmon. (PCR:3615). Likewise, this Court should defer to the trial judge's credibility determination and not be overly impressed with Mr. Salmon's opinion testimony. See Blanco v. State, 702 So. 2d 1250, 1252 (Fla. 1997) (stating that this Court will not substitute its judgment for that of the trial court on questions of fact, likewise of the credibility of the witnesses as well as the weight to be given to the evidence by the trial court).

The State established at the evidentiary hearing that Mr. Salmon had considerable bias and no special training, experience, or accomplishments, and no special track record as an attorney to warrant giving his opinions any weight. To begin

with, the State showed that Mr. Salmon was not forthcoming when he testified about whether he had always been a member in good standing with the Florida Bar. (PCT:63-67). In particular, the State established that Mr. Salmon had been punished by the Florida Supreme Court in July, 1992, when this Court publicly reprimanded Mr. Salmon for professional misconduct and further placed him on probation for two years. In fact, Mr. Salmon was on probation when Appellant's case went to trial in November, 1992. The State also established many other limitations to Mr. Salmon's claim of expertise in this case. Those limitations include the following. Mr. Salmon is not a "Florida Board-Certified lawyer" in criminal trial or criminal appellate practice. (PCT:67-68). Mr. Salmon had been involved with just 3 capital murder trials when he testified at the evidentiary hearing held in this case in 2001. (PCT:68-69). Mr. Salmon has always worked on the side of defendants. (PCT:69). Mr. Salmon did not attend the Capital Cases Seminar presented by the Commission on Capital Cases of the Florida Legislature in 2000 and 2001 notwithstanding Mr. Salmon's belief that "it's essential to have that kind of training." (PCT:72-73). Mr. Salmon feels "very strongly" that the death penalty is wrong and immoral. (PCT:75-76). Mr. Salmon was retained by Appellant's collateral counsel in another death penalty postconviction case

and, in 2000, the trial judge in that other case, like the trial judge in the instant case, found Mr. Salmon's opinions to be of no assistance. (PCT:76-83). In particular, that trial judge found "that reasonable attorneys would strongly disagree with [Mr. Salmon's] opinions, especially to the extent they would be in violation of this state's code of professional conduct." (PCT:76-83).

In the instant case, the State also established that no weight should be given to Mr. Salmon's opinions. In particular, Mr. Salmon testified that his opinions were based on his interpretation of "a couple of United States Supreme Court opinions" but Mr. Salmon could not give the State the names of those cases.³ (PCT:130-31). Mr. Salmon never reviewed the entire trial transcript and sentencing order in Appellant's case.⁴ (PCT:133). Mr. Salmon did not review the Florida Supreme Court opinion rendered in Appellant's direct appeal. (PCT:134). Mr. Salmon also did not read the transcript of the joint motion hearing which was held in Appellant's case along with

³During re-direct examination and in response to leading questions, Mr. Salmon did say that he was familiar with the cases of Turner v. Murray, 476 U.S. 28 (1986), and Ristaino v. Ross, 424 U.S. 589 (1976). (PCT:166).

⁴On re-direct, Mr. Salmon admitted that seeing the entire trial transcript might have aided him in his work on Appellant's case. (PCT:167).

codefendants Colbert and Frazier. (PCT:135). Mr. Salmon did not review the voir dire proceedings held in the trials of Appellant's co-defendants which trials preceded Appellant's trial. (PCT:144-45). Mr. Salmon never talked with Mr. Fanter or any of the lawyers representing Appellant and his codefendants. (PCT:135-36). Mr. Salmon specifically made his judgments in this case without knowing whether Mr. Fanter discussed the prospective final jury panel with Appellant. (PCT:135). While agreeing that the way to conduct a voir dire during trial necessarily depends in part on the unique circumstances of where the trial is being held, Mr. Salmon conceded that he has never lived nor practiced law in Hernando County. (PCT:136-37). Mr. Salmon also admitted that he did not know the demographics of Hernando County in 1992. (PCT:137). While conceding that news articles sometimes get the stories wrong, Mr. Salmon admitted that he made no effort to talk with any of the people mentioned in the news articles he reviewed to find out exactly what was on their minds regarding race relations or issues in Hernando County. (PCT:139). Mr. Salmon admitted that he had not seen the media articles submitted to him by Appellant's collateral counsel in context to know whether they were front page stories or something else. (PCT:163-64). Mr. Salmon conceded that Mr. Fanter has more experience trying

first-degree murder cases than he did. (PCT:143-44). Mr. Salmon also admitted that he really did not know what Mr. Fanter did on Mr. Fennie's behalf before the start of trial which is when the voir dire transcript provided to Mr. Salmon starts. (PCT:153). Mr. Salmon admitted that Mr. Fanter asked some jurors questions about racial issues. (PCT:157-60). Mr. Salmon also admitted that actually seeing someone give a response is better than reading a cold record. (PCT:160-61). Mr. Salmon also admitted that he did not know what body language potential jurors might have been communicating during voir dire. (PCT:187). Mr. Salmon said that what he knew of the racial composition of the jury in Appellant's case was just what Appellant's collateral counsel told him and that he knew nothing about the race of the juror alternates. (PCT:161-62). Mr. Salmon admitted that trying to make something racial when there is no racial issue could potentially backfire. (PCT:178).

In contrast to Appellant's "legal expert" utilized to opine on trial counsel's effectiveness during voir dire, it was established that Mr. Fanter had lived for more than 11 years in the Hernando County area and was always a member of the Florida Bar in good standing. (PCT:578-81). Prior to the time of Appellant's trial in this case, Mr. Fanter had litigated more than 5 or 6 capital trials, and had been involved to some level

in numerous other capital cases. (PCT:584). Mr. Fanter always tried to stay current with Florida's criminal law by regularly reading the Florida Law Weekly. (PCT:585). Mr. Fanter routinely attended seminars including the "Life Over Death" seminars sponsored by the Florida Public Defender's Association. (PCT:585-86). Mr. Fanter testified that he had assistance during his representation of Appellant. In particular, Mr. Fanter testified that he had co-counsel Hugh Lee, a full-time investigator, David Franklin, and the possibility of help from experienced death penalty colleagues Billy Nolas and T. Michael Johnson. (PCT:591-93). Mr. Fanter also testified that throughout the voir dire portion of Appellant's trial, Mr. Fanter tried to pay close attention to every member of the jury panel to watch for body language. (PCT:598). Mr. Fanter said that during this voir dire he tried to avoid any adverse consequences for Appellant and, accordingly, Mr. Fanter tried to be careful about how he asked questions pertaining to matters of race so as to not offend anyone or alienate any potential jurors. (PCT:599-600). Most importantly, Mr. Fanter testified that he was sure that he made no strikes without Appellant's agreement and that when a final panel was formed, he took an extra amount of time to go back to counsel table and discuss the panel with Appellant before accepting the final panel as the

actual jury. (PCT:601). Mr. Fanter also testified that the racial composition of the actual jury that heard Appellant's trial included two (2) African Americans with the two (2) alternates being African American as well. (PCT:602).

The postconviction judge also asked some questions of Mr. Fanter. In particular, the judge inquired about the Hernando County case of John Smith. As previously noted, Mr. Fanter testified that he represented John Smith, a black defendant charged with the first degree murder of a white teenager, Russell Coates. (PCT:605). Mr. Fanter testified that there was a great amount of publicity attending the Smith case but the trial still was able to be held in Brooksville. (PCT:607). Mr. Fanter said that he gained experience from trying that case which he used in his defense of Appellant. (PCT:608).

The case law is clear that the proper test for attorney performance is that of reasonably effective assistance. Strickland v. Washington, 466 U.S. 668 (1984). The two-prong test for ineffective assistance of counsel established in Strickland requires a defendant to show deficient performance by counsel and that the deficient performance prejudiced the defense. In any ineffectiveness of counsel case, judicial scrutiny of an attorney's performance must be highly deferential and there is a strong presumption that counsel's conduct falls

within the wide range of reasonable professional assistance. Strickland, 466 U.S. at 694. A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight. Id. at 696. Moreover, courts have recognized that "because representation is an art and not a science, '[e]ven the best criminal defense attorneys would not defend a particular client in the same way.'" Waters v. Thomas, 46 F.3d 1506, 1522 (11th Cir. 1995) (quoting Strickland, 466 U.S. at 689).

As a strategic decision, trial counsel's performance is virtually unassailable in postconviction litigation. See Maharaj v. State, 778 So. 2d 944 (Fla. 2000) (recognizing that counsel cannot be ineffective for strategic decisions made during a trial), cert. denied, 533 U.S. 935 (2001); United States v. Oliveras, 717 F.2d 1, 3 (1st Cir. 1983)("[T]actical decisions, whether wise or unwise, successful or unsuccessful, cannot ordinarily form the basis of a claim of ineffective assistance."). Within the wide range of reasonable professional assistance, there is room for different strategies with no one strategy necessarily "correct" to the exclusion of all others. Felker v. Thomas, 52 F.3d 907 (11th Cir. 1995).

Even with the benefit of hindsight in the instant case, it is readily apparent that Mr. Fanter's decision to handle voir

dire as he did constituted a reasonable and effective strategy. As Mr. Fanter testified, he "took the best of what we had." (PCT:601). That "best" is what Appellant saw for himself, was informed about and approved of. As the lower court properly concluded, none of the cases relied on by Appellant support his claim that it is error for trial counsel not to thoroughly inquire as to each and every juror regarding matters of racial bias or prejudice. The postconviction judge correctly analyzed Mr. Fanter's testimony and concluded that his strategy was not to offend any jurors by inquiring about racial issues with each juror. (PCR:3616). Mr. Fanter asked some jurors about racial issues, but did not question each and every juror. Mr. Fanter explained that he attempted to view the entire panel as he was asking questions to watch for nonverbal body language. (PCT:597-601). Given the fact that the venire contained several African-Americans, Mr. Fanter testified that he did not want to offend other members of the panel by asking questions about racial issues.⁵ Clearly, Mr. Fanter's strategy of asking only a few questions about racial issues so as to not offend other jurors was reasonable in the instant case. See Turner v. Murray, 476 U.S. 28, 37 & n.10 (1986) (stating that the issue of

⁵In fact, the actual jury selected by Mr. Fanter and Appellant contained two (2) African-American jurors, as well as two (2) African-American alternate jurors.

whether to question jurors on racial issues is left to the discretion of trial counsel); Spencer v. Murray, 18 F.3d 229, 234 (4th Cir. 1994) (rejecting defendant's claim that his attorneys were ineffective for failing to question jurors on issue of racial bias when counsel indicated that they had no reason to believe that any prospective juror harbored any racial bias against defendant and their decision not to ask any questions on voir dire that might have injected race into the case was a matter of trial tactics). Accordingly, this Court should affirm the trial court's finding that Appellant failed to carry his burden of establishing deficient performance.

The second or prejudice prong required by Strickland is not established by merely showing that the outcome of the proceeding might have been different had counsel's performance been better. Rather, prejudice is established only with a showing that the result of the proceeding was fundamentally unfair or unreliable. Lockhart v. Fretwell, 506 U.S. 364 (1993). The defendant bears the full responsibility of affirmatively proving prejudice because "[t]he government is not responsible for, and hence not able to prevent, attorney errors that will result in reversal of a conviction or sentence." Strickland, 466 U.S. at 693.

A claim of ineffective assistance of counsel fails if either the performance or the prejudice prong of Strickland is not

proven. Kennedy v. State, 547 So. 2d 912 (Fla. 1989). If a claim of ineffectiveness can be disposed of on the prejudice prong, there is no need to consider the deficiency prong. Strickland v. Washington, 466 U.S. 668, 697 (1984). In the instant case, Appellant has shown neither deficient performance nor the requisite prejudice. Accordingly, this Court should affirm the lower court's denial of this claim.

B. Individual Voir Dire

Appellant argues that his trial counsel was ineffective for failing to move for individual voir dire based on racial matters. Collateral counsel acknowledges the fact that trial counsel moved for individual voir dire, but such a request was denied by the trial judge. Collateral counsel argues that this request was insufficient because it was based on pretrial publicity and not based on the alleged racial tension in the community.⁶ Furthermore, collateral counsel acknowledges that Mr. Fanter indicated at the evidentiary hearing that he would not want to question jurors about racial issues based on a fear that he may offend other jurors, but asserts that individual

⁶Of course, in support of his allegation of racial tension, collateral counsel relied exclusively on "pretrial publicity," namely, newspaper clippings from local papers.

voir dire would have cured this concern.⁷ See Amended Initial Brief of Appellant at 36 n.9.

As conceded by collateral counsel, Mr. Fanter filed a motion for individual voir dire and sequestration of jurors prior to the voir dire proceeding held in Appellant's trial. (RI:191-93). Mr. Fanter alleged in the motion that collective voir dire of the venire would deprive Appellant of his right to obtain a jury of his peers, free from bias and open-minded to their duty to render a fair verdict. (RI:192). At the evidentiary hearing, the State established that a joint motion hearing was held on October 9, 1992, for the trial court to consider all of the motions then pending in the Fennie, Frazier and Colbert cases. Those motions included Mr. Fanter's Motion For Individual Voir Dire.⁸ (PCT:148-49). Additionally, at the beginning of Appellant's trial, Mr. Fanter renewed his Motion for Individual Voir Dire. (R.44).

It is clear that Appellant has failed to establish ineffective assistance of counsel based on trial counsel's

⁷Collateral counsel apparently overlooked Mr. Fanter's testimony that individual voir dire would not have changed his trial strategy regarding the possibility of offending a potential juror by inquiring about racial issues. (PCT:600).

⁸Line 24 of page 11 of the transcript of that Motion Hearing reflects Mr. Fanter making argument to the trial court about his Motion For Individual Voir Dire. Mr. Fanter also mentioned the possibility of moving for a change of venue. (PCT:149).

alleged failure to move for individual voir dire. Trial counsel in fact moved for individual voir dire, but his request was denied by the trial judge. In its order denying Appellant's postconviction relief, the lower court found that Appellant failed to carry his burden with regard to this claim. For the reasons set forth above, the State urges this Court to affirm the court's ruling.

C. Change of Venue

Appellant argues that his trial counsel was ineffective for failing to move for a change of venue. Collateral counsel attacks the postconviction judge's analysis on this issue as "faulty" because the judge found that Mr. Fanter conducted an extensive voir dire and was able to select a jury in Hernando County with four African-Americans on the panel. Collateral counsel claims that this ruling was erroneous because trial counsel's voir dire was not extensive as to the racial issues.

As previously noted, collateral counsel has failed to establish any legal requirement requiring trial counsel to conduct extensive questioning on racial issues. To the contrary, the issue of whether to question jurors on racial issues is a decision left to the discretion of trial counsel. See Turner v. Murray, 476 U.S. 28, 37 & n.10 (1986). In this

case, Mr. Fanter was in the best position to determine whether to ask racial questions during voir dire. Mr. Fanter, unlike the "expert" relied on by Appellant, had lived and prosecuted cases in Hernando County for a number of years, including the aforementioned Smith case which received much greater publicity than Appellant's case. Mr. Fanter strategically made a discretionary decision not to question each and every juror regarding racial issues.

It should also be noted that prior to Appellant's voir dire, Mr. Fanter mentioned the possibility of lodging a motion for change of venue. (PCT:149). Consistent with the standard practice in the Fifth Judicial Circuit at the time, counsel had to attempt to pick a jury before deciding to move for a change of venue. (PCT:143-44). Mr. Fanter correctly testified that this practice was consistent with applicable case law. (PCT:587-88); see Henyard v. State, 689 So. 2d 239, 245 (Fla. 1996) (and cases cited therein). In this case, Mr. Fanter picked a jury panel with four African-Americans on it; a panel that Appellant agreed upon after consulting with his counsel. Mr. Fanter also testified that there was much more publicity surrounding the Smith case which went to trial a year or two before Appellant's case. Regarding the Smith case, Mr. Fanter said that a jury was selected without a change of venue and the

ultimate verdict was for something far less than the death penalty sought by the State. (PCT:588-89). Furthermore, two separate juries were selected and jury trials were held in Hernando County for Appellant's two codefendants immediately before Appellant's case went to trial. Thus, for the reasons set forth above, this Court should affirm the lower court's finding that Appellant has failed to carry his burden of proof as to this claim.

ISSUE II

THE LOWER COURT PROPERLY DENIED APPELLANT RELIEF
ON HIS CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL
DURING THE PENALTY PHASE OF HIS TRIAL.

Appellant claims that the outcome of his penalty phase was materially unreliable because no adversarial testing occurred due to the ineffective assistance of his trial counsel. Specifically, Appellant claims that his trial counsel did not adequately prepare the witnesses for their testimony at the penalty phase, failed to investigate for available mitigation evidence and failed to call several lay witnesses and a mental health expert. After Appellant presented his evidence to support this claim at an evidentiary hearing, the judge entered a detailed order finding that Appellant had failed to carry his burden of establishing deficient performance and prejudice. (PCR:3624-27).

The determination of ineffectiveness pursuant to Strickland v. Washington, 466 U.S. 668, 694 (1984) is a two-pronged analysis: (1) whether counsel's performance was deficient; and (2) whether the defendant was prejudiced thereby. When this Court reviews an ineffective assistance of counsel claim, this Court gives deference to the trial judge's superior vantage point and upholds the court's factual findings that are supported by substantial, competent evidence. Stephens v.

State, 748 So. 2d 1028, 1034 (Fla. 1999). In this case, the court's factual findings are supported by competent, substantial evidence and Appellant has failed to demonstrate any error in the court's order denying his postconviction claim of ineffective assistance of counsel in the penalty phase.

At Appellant's penalty phase trial in November, 1992, defense attorney Hugh Lee called ten (10) witnesses on Appellant's behalf: Annie Fennie (mother), Kathy Reed (sister), Erwin Ward (friend for over 16 years), Diane Williams (girlfriend), Melanie Simmons (an instructor for Appellant's handicapped niece), and five correctional officers. The State did not produce any witnesses, but relied on the guilt phase evidence. The jury returned a verdict recommending death by a vote of 12-0. The trial judge followed this recommendation and sentenced Appellant to death. The court found five aggravating circumstances: (1) murder occurred during the commission of a kidnapping; (2) murder committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody; (3) murder committed for financial gain; (4) murder was especially heinous, atrocious or cruel (HAC); and (5) murder was committed in a cold, calculated and premeditated manner without

any pretense of moral or legal justification (CCP).⁹ The trial judge found no statutory mitigation, but did find ten nonstatutory mitigating circumstances.

Appellant's allegation that trial counsel was ineffective for failing to prepare the lay witnesses is without merit. This Court in Valle v. State, 778 So. 2d 960, 965-66 (Fla. 2001), stated:

In order to establish a claim of ineffective assistance of counsel, a defendant must prove two elements:

First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

Strickland, 466 U.S. at 687, 104 S. Ct. 2052; Rutherford v. State, 727 So. 2d 216, 219-20 (Fla. 1998).

In evaluating whether an attorney's conduct is

⁹This Court has previously stated that the aggravators of HAC and CCP are two of the most serious aggravators set out in Florida's statutory sentencing scheme. Larkins v. State, 739 So. 2d 90, 95 (Fla. 1999).

deficient, "there is 'a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance,' " and the defendant "bears the burden of proving that counsel's representation was unreasonable under prevailing professional norms and that the challenged action was not sound strategy." Brown v. State, 755 So. 2d 616, 628 (Fla. 2000) (quoting Strickland, 466 U.S. at 688-89, 104 S. Ct. 2052). This Court has held that defense counsel's strategic choices do not constitute deficient conduct if alternative courses of action have been considered and rejected. See Shere v. State, 742 So. 2d 215, 220 (Fla. 1999). Moreover, "[t]o establish prejudice [a defendant] 'must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.'" Williams v. Taylor, 529 U.S. 362, 120 S. Ct. 1495, 1511-12, 146 L. Ed. 2d 389 (2000) (quoting Strickland, 466 U.S. at 694, 104 S. Ct. 2052); see Rutherford, 727 So. 2d at 220.

In the instant case, Appellant has failed to carry his burden of showing either deficient performance or any resulting prejudice. Appellant argues that trial counsel failed to adequately prepare and investigate the available mitigation from numerous lay witnesses, including family members and Appellant's past girlfriends. Specifically, Appellant claims that these witnesses would have demonstrated that Appellant grew up in a physically abusive home in the projects, that he was a nonviolent man and was not as culpable as his codefendant Michael Frazier. The State submits that the lower court properly found that Appellant has failed to carry his burden of showing deficient performance and prejudice resulting from the

alleged ineffectiveness of counsel.

Collateral counsel begins his argument by stating that the evidence from the evidentiary hearing shows that Appellant's father provided no emotional or financial support for his children. Amended Initial Brief of Appellant at 38. There is simply no evidence to support such a conclusion. In fact, the evidence introduced by Appellant arguably shows the opposite is true. Appellant's sister, Kathy Reed, testified at the evidentiary hearing that Appellant and her lived with their father and stepmother for a period of time while they were approximately three or four years old.¹⁰ Their father kept them during the week and returned them to their mother on the weekends, and when they got a little older, he kept them. (PCT:501). The only testimony presented surrounding life with their father was from Kathy Reed who testified that they had to do chores like pumping water and preparing peas. According to Ms. Reed, Appellant slept with his stepmother and Kathy slept with her father.¹¹ Contrary to Appellant's assertions that his

¹⁰Appellant's father "went to the hospital to receive company to try and get us to have visitation with him." (PCT:501). In the context of her testimony, this apparently meant that Appellant's father sought some sort of custody arrangement with his children.

¹¹Collateral counsel opines that this sleeping arrangement was "inappropriate." Amended Initial Brief of Appellant at 39.

father provided no emotional or financial support to him, the evidence showed that Appellant's father fought for custody of him and raised Appellant and his sister for a period of time when they were young. Appellant also continued to have contact with his father once he got older and was living with his mother. (R.1951-53).

Collateral counsel relies on the testimony from Appellant's sisters to support his allegations that Appellant grew up in the projects under the domination of an abusive, alcoholic mother. As the postconviction court properly noted, almost all of the evidence collateral counsel suggests should have been presented from the lay witnesses was presented at trial. The only notable exception is the testimony from Deborah Fennie and Kathy Reed, Appellant's sisters, about the alleged physical abuse from their mother. However, as the court noted, even this evidence was minimized by the testimony of Annie Fennie at Appellant's penalty phase.

At Appellant's penalty phase, Ms. Fennie testified that she loved all her kids the same, despite the fact that the other children thought she loved Alfred more. (R.1953). Ms. Fennie, a regular church-going single mother, respected her children and would not allow any man to stay the night at her house. (R.1954, 1962). Ms. Fennie loved her children and thought she

raised them well. (R.1965). According to her, none of her other children had committed any crimes.¹² (R.1965).

At the evidentiary hearing in 2001, Appellant's sisters testified to the alleged abusive environment they grew up with while living with their mother. The sisters claimed that their mother whipped them with any item within reach, including such items as extension cords, hangers, and boards. (PCT:512, 536). Kathy Reed stated that she got whipped whenever they did something wrong. (PCT:529). Deborah Fennie testified that she and Kathy got beat more than Appellant. (PCT:538). Unfortunately, Ms. Fennie was not alive at the time of the hearing and was unavailable to rebut this testimony. Surprisingly in light of Appellant's argument that trial counsel was ineffective for failing to perpetuate Deborah Fennie's testimony at trial, collateral counsel never attempted to perpetuate Annie Fennie's testimony despite her severe health problems. According to collateral counsel, Annie Fennie died "just a few months" prior to the evidentiary hearing. Collateral counsel was obviously aware that Annie Fennie was a potential witness, as evidenced by the allegations in his postconviction motions and her inclusion on Appellant's various

¹²Despite this testimony, Kathy Reed subsequently claimed at the evidentiary hearing that her younger brother was in prison at the time of Appellant's trial. (PCT:525).

witness lists filed prior to the evidentiary hearing. Because of her unavailability, the State questions whether Kathy Reed and Deborah Fennie would have testified the same way regarding their family upbringing had their mother been alive to rebut their allegations.

The State further questions the veracity of the evidence presented at the evidentiary hearing from Appellant's sisters given the present record. This Court can observe numerous conflicts between Annie Fennie's 1992 trial testimony and the testimony presented by her daughters at the evidentiary hearing. For example, Annie Fennie testified at Appellant's trial that her family only lived in the "projects" from 1979 to 1987, and that life in the projects was fine if you minded your own business. (R.1954). During this time, Appellant would have been approximately 18 to 26 years old.¹³ Appellant's sister Kathy Reed, however, testified that they moved into the projects when she and Appellant were in the fourth grade.¹⁴ (PCT:505). Appellant's other sister, Deborah Fennie, testified that they moved to the projects when she was "six or seven years old, or

¹³Appellant was born on December 28, 1961. (R.1949).

¹⁴Kathy Reed is eleven months older than Appellant. (R.1951).

a little older.”¹⁵ (PCT:534). Based on the discrepancy between Annie Fennie’s trial testimony and the sisters’ testimony (which contradicted each other), the State questions the accuracy of Appellant’s sisters’ recollection of their childhood.

Collateral counsel concludes that Ms. Fennie was “mistaken” about the dates her family lived in the projects. Amended Initial Brief of Appellant at 59. Obviously, the State would respond that the sisters were the ones that were “mistaken.” Collateral counsel is apparently assuming, without any supporting evidence, that young children have a better recollection of where they lived than their adult mother. It should also be noted that Annie Fennie testified in 1992 that they had lived in the projects from 1979 until 1987, some five years before her testimony. Appellant’s sisters, on the other hand, came to the evidentiary hearing in 2001 and testified with great recollection to events that allegedly occurred approximately twenty to thirty years earlier.

Annie Fennie did testify that she lived in the projects, but she stated that it was not that bad provided you minded your own

¹⁵Deborah Fennie is approximately six years younger than Appellant. (PCT:546). Thus, Appellant was at least 12 or 13 years old at the time, and maybe older. Contrary to Appellant’s assertion that Deborah Fennie’s testimony “corroborates” Kathy Reed’s testimony, see Amended Brief of Appellant at 41-42 n.12, the State submits that this testimony is just another example of their contradictory testimony.

business. According to Ms. Fennie, her children did not socialize much in the neighborhood. (R.1954-55). Even the testimony at the evidentiary hearing from Appellant's sisters demonstrated that Appellant stayed inside their house and did not socialize much. (PCT:506, 515-16). Although Deborah Fennie testified that she had to personally fight often in the projects, she stated that Appellant did not have any problems with fighting. (PCT:534).

Appellant claims that trial counsel was unprepared to question Annie Fennie as evidenced by his failure to know the answers to certain questions ahead of time. For instance, Appellant claims that trial counsel was unprepared because Annie Fennie divulged that Appellant had completed his GED in a correctional institution. Hugh Lee, the attorney primarily responsible for the penalty phase, testified that he spent several hours speaking with Annie Fennie regarding her testimony and he did not expect Annie Fennie to give that response when questioned. (PCT:750-51). Counsel cannot be deemed ineffective when a witness gives testimony that is unexpected. A review of Annie Fennie's trial testimony demonstrates that despite counsel's attempts to ask specific questions, Ms. Fennie had the habit of straying beyond the question and adding extraneous information. Arguably, counsel could have cut off Ms. Fennie on

these occasions, but such action would risk alienating the jury.

Appellant also claims that counsel was deficient for failing to perpetuate the testimony of Appellant's younger sister, Deborah Fennie. Hugh Lee testified that he did not consider perpetuating her testimony at trial because she was not a critical witness. (PCT:807-08). Appellant argues that this could not have been a strategic decision because the trial transcript reflects that Mr. Lee apparently did not know that Deborah Fennie was unavailable. (R.1965). Mr. Lee, however, having spoken with the Fennie family numerous times prior to trial, knew the gist of their statements and determined that Deborah Fennie was not a critical witness given the fact that her sister and mother both testified. Thus, when faced with Deborah Fennie's unavailability at the penalty phase, Mr. Lee could have easily made the determination that her testimony was not critical and that he did not need to take any steps to attempt to present her testimony to the jury. Therefore, the fact that Mr. Lee failed to perpetuate Deborah Fennie's testimony was not deficient performance.

Even if Appellant established that Mr. Lee was deficient in failing to perpetuate Deborah Fennie's testimony, Appellant has failed to demonstrate any prejudice. Deborah grew up in the same house as her older sister Kathy Reed and her mother. Both

Kathy Reed and Annie Fennie testified at Appellant's trial. Because of their testimony, the trial judge found mitigation based on Appellant's broken home and his life growing up in the housing projects. Deborah Fennie's testimony at the evidentiary hearing was relevant to establishing that Appellant grew up in the projects, that he gambled with his mother,¹⁶ that he was an artist, that he suffered from asthma, and that her mother was abusive. With the exception of the alleged abuse, this evidence was all presented at Appellant's trial. As to the abuse, Deborah testified that her mother beat her when she was disobedient with clothes hangers, fan cords, extension cords, two by fours, soda water bottles and anything she could put her hands on. (PCT:536-37). She also testified that her mother beat her and Kathy the most. (PCT:538). She did not testify that Appellant was beat with any implement, but did testify that her mother beat Appellant on one occasion when he urinated on his bed when he was nine or ten years old. (PCT:538).¹⁷

¹⁶Deborah testified that her mother began taking Appellant gambling with her when the Appellant was around seven or eight years old. (PCT:536). Deborah would have been one or two years old at this time and obviously has incredible recall for such a young toddler.

¹⁷Again, it should be noted that at this time, Deborah would have been three or four years old.

Kathy Reed also testified that her mother was abusive and beat her with an extension cord, hangers, boards, and a fan belt off a car. (PCT:512). Kathy did not specifically testify that she saw Appellant beaten with any of these items, but related the same incident as her sister. When Appellant urinated on his bed, Annie Fennie allegedly whipped him. (PCT:512). Kathy also related stories about life in the projects and Appellant's lack of relationship with his father. Kathy testified that the defense attorneys or investigator met with her at her house about three times and called almost every weekend.¹⁸ (PCT:519-20).

Even if this Court were to find that Appellant's counsel was deficient in failing to elicit this testimony from his family members, the bulk of this evidence was presented at Appellant's trial and found by the trial judge as mitigation. Thus, this Court should find that Appellant was not prejudiced by the failure to introduce this testimony at trial. Although the jury that unanimously recommended the death penalty did not hear evidence that Appellant was abused and perhaps whipped on one occasion when he wet his bed, this fact would not have changed the jury's verdict or his sentence of death. Furthermore,

¹⁸Deborah Fennie also met with the attorneys on at least one occasion. (PCT:547-48).

despite this alleged abuse, which by the sisters' own testimony was worse for them than for Appellant, the sisters, unlike Appellant, were law-abiding citizens that did not commit murder or any crimes when they were approximately thirty years old. While Appellant's siblings testified to some aspects of Appellant's troubled youth, Appellant was almost thirty years old at the time of trial, and thus, far removed in time from that period in his life. See Tompkins v. State, 193 F.3d 1327, 1337 (11th Cir. 1999) (finding no prejudice for counsel's failure to present evidence of physical abuse as a child where the Appellant was twenty-six at the time of the crime, noting that where a defendant is not young at the time of the offense "evidence of a deprived and abusive childhood is entitled to little, if any, mitigating weight.") (quoting Francis v. Dugger, 908 F.2d 696, 703 (11th Cir. 1990)); Mills v. Singletary, 63 F.3d 999, 1025 (11th Cir. 1995) ("We note that evidence of Mills' childhood environment likely would have carried little weight in light of the fact that Mills was twenty-six when he committed the crime."). In this case, the overwhelming evidence of the five aggravating factors would have clearly outweighed any of the additional proffered mitigation evidence presented at the postconviction evidentiary hearing.

Appellant also claims that defense counsel was ineffective

for failing to present the testimony of Pamela Colbert at the penalty phase. Appellant claims that she had valuable mitigation evidence because of her long-standing relationship with Appellant and she could impeach Michael Frazier's testimony that Appellant was the lone person to lead the victim into the woods and shoot her in the back of the head. This argument is without merit.

As both attorneys noted, they discussed calling Pamela Colbert as a witness at the guilt phase and had her counsel speak with her during Appellant's trial. Mr. Fanter also testified that he stayed on top of Ms. Colbert's status even after Appellant's trial began. (PCT:726). Pamela Colbert's attorney informed Appellant's counsel that she would do nothing for their defense and would simply send their client to the electric chair. (PCT:661). Appellant, however, claims that Colbert would have testified that both Appellant and Michael Frazier walked down the road into the woods and then she heard the fatal shot. Of course, Ms. Colbert gave a conflicting account to law enforcement officers and claimed that Appellant was the only person to walk with the victim into the woods and that Michael Frazier remained at the car with her when Appellant shot the victim. (PCT:466-470). Colbert reiterated this story during Appellant's trial when she was asked by her own attorney,

Chip Harp, on behalf of Mr. Fanter, if she would testify on behalf of Appellant. (PCT:726). Obviously, counsel cannot be deemed ineffective for failing to call a witness that would testify that Appellant was solely responsible for killing the victim. As the postconviction court properly noted, "Colbert's testimony was all over the place . . . she gave conflicting testimony as to who was the actual shooter. . . . Ms. Colbert was an unpredictable witness, and while if she said some things, her testimony might help Mr. Fennie to some extent; other testimony she might give could condemn him. No testimony ever given by Ms. Colbert was truly exculpatory." (PCR:3619-23).

With regard to counsel's failure to call Dwayne Jones, the State submits that counsel was not deficient for failing to call a felon with eighteen convictions to testify that he and Michael Frazier broke into a sheriff officer's home and stole a .357 magnum years before the murder. Despite his testimony to the contrary, it is highly unlikely that Mr. Jones would have confessed in open court in 1992 that he had committed an uncharged burglary and possession of a firearm offenses. (PCT:234-37). Furthermore, although Appellant's strategy was to blame Frazier for the murder, the fact that Frazier once possessed a .357 magnum was irrelevant to the instant case considering the overwhelming evidence that Appellant possessed

and utilized a .25 semiautomatic to murder Mary Shearin. Appellant was arrested driving the victim's car the day after the murder. When pulled over, Appellant was in possession of the murder weapon. Appellant was also seen in possession of the murder weapon only days before the murder. (R.1471, 1688-90). In denying this claim, the postconviction court found that Mr. Jones was not a credible witness and his testimony would not have substantially changed things enough to alter the outcome. (PCR:3625). Thus, given the unlikelihood of Mr. Jones admitting to these uncharged offenses and the irrelevance of his testimony, this Court should affirm the lower court's rejection of this claim.

Appellant also claims that the defense team should have called Dr. Martin, a local dentist who opined in a written report that the bite mark on Michael Frazier's hand was "consistent with Mr. Frazier's hand coming from behind Ms. Shearin in an upright position, being placed against her mouth." (PCT:646). Dr. Martin's opinion was not expressed in absolute terms and his testimony would not have necessarily contradicted Michael Frazier's testimony regarding the bite mark. (PCT:721-23). In short, Dr. Martin's testimony would not have established any fact that was not already known by the jury. Thus, counsel had no reason to call Dr. Martin and cannot be

found ineffective based on their failure to call him as a witness.

Appellant further argues that counsel was ineffective for failing to call an expert witness to testify to possible mitigation evidence. Prior to trial, Dr. Peal was appointed to perform a mental health evaluation of Appellant. Dr. Peal provided a detailed report to the defense team, and the defense team discussed calling Dr. Peal as a witness. However, as Hugh Lee testified at the evidentiary hearing, counsel was scared to call Dr. Peal because of the statements Appellant made to him. (PCT:810). Dr. Peal acknowledged that Appellant gave numerous and significant inconsistent statements regarding his involvement in the crime. (PCT:275). The fact that Appellant lied about the crime was a constant theme in their representation of Appellant. Counsel noted that Appellant was a difficult client because he was a liar. (PCT:697, 703). Mr. Fanter testified that Appellant lied to him, lied to the police, and also lied to the court. (PCT:703). Thus, the fact that Appellant gave conflicting statements to Dr. Peal would not come as a surprise to counsel. The defense team also did not consider having another expert appointed to examine Appellant because with Dr. Peal's report and their own work with Appellant, the defense team could find no evidence of mental

health problems that would justify seeking a second expert's opinion. (PCT:815-16).

Clearly, Appellant's counsel conducted a reasonable investigation of mental mitigation when they hired Dr. Peal to evaluate Appellant for possible mitigating evidence and counsel provided Dr. Peal with Appellant's mother's telephone number so he would be able to obtain any necessary background information on Appellant. (PCT:248, 255). Based on Dr. Peal's evaluation of Appellant, defense counsel made the strategic decision not to present his testimony. The law is well established that when defense counsel conducts a reasonable investigation of mental health mitigation prior to trial and then makes a strategic decision not to present the information, counsel is not ineffective. Asay v. State, 769 So. 2d 974 (Fla. 2000) (stating that counsel was not ineffective for failing to present expert witness when doctor gave an unfavorable report and found defendant manipulative and deceptive); see also Jones v. State, 732 So. 2d 313 (Fla. 1999); Rose v. State, 617 So. 2d 291, 293-94 (Fla. 1993). Appellant argues that the defense team should have called an expert like Dr. Jethro Toomer to establish mitigation evidence.¹⁹ The lower court discussed Drs. Peal and

¹⁹Collateral counsel states in a footnote that trial counsel failed to provide Appellant with competent psychiatric assistance pursuant to Ake v. Oklahoma, 470 U.S. 68 (1985).

Toomer's testimony in detail in his order and correctly noted that, the best they could have done, placing the evidence in a light most favorable to Appellant, is possibly show alleged traits of Appellant such as those for being subservient, nonviolent, and susceptible to duress. The lower court noted that these themes were touched on by the witnesses at Appellant's penalty phase and some of these traits were found as nonstatutory mitigators. Accordingly, the court noted, "it is highly speculative and conjectural as to whether, even had Dr. Toomer or a similar expert testified, it would have had any substantial effect on the outcome." (PCR:3628).

Even if this Court finds that Appellant has established that counsel was somehow deficient in his questioning of witnesses or in failing to call certain witnesses at the penalty phase, Appellant has failed to carry his burden under Strickland of establishing any prejudice. In following the jury's unanimous recommendation and sentencing Appellant to death, the trial judge found as mitigation, among other things, that Appellant came from a broken home, his father had little contact with him,

Amended Initial Brief of Appellant at 65 n.23. As the lower court properly noted in its order, Appellant never challenged the qualifications of Dr. Peal, the expert forensic psychologist who examined Appellant prior to trial. In fact, collateral counsel stipulated that he was an expert in forensic psychology. (PCT:262). Thus, as the lower court found, Ake does not apply. (PCR:3627).

that he grew up in the housing projects, and that he was not a nonviolent person.²⁰ Thus, much of the mitigation evidence presented at the evidentiary hearing from the lay witnesses was already considered by the trial judge and was cumulative. Even had Appellant presented the additional testimony of Pamela Colbert and Drs. Peal, Toomer, and Martin, the outcome of the penalty phase would have been the same. The jury in this case unanimously recommended the death penalty, and given the strength of the five aggravating factors, there is no possibility that Appellant would have received a life sentence. Appellant's trial counsel presented the best argument possible against the State's case, but as counsel noted, "we did our best, we just couldn't prevail over the facts in this case." (PCT:807). Because Appellant has failed to establish either prong of Strickland, this Court should deny the instant claim.

Collateral counsel claims that "[t]he overwhelming evidence developed and presented by postconviction counsel could not and would not have been ignored had it been presented to the

²⁰The court also found: (1) Appellant is the father of three children; (2) Appellant has some talent as an artist; (3) Appellant has paid child support to the mothers of his children when he could; (4) Appellant has counseled children about obeying their elders and about the perils of prison life and a life of crime; (5) Appellant spent time caring for his sister's children, including one who was handicapped; (6) Appellant has been a model prisoner in the eyes of the staff of the Hernando County Jail; and (7) Appellant is a human being.

sentencing judge and jury." Amended Initial Brief at 69. Contrary to counsel's grandiose and speculative claims, the State submits that the lower court properly concluded that almost all of the mitigation evidence presented in the postconviction proceeding was presented at Appellant's trial. The lower court considered the total mitigation evidence presented and compared it to the evidence presented at Appellant's trial and properly concluded that "there is little possibility that the defendant could have received a life sentence; and suggestions to the contrary by collateral defense counsel are merely speculative and conjectural." (PCR:3626-27). The court's detailed order is supported by substantial, competent evidence and should be affirmed by this Court.

Collateral counsel further urges this Court to review his ineffective claims cumulatively in order to justify a reversal of his convictions and death sentence. The State submits that none of Appellant's claims have merit. All of the alleged errors were, in fact, not erroneous. Because there was no individual error to consider, Appellant is not entitled to combine meritless issues together in an attempt to create a valid "cumulative error" claim. See Spencer v. State, 27 Fla. L. Weekly S323 (Fla. Apr. 11, 2002) (denying defendant's claims that he was deprived of a fair trial by the cumulative errors

that occurred during his trial proceedings because claims of error are either procedurally barred or without merit); Mann v. Moore, 794 So. 2d 595 (Fla. 2001) (finding no cumulative effect to consider where all claims were either meritless or procedurally barred); Downs v. State, 740 So. 2d 506, 509 (Fla. 1999) (concluding that where allegations of individual error do not warrant relief, a cumulative error argument based thereon is without merit).

ISSUE III

THE LOWER COURT PROPERLY DENIED APPELLANT'S
MOTION TO INTERVIEW JURORS.

Appellant argues that the court denied him a full and fair evidentiary hearing because the court denied him the opportunity to interview the jurors. Appellant does not allege any specific juror misconduct, but simply speculates that the jurors *may* have been affected by the allegedly racial animosity in the community, by the interracial elements of the crime, or by the State's conduct at trial. Appellant's claim is procedurally barred and is also without merit.

Rule 4-3.5(d)(4) restricts an attorney from contacting jurors and only allows for such contact to those circumstances when an attorney can demonstrate to the trial judge that the attorney has reason to believe grounds for a legal challenge to the verdict exists. See Rule Regulating the Florida Bar 4-3.5(d)(4). In Spencer v. State, 27 Fla. L. Weekly 323, 328 (Fla. Apr. 11, 2002), this Court noted that the lower court properly concluded that a claim relating to the constitutionality of this rule was procedurally barred because it was not raised on direct appeal. See also Arbelaez v. State, 775 So. 2d 909, 920 (Fla. 2000) (stating that, even though lower court failed to address postconviction claim at all, this Court

would affirm denial of claim prohibiting jurors' interview because claim is procedurally barred because claim should and could have been raised on direct appeal); Young v. State, 739 So. 2d 553, 555 n.5 (Fla. 1999) (concluding that postconviction claim regarding the constitutionality of rule which limits an attorney's right to interview jurors after the conclusion of trial was procedurally barred because not raised on direct appeal). Appellant failed to raise any issue on direct appeal relating to jury conduct and has therefore failed to preserve this issue.

Furthermore, this Court has long recognized the privacy and sanctity of jury deliberations. In Cave v. State, 476 So. 2d 180, 187 (Fla. 1985), this Court stated:

[W]here the record does not reveal any misconduct or irregularity on the part of any juror, the case was fairly and impartially tried and each juror is polled and announces the verdict to be his or hers, it is improper to allow jurors to be interviewed. National Indemnity Co. v. Andrews, 354 So. 2d 454, 455 (Fla. 2d DCA 1978).

Collateral counsel has failed to demonstrate a prima facie showing of any juror misconduct. The alleged possibility of juror misconduct resulting from the alleged racial bias and/or alleged prosecutorial misconduct is nothing but sheer speculation and therefore is not worthy of this Court's consideration. Accordingly, this Court should affirm the lower

court's denial of Appellant's motion to interview the jurors.

ISSUE IV

THE LOWER COURT PROPERLY DENIED APPELLANT RELIEF
ON HIS CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL
DURING THE GUILT PHASE OF HIS TRIAL.

Appellant's claims of ineffective assistance of counsel are controlled by the standards set forth in Strickland v. Washington, 466 U.S. 668 (1984). In Strickland, the United States Supreme Court established a two-part test for reviewing claims of ineffective assistance of counsel, which requires a defendant to show that (1) counsel's performance was deficient and fell below the standard for reasonably competent counsel, and (2) the deficiency affected the outcome of the proceedings. The first prong of this test requires a defendant to establish that counsel's acts or omissions fell outside the wide range of professionally competent assistance, in that counsel's errors were "so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." 466 U.S. at 687, 690; Valle v. State, 705 So. 2d 1331, 1333 (Fla. 1997); Rose v. State, 675 So. 2d 567, 569 (Fla. 1996). The second prong requires a showing that the "errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable," and thus there is a reasonable probability that, but for counsel's errors, the result of the proceedings would have been different. Strickland, 466 U.S. at 687, 695;

Valle, 705 So. 2d at 1333; Rose, 675 So. 2d at 569.

Proper analysis of this claim requires a court to eliminate the distorting effects of hindsight and evaluate the performance from counsel's perspective at the time, and to indulge a strong presumption that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment; the burden is on the defendant to show otherwise. Strickland, 466 U.S. at 689. Where the record is incomplete or unclear about counsel's actions, counsel must be afforded the presumption that he performed competently. Kimmelman v. Morrison, 477 U.S. 365, 384 (1986); Chandler v. United States, 218 F.3d 1305, 1361 n.15 (11th Cir. 2000), cert. denied, 531 U.S. 1204 (2001). With these general principles in mind, Appellant's allegations will be addressed in turn.

Background

Appellant was a difficult client during the pre-trial and trial phases of this case. This fact was testified to by Mr. Fanter. (PCT:697). First and foremost, Appellant was difficult because he was a liar. Mr. Fanter testified that Appellant lied to him, lied to the police, and lied to the court. (PCT:697-703). In particular, Mr. Fanter testified regarding Appellant being caught by the State in one of his lies during the State's cross-examination of Appellant during the pretrial suppression

hearing. (PCT:702). Mr. Fanter also testified that he and the defense trial team wasted a lot of time in preparation because of Appellant's lying. (PCT:699). The defense team spent a considerable amount of time investigating Appellant's claim that the murder occurred in Polk County, rather than Hernando County. (PCT:700-01). Appellant also kept changing his story regarding the crime, even during the trial. (PCT:700). Mr. Fanter also testified about advising Appellant not to testify before the Grand Jury convened to consider whether or not to indict Appellant for the crimes at issue in the instant case. Mr. Fanter testified that Appellant agreed to follow his advice in this regard and not testify before that Grand Jury. Mr. Fanter further testified that after making this agreement, Appellant wrote a letter to the State behind Mr. Fanter's back and actually testified before the Grand Jury. The fact of Appellant having given testimony to the Grand Jury had implications relating to the matter of Appellant testifying during his trial. (PCT:699). These implications posed problems and limitations for the defense trial team as they tried to represent Appellant.

Some of the other noteworthy problems Appellant created for himself and his defense trial team include the following testified about by Mr. Fanter. Appellant maintained to his

attorneys for a long time that the victim was never alive while in the trunk of the vehicle. (PCT:703). During his trial, however, Appellant for the first time admitted that the victim was alive in the trunk. (PCT:703). Mr. Fennie also made the comment to Mr. Fanter that "it wasn't like [I] didn't see what happened." (PCT:703).

Trial Preparation and Cross Examination of Michael Frazier

The majority of Appellant's argument about allegedly ineffective trial preparation pertains to codefendant Michael Frazier. In particular, Appellant's argument is that his counsel was unprepared to proceed with Appellant's trial when the State informed them the day before the trial started that the State intended to call Mr. Frazier as a witness. Appellant's argument continues that the lack of preparation by the defense trial team regarding Mr. Frazier resulted in a "failed" cross examination of Mr. Frazier.

The bottom line to this issue is just what Judge Springstead found at the start of Appellant's trial when he denied Mr. Fanter's motion for continuance²¹ and Judge Tombrink found after

²¹The trial judge informed counsel that he would reconsider his ruling if counsel was unable to obtain any necessary impeachment evidence prior to Michael Frazier's testimony. (R.33). It should also be noted that the defense team was informed that Michael Frazier would be a witness for the State

conducting a postconviction evidentiary hearing. Both judges found that the defense trial team was not genuinely surprised when the State informed them that Mr. Frazier would be a State witness. As Judge Springstead noted at the time of trial, the defense trial team was aware for two months before trial that the State was attempting to convince Mr. Frazier to testify against Appellant. The defense trial team also had videotaped the testimonial portions of both codefendants trials, Mr. Frazier and Pamela Colbert. (R.17). The defense team was aware of, and had copies of, all of Michael Frazier's prior statements. The defense team deposed Mr. Frazier prior to his trial testimony. Accordingly, as both judges found, the defense trial team was not adversely affected in their ability to prepare for Appellant's trial by the addition of Michael Frazier as a witness.²²

on November 4, 1992. (R.27). Defense counsel deposed Mr. Frazier on November 7, 1992, and he did not testify until November 11, 1992. (PCT:792-94).

²²This Court likewise found that defense counsel was not prejudiced by the trial court's denial of Appellant's motion for continuance. On direct appeal this Court stated:

Fennie's defense could not have been prejudiced by the denial of his initial motion for continuance because, as the trial court indicated, he had always been aware of Frazier's involvement in the case. Frazier's trial testimony comported with all his previous statements to police and the statement he made at his own trial. Fennie had access to all

As the lower court found when denying Appellant postconviction relief on this claim:

As the trial judge found, Mr. Frazier had been known to the trial defense counsel since the beginning of the case. Trial defense counsel knew that Mr. Frazier was a key player. Moreover, Mr. Frazier had been tried for first degree murder prior to Mr. Fennie, and trial defense counsel had personnel in the courtroom during Mr. Frazier's trial video taping the entire proceeding. Moreover, trial defense counsel had been given another chance by the trial court to depose Mr. Frazier during trial, and they did so prior to his trial testimony in this case. (R.34). In addition, trial defense counsel had previously received and reviewed the sworn statement of Mr. Frazier given at the time that he was arrested. Thus the defense was fully armed with Mr. Frazier's prior testimony at trial which had been videotaped; with Mr. Frazier's deposition taken during the trial and prior to his testimony in Mr. Fennie's case; and a statement of Mr. Frazier given at the time of his arrest. **In reality, therefore, the trial defense team was not genuinely surprised whatsoever by the testimony of Mr. Frazier at trial; and the trial defense team was fully prepared to and in fact did extensively cross examine Mr. Frazier. Consequently, the cross examination of Mr. Frazier at trial was not meager, but in fact covered fifty-three pages in the trial transcript (R.1506-1559). Contrary to collateral defense counsel's representations, during Mr. Frazier's cross examination trial defense counsel did clearly reveal**

these statements and, consequently, could not have been surprised when Frazier implicated him as the triggerman. Additionally, the court made Frazier available for deposition and assured the defense it would reconsider a motion to continue if defense counsel encountered difficulty in obtaining witnesses or documents needed to impeach Frazier. **As a result, the defense was able to effectively cross-examine Frazier.**

Fennie v. State, 648 So. 2d 95, 97-98 (Fla. 1994).

to the jury Mr. Frazier's many prior violent convictions, and did provide ample testimony of Mr. Frazier's propensity to lie.

Nevertheless, for whatever reasons, these efforts were apparently not sufficient for the jury to switch the blame for the actual killing from Mr. Fennie to Mr. Frazier. Moreover, this apparent inability of the jury to find Mr. Frazier, as opposed to Mr. Fennie, to be the true perpetrator (as the collateral defense claims) cannot properly be laid at the feet of trial defense counsel. And for the various reasons set forth previously in this order, it is clear that trial practice is an art and not a series of scientific check lists guaranteed to spawn an exact result. **Collateral defense counsel's accusations against trial defense counsel are mere allegations, not supported by the record or matters brought out in the evidentiary hearing. Accordingly, this Court does not find that collateral defense counsel has met their burden of showing that trial defense counsel rendered ineffective assistance of counsel by virtue of their alleged failure to be prepared for the cross examination of Mr. Frazier during the murder trial.**

(PCR:3619-20) (emphasis added).

Appellant's argument that counsel was unprepared for the cross examination of Michael Frazier is simply without merit. As properly found by the lower court, trial counsel provided ample evidence of Frazier's propensity to lie. Appellant claims that counsel should have questioned Frazier about his involvement in violent crimes, like a prior armed robbery.²³ Of

²³Collateral counsel also argues that trial counsel was ineffective for failing to locate Dwayne Jones, a codefendant mentioned in a police report regarding an armed robbery committed by Michael Frazier, Jones, and another individual. As discussed previously in Issue II, *supra*, the lower court did not find Jones' testimony at the evidentiary hearing credible. Appellant argues that Jones' testimony would have cast doubt on

course, Appellant's jury was aware that Frazier had been convicted of thirteen felonies, including violent crimes like robbery, armed kidnapping, and first degree murder. (R.1463-66; 1512). Trial counsel also questioned Frazier about his common practice of "waiting for money," i.e., pretending to sell crack cocaine, but jumping in the buyer's car and robbing them of their money. (R.1511). Thus, contrary to Appellant's argument, trial counsel established that Frazier gave false testimony at his own trial when he indicated that he had never committed a violent crime. (R.1537).

Collateral counsel further asserts that trial counsel was ineffective for failing to cross examine Frazier regarding discrepancies in the time frame surrounding the kidnapping and murder of Mary Shearin. During his cross examination, Mr. Lee questioned Frazier about how long it took for Appellant and him to drive to a bank with the victim in the trunk of her car. (R.1516). At trial, Frazier said he could not say how long it took because they were taking back roads and he was not wearing

the State's case that Appellant possessed the gun used to kill the victim. Appellant's speculative argument is without merit. There was evidence from two witnesses that Appellant possessed the gun shortly before the murder and Appellant was caught in possession of the gun after the murder. Given the other overwhelming evidence introduced by the State establishing Appellant's guilt, there is no reasonable possibility that any alleged deficiency in counsel's performance would have affected the outcome of the instant proceedings.

a watch. (R.1516). Counsel impeached Frazier with his prior statement that it took two hours.

Appellant now argues that counsel was ineffective for failing to further discredit Frazier's statement by utilizing a map to show the jury that it did not take two hours to drive "across town" to a bank. First, it must be noted that Frazier said he was guessing when he told Hugh Lee it took two hours to drive the back roads to the bank. Although the bank may not appear to be "across town" on a street map, there was no definitive statement made by Frazier regarding how much time they spent driving around on the back roads. Frazier admitted that he was guessing and not wearing a watch.

Basically, despite collateral counsel's speculation to the contrary, the time frame testimony was not a very significant factor in this case. The evidence clearly showed that Appellant and Frazier kidnaped the victim in Tampa. Appellant and Frazier drove around Tampa with the victim in the trunk of the car and attempted to withdraw money from the victim's account at an ATM machine. Eventually, they picked up Appellant's girlfriend, Pamela Colbert, and some bricks and rope. Colbert then drove them from Tampa to Hernando County with the victim still in the trunk of her car. After Appellant said he was going to shoot the victim rather than drown her with the bricks and rope he had

picked up, Frazier, sitting in the backseat, heard the victim moving about in the trunk and soon noticed her fingers sticking out of the trunk while they were driving down interstate.²⁴ (R.1479-84). The amount of time it took Appellant and Frazier to drive around in Tampa was insignificant in the grand scheme of the kidnapping, robbery, and murder.

The State submits that there is substantial, competent evidence to support the lower court's finding that Appellant failed to meet his burden of showing that trial counsel's performance in cross examining Frazier was deficient and fell below the standard for reasonably competent counsel. Even if Appellant could establish any deficiency in counsel's performance, he is unable to demonstrate any prejudice. There is no reasonable probability that, but for counsel's alleged errors, the result of the proceedings would have been different. Accordingly, this Court should affirm the lower court's order denying Appellant relief on this claim.

Cross Examination of Other Witnesses

²⁴A forensic specialist conducted a test inside the trunk of the car and, like the victim, he was able to place his fingers outside the trunk when locked inside. (R.1647-48). The forensic specialist also testified that while he was in the trunk, he had no trouble hearing two coworkers carry on a conversation inside the passenger compartment of the car. (R.1655-56). Thus, the victim likely overheard Appellant tell Colbert and Frazier that he had to kill the victim because she had seen his face. (R.1482-83)

In this sub-issue, Appellant complains that trial counsel failed to effectively cross examine certain witnesses and failed to call other witnesses who would have allegedly cast doubt on the State's theory of the case. The State submits that the lower court properly denied this sub-claim based on the evidence presented at the postconviction evidentiary hearing.

Appellant claims that trial counsel Alan Fanter was ineffective based on his failure to cross examine the victim's husband about the time of his last conversation with his wife. At trial, John Shearin testified that his wife came home at about 3:15 a.m. on Sunday morning, September 8, 1991, and stayed at the house for about fifteen minutes before leaving again. (R.1146). According to a detective's report, Mr. Shearin told him shortly after the crime that he last saw his wife at approximately 3:30 or 3:45 that morning. (PCT:639-42). Mr. Shearin in each instance said either "approximately" [what he said to police] or "about" [what he said at trial] which indicated that he was not suggesting absolute certainty.²⁵

²⁵Likewise, Michael Frazier's testimony regarding the time sequence of his initial contact with the victim was not expressed with any certainty. Frazier testified that he met Appellant at "[a] little after 12:00, about 12:30 almost 1:00," and Appellant kidnaped the victim at gunpoint around forty-five minutes later. (R.1472-74). Of course, as previously noted, Frazier testified that he was not wearing a watch. (R.1472).

(PCT:721). Mr. Fanter testified at the evidentiary hearing that he believed it would be very risky to cross examine the victim's husband and risk offending the jury about this insignificant time difference. (PCT:719-20).

In denying this sub-issue of Appellant's claim, the lower court stated:

Collateral defense counsel takes minute conflicts in the evidence and then tries to build them into something much larger. Collateral defense counsel then speculates that if this matter had been brought out by trial defense counsel, that the trial jury would have been duly impressed, and that the result would have been different. The court finds for the reasons set forth herein that this process is pure speculation and conjecture and without an adequate legal foundation.

Collateral defense counsel faults trial defense counsel for failing to cross examine Mr. Shearin, the husband of the victim, on the time frame. There is apparently an approximately thirty minute time difference between when Mr. Shearin said that his wife left the home, and what was testified to by Mr. Frazier as to the time that the victim approached him. Collateral defense counsel makes a great deal out of this difference, but the Court believes, upon reflection and review, that this difference is largely unimportant. **Collateral defense counsel's arguments and effort in this regard are largely inferences based on inferences, and extremely speculative and conjectural in nature and scope. The Court finds and assigns very little weight to collateral defense counsel's arguments on this issue.**

(PCR:3620-21) (emphasis added). The State submits that the lower court properly found that this "minute" time conflict was "largely unimportant," and counsel was not ineffective for

failing to attack the victim's husband with this slight discrepancy.

Appellant also claims that his trial counsel was ineffective for failing to cross examine Ansell Rose regarding his statements to detectives after Appellant's arrest. Ansell Rose, a hitchhiker, was in the victim's car with Appellant when law enforcement officers arrested Appellant for the subject crimes. Mr. Rose testified at trial that when the police began following them, he observed Appellant reach behind him and take a small firearm and place it between the seat. (R.1285). Once stopped by the police, Mr. Rose saw Appellant place the gun under a floor mat. (R.1288). After conducting a search of the victim's vehicle, law enforcement officers found the loaded murder weapon hidden under the driver's side floor mat. (R.1179-80).

Mr. Fanter testified at the evidentiary hearing that Ansell Rose's statements to detectives were not very different from his trial testimony. (PCT:716-18). In one statement to detectives, the detective's report indicates that Mr. Rose stated that Appellant took something from his back pocket and tried to hide it, but Mr. Rose did not know what it was. (PCT:633). In a different detective's report, Mr. Rose reportedly stated that Appellant took a handgun from his back pocket and stuck it

between the seats prior to the car being pulled over. (PCT:634). Mr. Fanter acknowledged that in both reports, there was no mention of Appellant placing the gun under a floor mat after the car was pulled over. (PCT:637).

In denying this claim, the postconviction judge stated that he had compared Mr. Rose's pretrial statements with his trial testimony, and although there were differences, "the Court finds that the differences are not that great and are not especially significant. Ansell Rose testified in an essentially similar fashion both before trial and at trial, and the trial defense counsel's cross examination of Mr. Rose was at least adequate." The State submits that the lower court's conclusion is supported by competent, substantial evidence and thus should be affirmed.

Collateral counsel's argument of ineffectiveness regarding trial counsel's cross examination of Regina Rogers is also without merit. At the time of the murder, Regina Rogers was the girlfriend of codefendant Michael Frazier.²⁶ As such, she was the person who was given the victim's wedding ring which was

²⁶Contrary to collateral counsel's repeated assertions in his brief, Regina Rogers was not Michael Frazier's girlfriend at the time of Appellant's trial and was not in an "ongoing relationship" with him. She testified that she had not written to Mr. Frazier in over eight months and she had a new boyfriend for the past eight months. (R.1695, 1698).

taken during the subject crimes. Appellant argues that a Tampa Police Department report contradicts Ms. Rogers' pretrial deposition testimony and should have been used by trial counsel to impeach Ms. Rogers. Ms. Rogers testified at trial regarding a violent altercation with Michael Frazier which resulted in his arrest for aggravated battery and false imprisonment. At her deposition, Ms. Rogers indicated that this fight was the only violent incident with Mr. Frazier, but the police report indicated that this was not the only incident of violence. (PCT:616-23).

During the evidentiary hearing, Mr. Fanter acknowledged that he utilized the police report of an altercation between Ms. Rogers and Mr. Frazier during his cross examination of Regina Rogers at Appellant's trial. He also used her deposition testimony to impeach her at trial. (PCT:707-11). Although counsel did not bring out this single inconsistency, this does not equate to a finding of ineffectiveness given his thorough cross examination of this witness. Certainly, Appellant has failed to demonstrate any prejudice. As the lower court found when denying this claim, "[a]ny spectacular result that defense counsel would claim from a different or more thorough questioning on the [police] report is merely speculative and conjectural." (PCR:3622).

Failure to Call Certain Witnesses

Appellant's argument on this issue pertains to four witnesses: Dr. Kenneth Martin, codefendant Pam Colbert, Dwayne Jones, and Appellant himself. Appellee has discussed these witnesses' testimony in Issue II, supra at 36 - 43 and Issue VI, infra at 70 - 76, and there is no need to readdress the State's position at this juncture. As noted in these sections of the State's brief, Appellant's trial counsel was not ineffective for failing to call these witnesses. Because Appellant has failed to meet either prong of the Strickland test to establish ineffective assistance of counsel, this Court should affirm the lower court's detailed order denying Appellant postconviction relief.

ISSUE V

THE LOWER COURT PROPERLY DENIED APPELLANT AN
EVIDENTIARY HEARING ON TWO OF HIS POSTCONVICTION
CLAIMS.

The lower court summarily denied Appellant's claims of ineffective assistance of counsel based on trial counsel's failure to object to the State's questioning of witnesses regarding Appellant's sexual activity with the victim. To uphold the lower court's summary denial of claims raised in a 3.850 motion, the claims must be either facially invalid or conclusively refuted by the record. Peede v. State, 748 So. 2d 253, 257 (Fla. 1999). Further, where no evidentiary hearing is held below, this Court must accept the defendant's factual allegations to the extent they are not refuted by the record. Id.; Lightbourne v. Dugger, 549 So. 2d 1364, 1365 (Fla. 1989).

Appellant first claims that the lower court erred in failing to grant him an evidentiary hearing on his claim that counsel was ineffective for failing to object to the State's argument regarding an uncharged sexual battery. Appellant makes a related argument that this evidence effectively constituted a non-statutory aggravator. Because the State did not present any additional evidence at the penalty phase, both of these related sub-claims will be addressed together.

The lower court denied these claims based on a procedural

bar. The State submits that Appellant has failed to demonstrate any error in this ruling. It is well established in Florida that postconviction motions are not to be used as second appeals and claims which were, or could have been, raised on direct appeal are not cognizable in a motion filed pursuant to Florida Rule of Criminal Procedure 3.850. Zeigler v. State, 654 So. 2d 1162 (Fla. 1995); Oats v. Dugger, 638 So. 2d 20 (Fla. 1994). Furthermore, allegations of ineffective assistance of counsel cannot be used to circumvent the rule that postconviction proceedings may not be used as a second appeal. Lopez v. Singletary, 634 So. 2d 1054 (Fla. 1993); Medina v. State, 573 So. 2d 293 (Fla. 1991). This Court should follow settled Florida law and enforce the procedural bars that apply in this case so as to facilitate the orderly consideration of this case by the various appellate courts. In particular, the express finding by this Court of any procedural bar will enable whatever federal court is called upon to consider Appellant's case to discern the parameters of federal habeas corpus review. See Harris v. Reed, 489 U.S. 255 (1989); Wainwright v. Sykes, 433 U.S. 72 (1977).

In the event this Court wishes to address the merits of this claim in addition to relying on the procedural bar, the State submits that Appellant's claim of ineffective assistance of

counsel is without merit. Appellant claims that the prosecuting attorney engaged in misconduct by referring to an uncharged rape during the questioning of several witnesses in a "deliberate attempt to arouse deep-rooted racist fears in jurors regarding black men attacking white women. . . . (R.1091-1122; 1148-51; 1177)." ²⁷ The references to the transcript of Appellant's trial relied on by collateral counsel is inaccurate and misleading. During the direct examination of the medical examiner, R.1091-1122, the prosecutor briefly inquired about bruises to the victim's groin, thighs, and breast. (R.1103-04). The prosecutor then questioned the medical examiner as to whether she had found any indication that the victim had engaged in "sexual intercourse" prior to her death; "an ordinary procedure used in the course of an autopsy in a case like this." (R.1113-14). The medical examiner subsequently testified that there was no physical indication of forced sexual intercourse, but she did not necessarily expect to find any physical evidence of forced sexual activity because the victim was an adult woman who had

²⁷Collateral counsel's citations to the record are inaccurate. Pages 1091-1122 cover the medical examiner's entire direct examination. As will be discussed in more detail, the medical examiner answered a few questions regarding evidence of the victim engaging in sexual intercourse prior to her death, but this topic did not encompass her entire direct examination. Furthermore, collateral counsel mistakenly cites to page 1177 in the record in support of this claim. There is no reference on this page to any alleged sexual activity.

prior sexual activity. (R.1118). When the prosecutor asked the medical examiner if the bruises to the victim's body could have been inflicted during the course of forced sexual intercourse, defense counsel repeatedly objected to the prosecutor's questions. (R.1118-21). Eventually, the medical examiner testified that it was possible that the victim's bruises resulted from forced sexual intercourse. (R.1120-21).

On cross examination, defense counsel established that the bruises could have stemmed from another source other than forced sexual intercourse. (R.1122-23). The medical examiner also noted that there were no injuries to the victim's genitalia. (R.1123). On redirect examination, the prosecutor inquired if the medical examiner could determine from lab tests if the victim had engaged in sexual intercourse. The prosecutor specifically noted that he would not refer to "sexual battery," but would ask if the doctor could determine whether the victim had engaged in "sexual intercourse." (R.1135). The medical examiner testified that the victim had sexual intercourse prior to her death. (R.1137). Defense counsel elicited the fact that the intercourse may have occurred within days of her murder. (R.1137).

During the questioning of the victim's husband, John Shearin, the prosecutor inquired as to the last time he had

sexual intercourse with his wife. (R.1150-51). Mr. Shearin testified that it had been over a week. His wife had recently undergone a hysterectomy and her hormone problems had affected her desire to have sexual relations. (R.1151).

Collateral counsel fails to discuss other evidence of the sexual activity that was introduced through law enforcement officers and Appellant's codefendant, Michael Frazier. When Appellant was initially apprehended while driving the victim's vehicle and in possession of the murder weapon, he was interviewed by law enforcement officers. Appellant initially gave officers a false name and ID card bearing the name, Ezell Foster, Jr. (R.1244-45). Appellant gave officers a false story about a "Mr. Jim" being involved with the victim. (R.1244-60). In a separate interview with law enforcement officers, Appellant admitted that he had lied in his previous statement and now claimed that he had engaged in sexual intercourse with the victim and an undisclosed person that committed the murder was angry with Appellant because he was having sex with the victim. (R.1316-23). Appellant stated that he had sexual intercourse with the victim in the backseat of the car, but he denied having anal or oral sex with her. (R.1323). Appellant's codefendant, Michael Frazier, testified that he joined Appellant in the victim's car after Appellant had kidnaped her at gunpoint

and placed her in the trunk of the car. (R.1474-75). Appellant drove to a bank and attempted to get money out of the ATM with the victim's card. When he was unsuccessful, he drove away to a dark area and parked. Appellant got the victim out of the trunk and was telling her to give him the right numbers for the ATM machine. (R.1476-78). Michael Frazier exited the car and went and smoked a cigarette when Appellant placed the victim in the backseat. (R.1478). Once inside the car, Mr. Frazier overheard the victim say "she don't let her husband do these type of things to her." (R.1478).

Obviously, as a review of the above testimony demonstrates, the prosecutor did not impermissibly reference an uncharged rape in a "deliberate attempt to arouse deep-rooted racist fears in jurors regarding black men attacking white women." By Appellant's own admission to law enforcement officers, he engaged in sexual intercourse with the victim. However, based on the testimony of the medical examiner and codefendant Michael Frazier, it is reasonable to assume based on the totality of the evidence that it was not consensual.

Appellant's assertions that counsel was ineffective for failing to object to this evidence is without merit. Evidence of Appellant's sexual activity with the victim, even if it constituted an uncharged crime, is inseparable and inextricably

intertwined with the crimes charged, and is therefore admissible. Griffin v. State, 639 So. 2d 966 (Fla. 1994). Generally, evidence of other crimes or acts may be admissible if it is relevant to prove a material fact in issue. Bryan v. State, 533 So. 2d 744, 746 (Fla. 1988); Williams v. State, 110 So. 2d 654 (Fla. 1959). Relevance, not necessity, is the standard for admissibility. The evidence need not prove the defendant's guilt of the charged offense if "it is in the nature of circumstantial evidence forming part of the web of truth" proving the defendant to be the perpetrator, Bryant v. State, 235 So. 2d 721 (Fla. 1970), or if it would "cast light" upon the character of the act under investigation. See United States v. Canelliere, 69 F.3d 1116, 1124 (11th Cir. 1995) ("Furthermore, Rule 404(b)²⁸ does not apply where the evidence concerns the 'context, motive, and set-up of the crime' and is 'linked in time and circumstances with the charged crime, or forms an integral and natural part of an account of the crime, or is necessary to complete the story of the crime for the jury.'") (quoting United States v. Williford, 764 F.2d 1493, 1499 (11th Cir. 1985)).

In proving its case, the State is entitled to paint an

²⁸The Federal equivalent to Section 90.404 of the Florida Statutes.

accurate picture of events surrounding the crimes charged. Smith v. State, 699 So. 2d 629 (Fla. 1997). Inextricably intertwined evidence or inseparable crime evidence may be admitted at trial to establish the entire context out of which a criminal act arose. State v. Cohens, 701 So. 2d 362, 364 (Fla. 2d DCA 1997); Hunter v. State, 660 So. 2d 244, 251 (Fla. 1995); see also, Remeta v. State, 522 So. 2d 825, 827 (Fla. 1988) (stating that evidence of a collateral murder was admissible because the same gun was used in both crimes and the evidence established the defendant's possession of the murder weapon and counteracted the defendant's statements blaming the crimes on a companion).

Here, the relevancy of Appellant's sexual activity with the victim is beyond dispute. The sexual activity occurred near the time of the murder and resulted in compelling evidence establishing Appellant as the perpetrator. The relevancy of this evidence was not substantially outweighed by the danger of unfair prejudice. In fact, this evidence was so highly relevant and material that Appellant entirely failed to show any unfair prejudice in its admission.

Contrary to collateral counsel's assertions, the prosecuting attorney did not engage in deliberate misconduct by referring to the evidence of admitted sexual activity during the questioning

of certain witnesses. This evidence was admissible and inextricably intertwined with the charged offenses of armed kidnapping, armed robbery, and murder. Defense counsel was aware that Appellant told law enforcement officers in one of his many versions of events that he had engaged in sexual intercourse with the victim. Defense counsel had no legal argument to preclude the admission of evidence surrounding this sexual activity during the guilt phase. Thus, counsel cannot be found ineffective for failing to object to admissible evidence that did not unfairly prejudice Appellant. Accordingly, this Court should affirm the lower court's summary denial of Appellant's claim. See Teffeteller v. Dugger, 734 So. 2d 1009, 1016 (Fla. 1999) (stating that a motion for postconviction relief can be denied without a hearing when the motion and the record conclusively demonstrate that the defendant is entitled to no relief).

ISSUE VI

THE LOWER COURT PROPERLY DENIED APPELLANT'S CLAIM ALLEGING THAT HIS CONSTITUTIONAL RIGHTS WERE VIOLATED WHEN HIS TRIAL COUNSEL ALLEGEDLY PREVENTED HIM FROM TESTIFYING.

Appellant claims that his constitutional rights were violated when his trial counsel prevented him from testifying on his own behalf. The lower court granted Appellant an evidentiary hearing and afforded Appellant the opportunity to establish facts in support of this claim. At the evidentiary hearing, Appellant chose not to testify and offer evidence in support of his allegation that he wished to testify. Furthermore, it was unrebutted that Appellant's counsel informed him that it was his decision whether to testify. Because Appellant failed to present any evidence to support this claim, the lower court denied this claim.

The lower court found that Appellant's attorneys thoroughly discussed this issue with Appellant on a number of occasions, and even preserved a transcribed record of one of their conversations. Based on the evidence presented at the evidentiary hearing, the lower court concluded that Appellant made a fully informed, knowing, intelligent, voluntary, and strategic decision not to testify. (PCR:3629). Because this ruling is supported by competent, substantial evidence, this Court must affirm the lower court's denial of this claim.

The standard of review applied by an appellate court when reviewing a trial court's ruling on a rule 3.850 motion to vacate following an evidentiary hearing is: "As long as the trial court's findings are supported by competent substantial evidence, this Court will not substitute its judgment for that of the trial court on questions of fact, likewise of the credibility of the witnesses as well as the weight to be given to the evidence by the trial court." Blanco v. State, 702 So. 2d 1250, 1252 (Fla. 1997) (quotations omitted).

The State acknowledges that Appellant had a constitutional right to testify on his own behalf. United States v. Teague, 953 F.2d 1525, 1530 (11th Cir. 1992). However, contrary to Appellant's claim, it has never been established that Appellant's trial counsel refused to allow Appellant to testify or that counsel failed to fully explain Appellant's constitutional rights. At trial, Appellant's guilt phase attorney, Alan Fanter, along with his penalty phase counsel, Hugh Lee, spoke with Appellant at length regarding the pros and cons of calling any defense witnesses and of Appellant testifying. (Def. Ex. 15). During this colloquy, Mr. Fanter asked Appellant, "What about whether or not you're going to testify, **have you made your decision?**" (Def. Ex. 15, p.14). Appellant gave equivocal statements regarding his desire to

testify. After further discussion the following exchange took place:

Mr. Fanter: As far as your testifying, we will get to that later when it's the appropriate time.

Mr. Fennie: Okay.

Mr. Fanter: It's both Hugh's and my decision, based on your prior record and how the suppression hearing went, that we would rather argue your taped statement which has been indicated as the most truthful statement you made and we prepared along those lines now and not have you testify. That's just our opinion. ***It's your constitutional right to determine whether or not you want to testify or not, okay, but we can prepare - basically I feel it would be in your best interest not to testify. But again, when we get to that point it will be your call so to speak.*** Okay?

Mr. Fennie: Okay.

Mr. Fanter: Do you understand me?

Mr. Fennie: Yes.

Mr. Fanter: Any other questions for me at this point?

Mr. Fennie: No.

(Def. Ex. 15, p.18) (emphasis added).

At the evidentiary hearing, Alan Fanter testified that Appellant initially wanted to testify, but he changed his mind and decided not to when the time came. (PCT:656). Mr. Fanter explained that Appellant was a difficult client because he lied often. (PCT:698-703). Although Mr. Fanter declined to have Appellant testify before the Grand Jury, Appellant wrote a letter to the Grand Jury and agreed to testify without Mr. Fanter's knowledge. (PCT:698-99). Mr. Fanter was also concerned with Appellant testifying given his previous testimony

and the State's cross examination of Appellant at his motion to suppress hearing. (PCT:702-03; R.935-39). Mr. Fanter testified that based on these factors, coupled with Appellant's numerous inconsistent statements to law enforcement officers and his prior felony record, caused Mr. Fanter's to advise Appellant not to testify at trial. (PCT:698-704).

As previously noted, trial counsel had a court reporter transcribe a lengthy discussion with Appellant regarding the decision to call defense witnesses and whether Appellant would testify. (See Def. Ex. 15). Mr. Fanter testified that this was not the only conversation he had with Appellant regarding this issue. (PCT:724-31). Following his conviction, Appellant wrote a letter to the trial judge complaining of his trial attorneys. In response to this letter, Mr. Fanter wrote the following in a memo to his file:

That there is absolutely no question Mr. Fennie had the opportunity and the right to testify; this was made expressly clear to him prior to, during the trial, and at the appropriate time when it would have been time for him to testify.

Obviously, Mr. Fennie had at least 24 felony convictions, several petit theft convictions, and it was my opinion that he shouldn't testify, but that opinion was in fact given to him; he made his decision not to testify. Nobody stopped him, forced him or pressured him not to testify.

(State Ex. 5). Furthermore, when Mr. Fanter was cross examined

about Appellant's desire to testify, the following exchange took place at the evidentiary hearing:

Q: This business of Mr. Fennie claiming through his attorney that he wanted to testify and you wouldn't let him, that's just sheer nonsense, isn't it?

A: Yes, sir.

Q: In fact, you consider it a matter of your professional integrity to follow the rules in that regard. If he wants to testify, whether you think it's the dumbest idea in the world or not, because it's his case you're going to let him.

A: Absolutely.

Q: And in fact, in this case you would have let him?

A: Yes, sir.

(PCT:730-31).

Appellant failed to offer any evidence in his postconviction proceedings to rebut the testimony of his trial counsel that he was fully informed of his constitutional rights and that he made the voluntary, strategic decision not to testify. In United States v. Nohara, 3 F.3d 1239, 1244 (9th Cir. 1993), the court stated that "[w]hen a defendant is silent in the face of his attorney's decision not to call him as a witness, he has waived his right to testify." Furthermore, in United States v. Teague, 953 F.2d 1525, 1533 (11th Cir. 1992), the Eleventh Circuit stated:

Defense counsel bears the primary responsibility for advising the defendant of his right to testify or not to testify, the strategic implications of each choice, and that it is ultimately for the defendant himself to

decide. . . . Moreover, if counsel believes that it would be unwise for the defendant to testify, counsel may, and indeed should, advise the client in the strongest possible terms not to testify. The defendant can then make the choice of whether to take the stand with the advice of competent counsel.

In the instant case, defense counsel conformed to his professional obligations by informing Appellant of his right to testify and the strategic implications of Appellant's decision. Counsel informed Appellant that it was his professional opinion that he should not testify, but informed Appellant that it was ultimately Appellant's decision. It remains unrebutted that, at the appropriate time, Appellant made the informed decision not to testify. Thus, because Appellant has failed to establish that counsel was deficient in any manner, this Court should deny Appellant's claim based on Strickland.

Even if this Court finds that trial counsel was deficient in rendering advice to Appellant regarding his decision whether to testify or not, Appellant has failed to establish any prejudice resulting from his failure to testify. See Oisorio v. State, 676 So. 2d 1363 (Fla. 1996) (stating that a defendant claiming ineffective assistance of counsel based on counsel's interference with his right to testify must meet both prongs of Strickland v. Washington, 466 U.S. 668 (1984)); Underwood v. Clark, 939 F.2d 473 (7th Cir. 1991) (finding defendant failed to show prejudice when he asserted counsel rendered ineffective

assistance of counsel by advising him not to testify when the court concluded that the outcome would not have changed because the jury would not have believed the defendant's story). Likewise, in this case, the jury would not have believed Appellant's story had he testified. As defense counsel conceded at the evidentiary hearing, Appellant continuously lied about the details of the crime. Appellant gave numerous conflicting statements to law enforcement officials, to the Grand Jury, and even to his own trial counsel regarding the crime. The State would have easily impeached Appellant's story with these inconsistencies. Furthermore, the jury would have learned of Appellant's extensive prior felony convictions. Based on the overwhelming evidence of Appellant's guilt, this Court can conclude that there is no reasonable probability that the outcome would have been different had Appellant testified. Accordingly, this Court should deny the instant claim.

CONCLUSION

In conclusion, Appellee respectfully requests that this Honorable Court affirm the lower court's order denying Appellant postconviction relief.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail to John J. Jackson, Assistant Capital Collateral Counsel, Capital Collateral Counsel - Northern Region, 1533-B South Monroe Street, Tallahassee, Florida 32301, on this 3rd day of September, 2002.

COUNSEL FOR APPELLEE

CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this brief is 12-point Courier New, in compliance with Fla. R. App. P. 9.210(a)(2).

COUNSEL FOR APPELLEE