IN THE SUPREME COURT OF FLORIDA

CLARENCE FORD,

Petitioner,

v. CASE NO. SC01-690

STATE OF FLORIDA,

Respondent.

_____/

ON DISCRETIONARY REVIEW FROM
THE FIFTH DISTRICT COURT OF APPEAL

RESPONDENT'S AMENDED BRIEF ON THE MERITS

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

ALFRED WASHINGTON, JR.
ASSISTANT ATTORNEY GENERAL
Florida Bar #0111163
444 Seabreaze Boulevard
Daytona Beach, FL 32118
(386) 238-4990
(386) 238-4997(FAX)

COUNSEL FOR RESPONDENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATEMENT OF THE CASE AND FACTS

The Respondent generally agrees with the Petitioner's Statement of the Case and Facts, and provides the following additions and reiterations thereto:

On June 25, 1998, the State of Florida charged the Petitioner, Clarence Ford, by a 5-count information for Count I--Resisting an officer (Officers Stephen Algin and Danny Anderson) with violence, Count II–Battery on a law enforcement officer (Algin), Count III–Battery on a law enforcement officer (Anderson), Count IV–Resisting arrest without violence (both officers), and Count V–Possession of drug paraphernalia (crack pipe). (R. 28-29--trial court order Exhibit A).[1] The Petitioner's jury trial was conducted on November 19, 1998. (App. A).[2] The jury verdicts were as follows: Count I–guilty of the lesser included offense of resisting an officer without violence, Count II--not guilty, and Counts III, IV and V--guilty. (R. 30-34–trial court order Exhibit B; App. A, T. 261).

The Petitioner filed a direct appeal with the Fifth District Court of Appeal, wherein the Court reversed Count IV (resisting

---

[1]"R" represents the Fifth District Court of Appeal's record transmitted to this Court followed by the designated page number. The undersigned notices that the district court's index to the record renumbered the documents contained therein, and thus, shall accordingly follow that numerical designations.

[2]This Court can take judicial notice of court files interrelated to the instant case. See e.g., Stark v. Frayer, 67 So. 2d 237 (Fla. 1953); Weaver v. State, 764 So. 2d 912, 913 (Fla. 1st DCA 2000); Melgares v. State, 762 So. 2d 921, 923 n.3 (Fla. 3d DCA 1999).

without violence) and affirmed the remaining counts on appeal. See Ford v. State, 735 So. 2d 615 (Fla. 5th DCA 1999).

Thereafter, on April 18, 2000, the Petitioner executed a Florida Rule of Criminal Procedure 3.850 motion for post conviction relief in the trial court (with general affidavits attached as exhibits) raising three (3) claims of ineffective assistance of counsel. (R. 1-24). The Petitioner alleged under claim I that his trial counsel was ineffective for failure to conduct an adequate pretrial investigation by failing to interview and call witnesses Pearlie Mae and Clarence Ford (his parents), and Johnson Bruce. (R. 4-9). The Petitioner also alleged that his parents' testimony would have supported his alibi, that at no time did he intentionally touch, strike, or attempt to strike either officer and that at no time did he grab any of the officer's equipment including the can of mace used by Officer Anderson. (R. 5). The Petitioner further alleged that witness Bruce did not observe what had happened inside the home, but was a witness to the events that had occurred outside the home. (R. 6-7).

The Petitioner alleged under claim II that his trial counsel was ineffective for misadvising him about his right to testify. The Petitioner also alleged that after the State had rested its case, and during a brief recess, his trial counsel had informed him that it would not be a good idea for him to testify because the jury would find out that he had just been convicted of a battery on a person over sixty-five less than a year ago and had been in trouble since 1976, and that the jury would automatically by law

find him guilty. (R. 9-10). The Petitioner further alleged that he was entitled to an evidentiary hearing on this claim. (R. 10).

The Petitioner alleged under claim III that his trial counsel was ineffective by failing to properly cross-examine the prosecution witness, Renee Buggs (his probation officer), by asking her only one question. (R. 11-12).

On June 8, 2000, the trial court entered its order denying the Petitioner's motion for post conviction relief, ruling in part that:

> . . . Defendant presented one ground for post conviction relief under Florida Criminal Rule 3.850; ineffective assistance of counsel. He alleged that his attorney was ineffective for three reasons: because he did not call certain witnesses at trial who the Defendant wanted to testify on his behalf, because he misadvised the Defendant with regard to the Defendant's right to testify on his behalf, and he failed to properly cross-examine a State witness to the Defendant's satisfaction. According to the United States Supreme Court in *Strickland v. Washington*, a defendant must meet a two-prong test to successfully allege ineffective assistance of counsel. 466 U.S. 668, 669 (1984). First, he/she must show "that but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* The Supreme Court stated that there is a strong presumption that the defense counsel's actions fell "within the wide range of reasonable professional assistance." *Id.* at 670.
>
> First, the Defendant alleged that defense counsel was ineffective for not calling witnesses to trial. The names of the three people the Defendant wanted to testify on his behalf at trial did not appear on either the Defense' witness list or the State's witness list. The record does not reflect that the witnesses the Defendant want to testify were available alibi witnesses as no Notice of Alibi was filed by the defense. Post conviction relief is denied as to this

allegation because strategic decisions regarding whether or not to use defense witnesses is a tactical decision, and therefore not subject to the Defendant's attack under a 3.850 motion. *See Wright v. State*, 581 So. 2d 882, 883-84 (Fla. 1991).

Second, the Defendant alleges that defense counsel was ineffective for advising him not to testify on his own behalf. In order for a defendant to prevail in a motion for post conviction relief under the ground that counsel was ineffective for interfering with the right to testify, the Defendant must be able to meet both prongs of *Strickland*. *See Oisorio v. State*, 676 So. 2d 1363 (Fla. 1996). The Defendant alleges that his attorney erroneously advised him not to testify because the jury would then hear evidence that the Defendant was convicted of battery on a person over 65. If counsel advises a defendant not to testify because the jury will automatically be told the specific nature of prior felonies, it may constitute a deficient performance by counsel. *See Everhart v. State*, 2000 WL 665520 (Fla. 2d DCA). However, the Defendant is not entitled to a hearing on the first prong of the *Strickland* test, because he has not demonstrated how he was prejudiced by counsel's advice not to testify. In *Everhart*, supra, the defendant stated in his 3.850 motion that but for counsel's advice, he would have testified and the court found that his potential testimony (as proposed by him in his motion) would have provided the jury with evidence that contained probative value. In the instant case, the Defendant asserts that he wanted to tell his side of the story, but does not explain what he would have testified to and how the absence of his testimony prejudiced his right to a fair trial. The Court is not required to make a specific finding about counsel's performance when it is clear that the prejudice component of the *Strickland* test is not satisfied. *See Kennedy v. State*, 547 So. 2d 912 (Fla. 1989). Therefore, post conviction relief is denied as to this allegation because the Defendant failed to make a showing that but for the alleged misadvise of his attorney, the outcome of his trial would have been different.

> Third, the Defendant alleged that his counsel was ineffective because he conducted an unsatisfactory cross-examination of a State witness. After the State's direct examination of Officer Buggs, defense counsel asked one cross-examination question. The Defendant is of the opinion that this was not a proper cross-examination because his counsel did not ask other detailed questions about the incident. Florida case law has consistently held that courts should not review "any specific discretionary or judgmental act or position of trial counsel, whether tactical or strategic, on an inquiry as to effectiveness of counsel." *McNeal v. State*, 409 So. 2d 528 (Fla. 5th DCA 1982). Post conviction relief is denied as to this allegation because defense counsel's decision on whether and how to cross-examine a witness is discretionary trial strategy by the attorney, not reviewable by this court in a post conviction motion on the grounds of ineffective counsel.

(R. 25-27).

Thereafter, the Petitioner appealed the trial court's summary denial of his motion for post conviction relief, wherein the Fifth District Court of Appeal per curiam affirmed on December 12, 2000. (R. 65). The Petitioner then filed a motion for rehearing, to which the Fifth District Court of Appeal denied after addressing his claims as follows:

> Clarence Ford filed a motion for rehearing after we affirmed per curiam the trial court's order summarily denying his Rule 3.850 motion, which alleged three instances of ineffective assistance of trial counsel. Ford was convicted of two counts of resisting arrest without violence and other offenses after a jury trial. We deny his motion.
>
> Ford argues that his trial counsel failed to conduct an adequate pre-trial investigation by failing to interview and call several potential witnesses. Under the circumstances, we conclude that he was not entitled to relief on this claim. As the trial court point out in its order, generally the decision whether

> to call certain defense witnesses is a tactical decision not subject to attack under Rule 3.850. Given these circumstances, the tactical decision was a reasonable one as two of the three witnesses were Ford's own parents; defense counsel could have well decided that calling them would not have been beneficial.
>
> Ford further complained that his trial counsel was ineffective for advising him not to testify on his own behalf. We conclude that he was not entitled to relief on this claim. As the trial court pointed out in its order, Ford failed to demonstrate any prejudice. *See Strickland v. Washington*, 104 S.Ct. 2052 (1984).
>
> Ford also asserted that his trial counsel was ineffective for allegedly failing to conduct a proper cross-examination of a state witness, Ms. Renee Buggs. Specifically, Ford complained that defense counsel's cross-examination of Ms. Buggs consisted of only one question, whether she actually saw Ford "windup and punch" any of the officers. Ford failed to demonstrate just how his trial counsel was ineffective for limiting his cross-examination to that question. Trial counsel may well have had good reason not to ask any other questions of her.
>
> MOTION FOR REHEARING DENIED.

(R. 71-72); See also Ford v. State, 776 So. 2d 373, 373-74 (Fla. 5th DCA 2001).

After the parties filed their respective jurisdictional briefs, this Court on September 12, 2001, entered its Order accepting jurisdiction and dispensing with oral argument, and directing the parties to file their respective briefs on the merits.

SUMMARY OF ARGUMENT

This Court's exercise of its discretionary jurisdiction was improvidently granted because of the Fifth District Court of Appeal's per curiam affirmance, and its denial of rehearing was confined to its four corners and presented no conflict with any opinion of this Court or district courts. However, if the merits are reached, then the Petitioner was properly denied post conviction relief and was not entitled to an evidentiary hearing on his claims.

ARGUMENT

THE PETITIONER'S MOTION FOR POST CONVICTION RELIEF BASED ON INEFFECTIVE ASSISTANCE OF COUNSEL WAS PROPERLY SUMMARILY DENIED AND AFFIRMED, AND HE IS NOT ENTITLED TO AN EVIDENTIARY HEARING BECAUSE THE RECORD REFUTES HIS CLAIMS.

Below, the trial court summarily denied the Petitioner's motion for post conviction relief which raised three (3) claims of ineffective assistance of counsel. (R. 25-27). Thereafter, the Fifth District Court of Appeal per curiam affirmed the trial court's summary denial of the Petitioner's motion (R. 65), and also denied his motion for rehearing after addressing his claims of ineffective assistance of counsel, citing only to Strickland v. Washington, 466 U.S. 668 (1984). (R. 71-72); See also Ford v. State, 776 So. 2d 373, 373-74 (Fla. 5th DCA 2001). It is the Respondent's position that this Court's exercise of its discretionary jurisdiction was improvidently granted in light of the fact that the Fifth District Court of Appeal per curiam affirmed, see Jenkins v. State, 385 So. 2d 1356, 1359 (Fla. 1980); Dept. of Legal Affairs v. District Court of Appeal, 5th Dist., 434 So. 2d 310 (Fla. 1983); Dodi Publishing Co. v. Editorial America S.A., 385 So. 2d 1369 (Fla. 1980), and that its denial of rehearing was confined to its four corners and presented no conflict with any opinion of this Court or district courts. See Reaves v. State, 485 So. 2d 829 (Fla. 1986)(the conflict must be found within the four corners of the district court's opinion). However, because this Court has ordered the parties to address the merits, the Respondent's argue that the Petitioner's motion for post conviction

relief was properly denied without resorting to an evidentiary hearing.

The Petitioner contends in his merits brief, that the trial court should not have denied his motion for post conviction relief without an evidentiary hearing upon factual assertions which, if proven, would have entitled him to relief. The Petitioner also contends that the district court affirmed the summary denial of his motion, and in so doing assumed numerous facts to have been proven, although trial counsel was never called to testify, as there had been no evidentiary hearing. Lastly, the Petitioner contends that both the trial court and the district court made rulings which were in conflict with the substantial body of decisional law which dictates that the denial of a rule 3.850 motion is to be supported by record evidence and/or testimony to support the ruling.

The Respondent argues that the record on whole supports both the trial court's denial, and the district court's affirmance of the denial of Petitioner's motion for post conviction relief. Because the specific issue before this Court is whether the trial court erred in denying the Petitioner's ineffective assistance of counsel claims without an evidentiary hearing, the Respondent shall address each of those claims and show that the Petitioner was not entitled to either post conviction relief nor an evidentiary hearing.

STANDARDS OF REVIEW

This Court in State v. Williams, 26 Fla. L. Weekly S540 (Fla. Aug. 23, 2001), cited its ruling in Freeman v. State, 761 So. 2d

1055, 1061 (Fla. 2000) as setting forth the standard for determining whether an evidentiary hearing is required in a post conviction proceeding:

> [A] defendant is entitled to an evidentiary hearing on a post conviction relief motion unless (1) the motion, files, and records in the case conclusively show that the prisoner is entitled to no relief, or (2) the motion or a particular claim is legally insufficient. The defendant bears the burden of establishing a prima facie case based upon a legally valid claim. Mere conclusory allegations are not sufficient to meet this burden. However, in cases where there has been no evidentiary hearing, we must accept the factual allegations made by the defendant to the extent that they are not refuted by the record. We must examine each claim to determine if it is legally sufficient, and if so, determine whether or not the claim is refuted by the record.

Williams, 26 Fla. L. Weekly at S541(citations omitted); See also Atwater v. State, 788 So. 2d 223, 229 (Fla. 2001); Occhicone v. State, 768 So. 2d 1037, 1041 (Fla. 2000); Peede v. State, 748 So. 2d 253, 257 (Fla. 1999). Additionally, this Court has held that "[t]o support summary denial without a hearing, a trial court must either state its rationale in its decision or attach those specific parts of the record that refute each claim presented in the motion." Anderson v. State, 627 So. 2d 1170, 1171 (Fla. 1993)(emphasis supplied)(citing Hoffman v. State, 571 So. 2d 449, 450 (Fla. 1990); See also Sireci v. State, 773 So. 2d 34, 45 n.15 (Fla. 2000)("In the instant case, while the trial court did not attach portions of the record, it did state its rationale"); Freeman, 761 So. 2d at 1069("the trial court stated the reasons for

summary denial of each claim in the order"); Diaz v. Dugger, 719 So. 2d 865, 867 (Fla. 1998).

The standard of review for an ineffective assistance of counsel claim is set forth in Strickland v. Washington, 466 U.S. 668 (1984), which advances two components/elements that the Petitioner must establish:

> 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 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. . . .
>
> To establish ineffectiveness, a defendant must show that counsel's representation fell below an objective standard of reasonableness. To establish prejudice he 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, 120 S.Ct. 1495, 1511-12 (2000)(quotation marks omitted)(citing Strickland, 466 U.S. at 687-688); See also Atwater, 788 So. 2d at 229. Consistently, "because the Strickland standard requires establishment of both prongs, when a defendant fails to make a showing as to one element, it is not necessary to delve into whether he has made a showing as to the other element." Thompson v. State, 26 Fla. L. Weekly S621, S622 (Fla. Sept. 20, 2001)(citing Strickland, 466 U.S. at 697).

MERITS

Claim I:

The Petitioner alleges under his claim I on appeal that neither the trial court nor the district court could reasonably conclude, without hearing from trial counsel, whether the failure to depose witnesses or elicit their testimony at trial was a tactical decision or an act of misfeasance. The Petitioner also contends that he named the potential witnesses in his motion for post conviction relief, and that he complained not only of the failure to call the witnesses at trial, he also alleged that trial counsel failed to even contact or attempt to locate potential witnesses. Lastly, the Petitioner contends that since at least one of the witnesses was not a family member, only trial counsel could testify as to whether or not the failure to investigate the potential witness was a tactical decision.

In his motion for post conviction relief below, the Petitioner alleged under claim I that his trial counsel was ineffective for failure to conduct an adequate pretrial investigation by failing to interview and call witnesses Pearlie Mae and Clarence Ford (his parents), and Johnson Bruce. (R. 4-9). The Petitioner also alleged that his parents' testimony would have supported his alibi, that at no time did he intentionally touch, strike, or attempt to strike either officer and that at no time did he grab any of the officer's equipment including the can of mace used by Officer Anderson. (R. 5). The Petitioner further alleged that witness Bruce did not observe what had happened inside the home, but was a

witness to the events that had occurred outside the home. (R. 6-7).

After the trial court set forth the Strickland standard for evaluating the Petitioner's ineffective assistance of counsel claim(s), it ruled the following in reference to claim I:

> First, the Defendant alleged that defense counsel was ineffective for not calling witnesses to trial. The names of the three people the Defendant wanted to testify on his behalf at trial did not appear on either the Defense' witness list or the State's witness list. The record does not reflect that the witnesses the Defendant want to testify were available alibi witnesses as no Notice of Alibi was filed by the defense. Post conviction relief is denied as to this allegation because strategic decisions regarding whether or not to use defense witnesses is a tactical decision, and therefore not subject to the Defendant's attack under a 3.850 motion. *See Wright v. State*, 581 So. 2d 882, 883-84 (Fla. 1991).

(R. 26).

The Petitioner appealed his claims to the Fifth District Court of Appeal. After district court had issued its per curiam affirmance, it considered the Petitioner's claims and ultimately denied his motion for rehearing. In addressing the Petitioner's claim I, the district court concluded that he was not entitled relief, and followed the reasoning of the trial court's order that "generally the decision whether to call certain defense witnesses is a tactical decision not subject to attack under Rule 3.850." (R. 71-72); See also, Ford, 776 So. 2d at 374. The district also concluded that "[g]iven these circumstances, the tactical decision was a reasonable one as two of the three witnesses were Ford's own

parents[, and] defense counsel could have well decided that calling them would not have been beneficial." Id.

"[T]he failure to call witnesses can constitute ineffective assistance of counsel if the witnesses may have been able to cast doubt on the defendant's guilt, and the defendant states in his motion the witnesses' names and the substance of their testimony, and explains how the omission prejudiced the outcome of the trial." Jackson v. State, 711 So. 2d 1371, 1372 (Fla. 4th DCA 1998)(citing Sorgman v. State, 549 So. 2d 686 (Fla. 1st DCA 1989); See also McLoyd v. State, 768 So. 2d 1159, 1160-61 (Fla. 2d DCA 2000); Tyler v. State, 793 So. 2d 137, 141 (Fla. 2d DCA 2001); Odom v. State, 770 So. 2d 195, 197 (Fla. 2d DCA 2000)("[A] facially sufficient motion alleging ineffective assistance of counsel for failure to call witnesses must set forth (1) the identity of the prospective witness; (2) the substance of the witness' testimony; and (3) an explanation as to how the omission of the testimony prejudiced the outcome"). Nevertheless, the decision to call certain witnesses constitutes trial strategy, and "such a decision is subject to collateral attack only in rare circumstances when the decision is so irresponsible as to constitute ineffective assistance of counsel." Jackson, 711 So. 2d at 1372(citing Roth v. State, 479 So. 2d 848 (Fla. 3d DCA 1985)).

Both the trial court and the district court concluded that the Petitioner was not entitled to any relief on this claim because his trial counsel's decision not to call the Petitioner's alleged witnesses was tactical and/or strategy. The Respondent agrees with

the courts below. This Court has held that "[n]ot all decisions of counsel are reviewable under Strickland as constituting ineffective assistance of counsel[, and] 'any specific discretionary or judgmental act or position of trial counsel, whether tactical or strategic, on an inquiry as to effectiveness of counsel' will not be considered under Strickland." Atwater, 788 So. 2d at 230(citing McNeal v. State, 409 So. 2d 528, 529 (Fla. 5th DCA 1982)).

Although the Petitioner's motion may have satisfied (1) the identity of the prospective witnesses and (2) the substance of their testimony, he has however failed to provide (3) an explanation as to how the omission of the testimony prejudiced the outcome. The same is true if this claim was reviewed under the Strickland standards. Even if this Court were to assume that the Petitioner's trial counsel's performance was deficient, the Petitioner still had to establish prejudice. The Petitioner alleged in his motion that his parents' testimony would have supported his alibi, that at no time did he intentionally touch, strike, or attempt to strike either officer and that at no time did he grab any of the officer's equipment including the can of mace used by Officer Anderson. The Petitioner also alleged that witness Bruce did not observe what had happened inside the home, but was a witness to the events that had occurred outside the home. However, the Petitioner has simply failed to show how the testimonies of these three witnesses would have changed the outcome.

The jury found the Petitioner not guilty of battery on Officer Align and guilty of battery on Officer Anderson. It cannot be disputed that there was conflicting testimony between Officers Align and Anderson about whether the can of mace was actually sprayed or not. (Align–App. A, T. 46-49,82-83,97; Anderson–App. A, T. 108-111,123-125).[3] The Petitioner appears to assume that the jury found him guilty of battery on Officer Anderson because of the injury to his knuckle. According to Officer Anderson, the injury to his knuckle occurred when he attempted to get the can of mace from the Petitioner. (App. A, T. 111,127). The Petitioner alleged in his motion that Officer Anderson's injury occurred when he hit the concrete slab after swing at his leg. (R. 6). The Respondent argues that the Petitioner has overlooked the fact that both Officers testified that the Petitioner swung and hit Officer Anderson. (Align–App. A, T. 76; Anderson–App. A, T. 113-114,126,129). The jury could have reasonably thought that this action constituted the battery on Officer Anderson, even in light of witness Buggs' testimony that she did not see the Petitioner wind up and hit either officer.

---

[3]The undersigned would like to point out that Circuit Judge, Kenneth R. Lester, Jr., conducted the Petitioner's jury trial and also authored the order denying him post conviction relief. Therefore, the undersigned has attached the relevant portions of the trial transcript to its brief on the merits. Although Judge Lester did not attach the trial transcript to its order, he conducted the Petitioner's trial and stated his rationale for denying post conviction relief in said order. See e.g., Sireci, 773 So. 2d at 45 n.15("In the instant case, while the trial court did not attach portions of the record, it did state its rationale"); Freeman, 761 So. 2d at 1069("the trial court stated the reasons for summary denial of each claim in the order").

Florida case law that provides that engaging in a scuffle with an officer during an improper detention constitutes battery upon a law enforcement officer and can itself give rise to a valid arrest and conviction for the offense of resisting arrest with violence. See Miller v. State, 636 So. 2d 144, 151 (1st DCA 1994)(the determination that the officer acted improperly in performance of his legal duty at the time of the defendant's forcible resistance to officer is not a defense to the charge of resisting arrest with violence); State v. Downer, 789 So. 2d 1208 (Fla. 4th DCA 2001)("Even if the initial contact by the officers was unauthorized or illegal, [defendant] had no right to commit battery on the officer. Battery on a law enforcement officer is illegal. . . . Once [defendant] committed battery on one of the officer, the officers had the lawful right to seize and arrest him"); Lennear v. State, 784 So. 2d 1181, 1183 (Fla. 5th DCA 2001); Ruggles v. State, 757 So. 2d 632, 633 (Fla. 5th DCA 2000); Norton v. State, 691 So. 2d 616, 617 (Fla. 5th DCA 1997)(citing State v. Barnard, 405 So. 2d 210 (Fla. 5th DCA 1981)(warrantless felony arrest in suspect's home did not justify suspect's use of force to resist arrest by uniformed officer he knew to be law enforcement officers)); Reed v. State, 606 So. 2d 1246 (Fla. 5th DCA 1992); Bradford v. State, 567 So. 2d 911, 914 (Fla. 1st DCA 1990); Savage v. State, 494 So. 2d 274 (Fla. 2d DCA 1986), rev. denied, 506 So. 2d 1043 (Fla. 1987).

Again, the Petitioner was found not guilty of battery on Officer Align and guilty of battery on Officer Anderson. The

Petitioner appeared to allege that the circumstances surrounding the battery on Officer Anderson resulted from Officer Anderson swinging to hit him again, and this was when Officer Anderson hit his knuckle on the concrete slab, at least according to his three witness. The Petitioner's own affidavit provides that he engaged in actions sufficient to support the charged offenses. The Petitioner stated in his affidavit that:

> . . . I then asked the officer what did he want me for and what have I done. Officer Algin told me that I had violated my probation and he had a warrant for my arrest. Since, I had just gotten finish smoking some "crack," and still had the warm "crack pipe" in my back pants pocket, I ran towards the front door trying to get away.
>
> Officer Algin stepped in front of me and tried to spin me away from the front door. I continued trying to get through the front door and we both fell through the door with him landing on top of me.
>
> While I was on the ground I saw a bunch of people standing around me, then out of no where came another officer, who I found out to be officer Anderson. He came and started yelling at me telling me to "stop resisting" and "put" my hands "in front of me."
>
> I knew that if they were to arrest me right then, they would find the "crack pipe," and then they would test me and find out I had been smoking and that would be another charge, which would definitely send me to prison being that I was on probation.
>
> So, I continued resisting, hoping that I could brake away and run inside the crowd of people and get the "crack pipe" off me before being arrested. . . .

(R. 17–Petitioner's affidavit attached to his motion for post conviction relief)(emphasis supplied).

Because the Petitioner has failed to show how his trial counsel's performance resulted in any prejudice, the courts below

were correct in the denial of post conviction relief and an evidentiary hearing on this claim.

Claim II:

The Petitioner contends under this claim on appeal that neither the trial court nor district court could reasonably conclude that he knowingly and voluntarily waived his right to testify at trial, without either the testimony of trial counsel regarding that issue or reference to the portion of the trial transcript reflecting said waiver.

In his motion for post conviction relief below, the Petitioner alleged under claim II that his trial counsel was ineffective for misadvising him about his right to testify. The Petitioner also alleged that after the State had rested its case, and during a brief recess, his trial counsel had informed him that it would not be a good idea for him to testify because the jury would find out that he had just been convicted of a battery on a person over sixty-five less than a year ago, and that he had been in trouble since 1976, and that the jury would automatically by law find him guilty. (R. 9-10). The Petitioner further alleged that he was entitled to an evidentiary hearing on this claim. (R. 10).

In denying the Petitioner's motion for post conviction relief on his claim II, the trial court ruled that it did not need to consider the deficient performance prong under Strickland because the Petitioner had failed to demonstrate how he was prejudiced by trial counsel's advice not to testify. (R. 26).

On appeal, the district court in its denial of the Petitioner's motion for rehearing considered the Petitioner's claim II and concluded that he was not entitled to relief on this claim, and followed the trial court's reasoning in its order that he failed to demonstrate any prejudice as required by Strickland. (R. 72); See also Ford, 776 So. 2d at 374.

Florida case law provides that "[w]here counsel incorrectly informs a defendant regarding the use of prior convictions as impeachment, specifically, that upon testifying the jury will hear the specific nature of the prior convictions, and the defendant shows that because of the misinformation he did not testify, he has satisfied the deficient performance prong of an ineffective assistance of counsel claim." Tyler v. State, 793 So. 2d at 141(citing Everhart v. State, 773 So. 2d 78, 79 (Fla. 2d DCA 2000)). However, "[a] defendant must also show how he was prejudiced by the deficient performance to be entitled to post conviction relief." Tyler, 793 So. 2d at 141; See also Everhart, 773 So. 2d at 79(citing Jackson v. State, 700 So. 2d 14 (Fla. 2d DCA 1997)).

At the beginning of the Petitioner's jury trial, the trial court instructed him about his right to testify and that he had to make that decision before the Defense put on its case. (App. A, T. 9). After the State had rested its case, the trial court had the jury removed and the Defense argued its motion for judgment of acquittal, the State's responded, and the trial court ruled denying

the motion. (App. A, T. 138-139). Immediately following the trial court's ruling, the following colloquy transpired:

> [The Court:] I'll deny the motion for judgment of acquittal at this time.
>
> You want to go forward with your case, Mr. Lammers.
>
> [Defense Counsel (Lammers):] Yes, your Honor. We're going to call Miss Eunice Jackson.
>
> [The Court:] Do you know if your client's going to testify or not?
>
> [Defense Counsel:] No. Mr. Ford is indicating he wishes to waive his right to testify in this case.
>
> [The Court:] Okay. Mr. Ford, as I stated before -- If I could get you to raise your right hand, sir.
>
> (Whereupon, the Defendant was duly sworn by the Court.)
>
> [The Court:] Please state your name for the record.
>
> [Mr. Ford:] Clarence L. Ford.
>
> [The Court:] Mr. Ford, like at the beginning of the trial we discussed at this point of the case where you might have the opportunity to testify. While the opportunity does present itself and this is your opportunity to put on your case in chief, your attorney has advised me that you're going to call witnesses or a witness, but I also want to make sure that you have a right to testify if you choose to do so or you can exercise your right to remain silent. Whatever decision, whichever way you go, if you want to remain silent or not testify, it's your decision. Naturally, I encourage you to discuss it with your attorney. Your attorney's indicated to me at this time you wish to remain silent and not testify. Is that your decision?
>
> [Mr. Ford:] Yes, Sir. It won't do no good.

> [The Court:] I'm asking is it you decision. If you want to testify, you can testify. If you don't want to testify, you don't have to testify.
>
> [Mr. Ford:] No.
>
> [The Court:] And you understand that you have the right to testify?
>
> [Mr. Ford:] Yes, sir.
>
> [The Court:] If you wanted to testify, we would give you the opportunity to testify.
>
> [Mr. Ford:] Yes, sir.
>
> [The Court:] And it is your decision personally not to testify at this time, correct?
>
> [Mr. Ford:] Yes, sir.
>
> [The Court:] Thank you, Mr. Ford.
> Why don't you bring the jury back in.
>
> (Whereupon, the jurors were returned to the courtroom.)

(App. A, T. 139-141).

The above colloquy indicates that the Petitioner made an informed decision not to testify. The Petitioner also stated in the colloquy that it would do no good for him to testify. Even assuming that Petitioner's trial counsel made the statements about the use of his prior convictions, the Petitioner failed to establish prejudice. In fact, the allegations set forth in Petitioner's affidavit admitted to the possession of the crack pipe, and to resisting and attempting to break free from the officers so he could run into the crowd to discard the crack pipe.

Because the Petitioner did not show prejudice, both courts below were correct in denying him post conviction relief and an evidentiary hearing.

Claim III:

The Petitioner contends under this claim, that without the testimony of his trial counsel, it cannot be determined conclusively that the limited cross-examination of the prosecution witness was a strategic choice.

In his motion for post conviction relief below, the Petitioner alleged under claim III that his trial counsel was ineffective by failing to properly cross-examine the prosecution witness, Renee Buggs (his probation officer), by asking her only one question. (R. 11-12). The Petitioner also appears to alleged that his trial counsel should have further questioned Buggs because she was present at the scene of arrest, and that it would have been logical for trial counsel to properly cross-examine her concerning all alleged statements made pertaining to his arrest. (R. 12).

The trial court in denying the Petitioner post conviction relief on his claim III ruled the following in its order:

> Third, the Defendant alleged that his counsel was ineffective because he conducted an unsatisfactory cross-examination of a State witness. After the State's direct examination of Officer Buggs, defense counsel asked one cross-examination question. The Defendant is of the opinion that this was not a proper cross-examination because his counsel did not ask other detailed questions about the incident. Florida case law has consistently held that courts should not review "any specific discretionary or judgmental act or position of trial counsel, whether tactical or strategic, on an inquiry as to effectiveness

> of counsel." *McNeal v. State*, 409 So. 2d 528 (Fla. 5th DCA 1982). Post conviction relief is denied as to this allegation because defense counsel's decision on whether and how to cross-examine a witness is discretionary trial strategy by the attorney, not reviewable by this court in a post conviction motion on the grounds of ineffective counsel.

(R. 26-27).

On appeal, the district court in its decision to deny the Petitioner's motion for rehearing, addressed his claim III and concluded that he failed to demonstrate just how his trial counsel was ineffective for limiting his cross-examination to that one question, and that his trial counsel may well have had good reason not to ask any other questions of Ms. Buggs. (R. 72); See also Ford, 776 So. 2d at 374.

The courts below were correct. The manner in which the Petitioner's trial counsel cross-examined witness Buggs is not subject to an ineffective assistance of counsel claim, unless his trial counsel entirely failed to subject the prosecution's case to meaningful adversarial testing. See Atwater, 788 So. 2d at 231(citing United States v. Cronic, 466 U.S. 648, 659 (1984)). As urged above, this Court has held that "[n]ot all decisions of counsel are reviewable under Strickland as constituting ineffective assistance of counsel[, and] 'any specific discretionary or judgmental act or position of trial counsel, whether tactical or strategic, on an inquiry as to effectiveness of counsel' will not be considered under Strickland." Atwater, 788 So. 2d at 230(citing McNeal, 409 So. 2d at 529).

As to the resisting arrest charges, Buggs observed the Petitioner repeatedly struggle and moved his arms up and down to avoid being handcuffed. (App. A, T. 26-29). After several more verbal commands to stop resisting, Buggs also observed Officer Anderson use his baton to hit the Petitioner less than five times in an effort to stop the Petitioner from resisting. (R. 28). Buggs' testimony was consistent with the Petitioner's affidavit, and was sufficient to support the resisting arrest charges. As to the battery charges, on cross-examination, Buggs was asked did she see the Petitioner punch or wind up and punch any of the deputies, and she responded, "I can't say I did." (App. A, T. 31). The Petitioner in his motion for post conviction relief, did not allege what other questions should have been asked of Buggs or what she may have further testified to observing; whether impeachment evidence or not.

The Petitioner's claim III was facially insufficient, because he did not allege how the failure to more thoroughly cross-examine Buggs prejudiced his case. See e.g. Robinson v. State, 707 So. 2d 688, 699-700 (Fla. 1998); Tyler, 793 So. 2d at 144("The decision not to cross-examine a witness regarding certain areas may be strategic"); Childers v. State, 26 Fla. L. Weekly D956 (Fla. 1st DCA April 5, 2001). The Petitioner has not set forth any matters that counsel should have brought out that would have helped his case. If anything, further questioning of Buggs would have hurt the Defense's case, because Buggs did testify during direct examination that she had informed the Petitioner earlier on the date of arrest

that she had a warrant for his arrest (App. A, T. 24), and that once she arrived at his residence, she observed the Petitioner repeatedly resist arrest and move his arms and hands to avoid being handcuffed. Buggs also testified that the Petitioner ignored her orders to stop resisting. The decision not to ask Buggs any more question was simply a discretionary act to which the Petitioner has failed to show prejudice, and thus, was properly denied post conviction relief and an evidentiary hearing on this claim.

Consequently, the record on a whole shows that the Petitioner was not entitled to either post conviction relief or an evidentiary hearing. Thus, this Court should accordingly deny him any relief requested.

CONCLUSION

Based on the argument and authorities presented herein, the Respondent requests this Honorable Court to conclude that either its discretionary jurisdiction was improvidently granted, or that the Petitioner was properly denied post conviction relief and that no evidentiary hearing was warranted.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing Respondent's brief on the merits in case number S01-690 has been furnished by hand delivery to NOEL P. PELELLA, Assistant Public Defender, 112 Orange Avenue, Suite A, Daytona Beach, Florida 32114, via the Public Defender's basket at the Fifth District Court of Appeal, this ____ day of October, 2001.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

_____
ALFRED WASHINGTON, JR.
ASSISTANT ATTORNEY GENERAL
Florida Bar #0111163

_____
KELLIE A. NIELAN
ASSISTANT ATTORNEY GENERAL
Fla. Bar #618550
444 Seabreeze Boulevard
Daytona Beach, FL 32118
(386) 238-4990
(386) 238-4997 (FAX)

COUNSELS FOR RESPONDENT

CERTIFICATE OF 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).

_____
ALFRED WASHINGTON, JR.
ASSISTANT ATTORNEY GENERAL