IN THE SUPREME COURT OF FLORIDA

ANTHONY FLOYD WAINWRIGHT,

Appellant,

v. **Case No. SC02-1342**

STATE OF FLORIDA,

Appellee,
____________________________/

ON APPEAL FROM THE CIRCUIT COURT
OF THE THIRD JUDICIAL CIRCUIT,
IN AND FOR HAMILTON COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

Appellant, Anthony Floyd Wainwright, was the defendant in the trial court. This brief will refer to Appellant as such, Defendant, or by proper name. Appellee, the State of Florida, was the prosecution below. This brief will refer to Appellee as such, the prosecution, or the State.

The record on appeal from the Defendant's direct appeal will be referenced as (R.) followed by the appropriate page number. The record of appeal from the post-conviction proceedings will be referenced as (PCR.) followed by the appropriate volume and page number.

STATEMENT OF THE CASE AND FACTS FROM THE TRIAL

The Defendant was charged by indictment along with his co-defendant, Richard Eugene Hamilton, with first degree murder, armed robbery, armed kidnapping, and armed sexual battery. (R. 1-2). The Defendant and co-defendant were tried in a single trial with two juries.

Guilt Phase

At trial, the State introduced evidence demonstrating the Defendant's guilt beyond a reasonable doubt. Prior to April 24, 1994, the Defendant and co-defendant were prisoners at the Cateret Correctional Center in Newport, North Carolina. (R. 2617-2618). They met at the prison and planned an escape which

took place on April 24. (R. 2617-2618).

The Defendant and co-defendant then began a crime spree ranging through North Carolina, Florida and Mississippi. First, on the day they escaped from prison the Defendant and co-defendant stole a green Cadillac in North Carolina. (R. 2618-2619). The following morning they burglarized a home taking money and firearms. (R. 2619-2620). The guns they took included, among others, a Winchester .30-.30 rifle and Remington single shot .22 rifle. (R. 2619-2620).

The defendants eventually worked their way south, and were in the Daytona Beach area at one point where they spent the night in the Cadillac while parked behind a church. (R. 2622). When they left, they headed west until their Cadillac began having problems in Lake City, Florida. (R. 2622). There they pulled into a grocery store looking for another vehicle. (R. 2622-2623). What they found was the victim, Carmen Gayheart, and her Ford Bronco.

Mrs. Gayheart was a student attending classes at Lake City Community College. (R. 1995). On April 27, 1994, she met with her friend, Jennifer Smithhart, after class and they ran errands during lunch. (R. 19951997). Ms. Smithhart testified that they returned to campus at approximately 12:15 p.m., because Mrs. Gayheart needed to pick up her kids from the daycare center by

12:30 p.m. (R. 2004). Mrs. Garyheart never arrived at her children's daycare center.

Before picking up her children, Mrs. Gayheart must have stopped at Winn Dixie to buy some grocery items because, according to the Defendant's confession, he and the co-defendant encountered her when they stopped at Winn Dixie looking for a vehicle to replace their overheated Cadillac. (R. 2622-2624).

According to the Defendant's confession, the Cadillac the defendants stole in North Carolina had problems and they were driving around looking for another vehicle. (R. 2622-2623). They spotted the victim coming out of a Winn Dixie supermarket and followed her to her Bronco. (R. 2622-2623). The co-defendant forced Mrs. Gayheart into her Bronco at gunpoint, and the Defendant followed in the Cadillac. (R. 2623-2624). They ditched the Cadillac, transferred all their weapons and ammunition to the Bronco, and then drove off. (R. 2624).

The Defendant stated in his confession that after they ditched the Cadillac, the victim began crying in the floor next to the driver's seat and the co-defendant slapped her. (R. 2624). The victim was then forced into the backseat of the vehicle where both the Defendant and co-defendant raped her. (R. 2624, 2742-2643). The victim was then taken out of the vehicle, the Defendant tried to strangle her and then she was shot twice

in the head with the .22 caliber rifle. (R. 2626-2628, 2704-2710, 2742-2743). After she was shot, the victim's body was dragged some fifty to seventy-five feet away. (R. 2627-2628). The defendants then drove off and later discarded the victim's clothing, jewelry and purse so that none of it would be found with the body. (R. 2587-2588, 2654-2655).

After the murder, the defendants proceeded westward until they were in Mississippi. In Mississippi, the defendants were spotted driving the Bronco by Mississippi State Trooper John Leggett. (R. 2022-2023). Trooper Leggett testified that on April 28, 1994 he saw a blue Bronco with very dark tinted windows driving in Lincoln County. (R. 2022-2023). He called the tag into his dispatcher to run a check (R. 2024), and observed that the driver of the Bronco was speeding 50 mph in a 40 mph zone. (R. 2024). Trooper Leggett then attempted to stop the car. (R. 2024).

When the trooper tried to stop the defendants, the Defendant (the driver) attempted to outrun and elude the trooper. (R. 2024, 2029). Trooper Leggett gave chase, but as he closed on the defendants, the rear window of the Bronco was rolled down and the co-defendant (the passenger) pointed a gun at the trooper and started shooting. (R. 2024-2026, 2029). The chase ended when the Defendant drove toward the Trooper as if to ram

him and then swerved, lost control of the Bronco and hit a tree. (R. 2030-2035). When the Defendant came out of the car, he ran off into the woods. (R. 2037). The co-defendant then got out of the Bronco carrying a shotgun and trying to load a shell. (R. 2036). Trooper Leggett shot at the co-defendant, hitting him. (R. 2037). As a result of the exchange of gunfire, the co-defendant received a grazing wound to his forehead and an upper arm wound. (R. 2048-2049).

The Defendant was subsequently found by Trooper Carl Brown. When captured, the Defendant had a gunshot wound to his head and needed an ambulance. (R. 2082-2087). The Defendant told Trooper Brown, "go ahead and shoot me you black son of a bitch. I don't have nothing to loose. Go ahead and shoot me." (R. 2087). The Defendant also told the Trooper, "I'm not the one who shot the son of a bitch [shooting at Trooper Leggett]. If I would have shot him I would have killed him." (R. 2087).[1]

The Defendant was first taken into custody in Mississippi. (R. 2347). There his co-defendant sent him plans to escape from the jail. The plans discussed what was needed and how they should take out the jailer. The letter to the Defendant was found in the co-defendant's cell along with a hacksaw and a map

[1]/ The Troopers also testified that the Defendant told them that he had AIDS. (R. 2087-2088, 2111).

of the jail. (R. 2350-2361).

The Defendant later agreed to voluntarily return to Florida and cooperate with authorities. (R. 2582-2583). The Defendant gave statements to the police, and sought a plea bargain wherein he would receive a life sentence. However, he voided the agreement when he refused to take the requisite polygraph test. (R. 2583-2584).

At trial, the State introduced the confession and other statements of the Defendant to the police. They also introduced confessions which the Defendant made to Robert Murphy and Gary Gunter, fellow inmates. (R. 2704-2710, 2742-2744). Additionally, the State also presented DNA evidence linking the Defendant to the crime. (R. 2851, 2987-2988). The Defendant objected to the evidence because the State provided information about three additional RFLP aspects of the DNA and three additional loci after the trial began. The trial court granted the Defendant a 24 hour continuance to prepare and digest the new information. (R. 2851-2870).

The jury found the Defendant guilty as charged on all counts. (R. 1136-1138).

<u>Penalty Phase</u>

At the penalty phase, the State introduced certified copies

of the plea and sentence by the Defendant in Mississippi for aggravated assault upon a law enforcement. (R. 3665-3666). The State also requested that the trial court take judicial notice of the conviction it entered on May 30, 1995 for armed robbery with a firearm, armed kidnapping with a firearm, and sexual battery while armed with a firearm. (R. 3665-3666). The State then rested.

The Defendant presented the testimony of one witness, the Defendant's mother Kay Wainwright. (R. 3666-3667). Mrs. Wainwright testified that she and her husband had been married for twenty-seven years and have two children, the Defendant and his sister. (R. 3667). Mrs. Wainwright explained that when the Defendant was born, he suffered from colic and was sickly with bronchitis and pneumonia during the first year. (R. 3668).

As a child he was very active, loved the outdoors but was accident prone. (R. 3669). She recalled that the Defendant had three head injuries and he had to have stitches to his head. (R. 3669). He was basically a normal infant and a normal child but even in his early years he did not make friends easily. (R. 3669). She believed he did not interact with other children or play well with other children and seemed to be a loner. (R. 3669). He never talked much nor opened up to his parents and spent a lot of time in his room. (R. 3669). The family was

middle class with no financial problems, however Mrs. Wainwright observed that she should have been home with her son during the early years. (R. 3669-3670).

Although they were a close family, there came a time when the Defendant was in the fourth grade that he started having problems in school. (R. 3669-3670). Mrs. Wainwright revealed that the Defendant was a bed-wetter until he was fourteen years old and that this condition was stressful to him. (R. 3671-3672). Mrs. Wainwright observed that it was a real embarrassment to him and that is why he did not want to be at anybody else's house. (R. 3672). The Defendant was taken to a pediatrician who said that his problem was something that he would grow out of. However, the Defendant did not grow out of it. (R. 3672).

In fourth grade, after testing was done, it was recommended that the Defendant be put in a learning disability class. However, his performance did not improve. (R. 3673-3674). More problems occurred when it became clear that the Defendant was not improving in school, yet his sister was doing very well and was very outgoing with lots of friends. (R. 3675).

Mrs. Wainwright testified that her son was taken to many doctors and psychiatrists, however no one came up with the same answer. (R. 3676). When she took the Defendant to Dr. Charles

Boyd in Greenville, North Carolina, he told her that the Defendant was borderline mentally retarded. (R. 3676). Mrs. Wainwright said that this diagnosis was the very opposite of what the school had told her because they believed he was capable of performing at his age level and, based on his tests, there were no problems. (R. 3676). The Defendant was taken to Chapel Hill and was found to have a slight auditory problem. (R. 3676-3677).

The Defendant finally ended up as a young adult in state prison system in North Carolina for auto larceny. (R. 3679-3680). He was sentenced to ten years and was required to take alcohol and psychiatric counseling while incarcerated. (R. 3680). Mrs. Wainwright testified that to her knowledge he was only involved in auto theft and had not engaged in any kind of physical violence. (R. 3681-3682).

Mrs. Wainwright explained the Defendant's problems saying that he got involved with the wrong crowd. As the Defendant was growing up, Mrs. Wainwright was told that he was a follower, that his maturity level was approximately four years below his age level, and that sometimes he did not have the ability to understand the consequences of his actions. (R. 3682-3683). Mrs. Wainwright also testified that during the time he had been incarcerated his family members were supportive of him and that

he always had a home with her family. (R. 3684).

Outside the presence of the jury, a discussion ensued with regard to a letter Mrs. Wainwright wrote reflecting that the Defendant may have been sexually molested. The Defendant had instructed his trial counsel not to discuss the issue, and trial counsel was unable to proceed further with the mother. (R. 3686-3687).

The jury voted that the Defendant should be sentenced to death by a vote of 12-0. (R. 1143). The trial court then sentenced the Defendant to death. In imposing that sentence, the trial court found the following applicable aggravators-

> 1. The Defendant was already under a sentence of imprisonment.
>
> 2. The Defendant was previously convicted of another felony involving the use or threat of violence - aggravated assault on a law enforcement officer in Mississippi.
>
> 3. The murder was committed during the course of a robbery, sexual battery and a kidnapping.
>
> 4. The murder was committed to avoid arrest.
>
> 5. The murder was especially heinous, atrocious or cruel.
>
> 6. It was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification.

(R. 1170-1173).

The trial court found that two statutory mitigators which

it had instructed the jury on deserved little weight and that there were no other applicable mitigating circumstances. (R. 1174-1175). The two statutory mitigating factors which received little weight were (a) being an accomplice with relatively minor participation and (b) being under extreme mental duress or the substantial domination of another person. (R. 1174). As to non-statutory mitigation, the trial court found-

> The defendant presented the testimony of his mother. Her testimony established that defendant grew up in a stable, middle class home. She and defendant's father held responsible jobs, and their marriage has endured for 27 years. Although defendant had some childhood difficulties with his sister, these were not significant. His mother's testimony established that defendant was respectful of his parents and non-violent as a child. She testified that defendant had difficulties in school, and was placed in learning disability classes. At his mother's insistence, he was tested by school authorities, as well as private behavior specialists hired by his parents. He was moved to several different public schools, as well as being private school by his parents. Defendant's mother also testified that as a child defendant was a loner and had few friends, experiencing difficulties with social adjustment. According to his mother, defendant was a bed-wetter until the age of 14, making him embarrassed to spend the night away from home, or have friends spend the night at his home. She also testified that defendant was not a leader, and was easily swayed and dominated by others. His mother also testified to defendant's difficulties with the criminal justice system, and his repeated brushes with the law occasioned by this stealing automobiles.

(R. 1176).

The trial court found that this testimony amounted to some

measure of mitigation, but only afforded it little weight. (R. 1176). The trial court determined that these mitigating circumstances were outweighed by any single aggravating circumstance. (R. 1176).

Direct Appeal

The Defendant appealed his conviction and sentence. On direct appeal, the Defendant raised nine issues. Those issues were-

> I. THE TRIAL COURT ERRED IN ALLOWING STATEMENTS MADE BY MR. WAINWRIGHT TO THE POLICE IN EVIDENCE AT THE TRIAL.
>
> II. THE TRIAL COURT ERRED IN ALLOWING THE STATE TO INTRODUCE THE RESULTS OF THE FINAL THREE DNA LOCI.
>
> III. THE TRIAL COURT ERRED IN PERMITTING THE STATE TO BE JOINTLY TRIED WITH SEPARATE JURIES.
>
> IV. THE TRIAL COURT ERRED IN PERMITTING THE STATE TO INTRODUCE EVIDENCE OF OTHER CRIMES, WRONGS OR ACTS.
>
> V. THE TRIAL COURT ERRED IN REMOVING A JUROR ON DAY TEN OF TRIAL.
>
> VI. THE COURT ERRED IN ADMITTING THE TESTIMONY THAT MRS. GAYHEART HABITUALLY PICKED HER CHILDREN UP FROM A DAY CARE CENTER, BUT ON APRIL 27, 1994, SHE DID NOT, A VIOLATION OF WAINWRIGHT'S FOURTEENTH AMENDMENT RIGHT TO A FAIR TRIAL.
>
> VII. THE COURT ERRED IN ADMITTING ANY STATEMENTS WAINWRIGHT MADE THAT HE HAD SEXUALLY BATTERED MRS. GAYHEART BECAUSE THE

STATE FAILED TO ESTABLISH THE CORPUS DELICTI FOR THAT OFFENSE, A VIOLATION OF HIS FOURTEENTH AMENDMENT RIGHT TO A FAIR TRIAL.

VIII. THE TRIAL COURT ERRED IN ALLOWING WAINWRIGHT'S STATEMENT TO THE POLICE THAT HE HAD AIDS.

IX. THE TRIAL COURT ERRED IN THE NON-CAPITAL SENTENCINGS.

(Initial Brief of Appellant, SC 86,022).

This Court fully affirmed the Defendant's conviction and sentence in Wainwright v. State, 704 So.2d 511 (Fla. 1997), cert. denied, 523 U.S. 1127 (1998), specifically discussing issues 1, 2, 7 and 9 while simply finding 3-6 and 8 to be without merit. Id. at 514-516.

Post-Conviction

The Defendant then began his post-conviction litigation which led to the filing of his First Amended Motion to Vacate, Set Aside, or Correct Sentence. (PCR. I 3-33). On December 14, 2000, a hearing was held pursuant to Huff v. State, 622 So.2d 982, 983 (Fla. 1993) (PCR. II). At the Huff hearing, the trial court determined that an evidentiary hearing should be held as to-

- The claim regarding the microphone in the Defendant's cell;
- The claim of ineffective assistance of trial counsel based on not maintaining a proper attorney-client

relationship, assuring adequate mental health evaluations, and investigating a presenting mitigating evidence;

- The claim that original trial counsel, Victor Africano, was ineffective in his pretrial representation;

- The claim of ineffective assistance of trial counsel for introducing statements of the co-defendant.

- The claim that trial counsel's illness during trial rendered him ineffective.

(PCR I 41-46). All other claims were summarily denied. (PCR. I 41-46).

The evidentiary hearing was held on January 23, 2002. (PCR III). The evidence presented therein will be discussed below. Following the evidentiary hearing, the trial court denied all of the remaining issues in the Defendant's post-conviction motion. (PCR I 107-115). The Defendant has now appealed the trial court's denial to this Court.

STATEMENT OF FACTS FROM THE EVIDENTIARY HEARING

At the evidentiary hearing, it was first stipulated that the Defendant's first attorney, Victor Africano, was unavailable and incompetent to testify. (PCR III 5-6). The stipulation noted that he was confined to a wheelchair, in excruciating pain and the medication he was taking effected his memory. (PCR III 5-6). The Defendant presented his own testimony (PCR III 40) and the

State presented the testimony of Sheriff Reid, Defendant's trial attorney (Clyde Taylor), Investigator Daniels, and State Attorney Jerry Blair. (PCR III 63, 82, 140, 142).

Defendant's Testimony

The Defendant presented his own testimony. (PCR III 40). The Defendant stated that when he was brought to Florida on these charges he was introduced to his first attorney, Mr. Africano, in the jail conference room. (PCR III 41). They spoke for approximately 25-30 minutes, and Mr. Africano told the Defendant to cooperate fully so that he could receive a life sentence. (PCR III 42).

According to the Defendant, the life sentence was conditioned on him fully cooperating and passing a polygraph test on the issue of whether he actively participated in the rape and murder of the victim. (PCR III 43). The Defendant admitted that he was informed of these conditions by the police in Mississippi and by Mr. Africano. (PCR III 43).

The Defendant then testified that the meeting with Mr. Africano took place on May 9 at 5:30-6:00pm, and that he and Mr. Africano met with Sheriff Reid at 7:00-7:15pm. (PCR III 44). The Defendant claimed that the terms of the deal were not discussed that night, not put into writing, and he went out with

the Sheriff looking for evidence. (PCR III 45). However, it got dark before they could find anything and he returned to the jail. (PCR III 46). The following day, May 10, the Defendant met with Sheriff Reid and they went out again. (PCR III 46). Mr. Africano was not present that day. (PCR III 46).

On May 20, the Defendant was brought to the State Attorney's Office to take the polygraph examination pursuant to the plea. (PCR III 47). Mr. Africano was with him. (PCR III 47). The Defendant admits that he refused to take the polygraph test. (PCR III 47). According to the Defendant, he refused to take the polygraph until he had a written deal with the police. (PCR III 47). The Defendant claims that the Sheriff told him he did not know anything about a deal, that Mr. Africano said nothing, and that the Sheriff simply left without further discussion. (PCR III 47-48). The Defendant testified that he was still willing to take the polygraph test, but that he never saw Mr. Africano again. (PCR III 48-49).

On cross-examination, the Defendant clarified several of his statements. First, he explained that his attorney in Mississippi came to him and explained that Florida was investigating him for this murder. (PCR III 49). The Defendant was told that he might escape death if he came to a plea agreement with Florida. (PCR III 50). The Defendant understood

that this meant he had to cooperate and prove in a polygraph test that he did not pull the trigger in the victim's murder. (PCR III 50). The Defendant understood this in Mississippi and he agreed to voluntarily come back to Florida to try to work out a deal because he knew that the co-defendant was pointing the blame at him. (PCR III 50-51).

The Defendant admitted that he agreed to return to Florida to counter his co-defendant's claims, and that he wanted to be the one to make a deal. (PCR III 51). He understood that his deal would require his cooperation and passing the polygraph test. (PCR III 52). The Defendant admitted that Mr. Africano went over the terms of the deal with him and he told Mr. Africano that he did not kill or rape the victim. (PCR III 52). Mr. Africano talked to the Defendant about the polygraph test and told him not to lie. (PCR III 53).

However, the Defendant denied raping the victim or admitting to various witnesses that he raped the victim. (PCR III 54-56).

<u>Sheriff Reid's Testimony</u>

Next, Sheriff Reid of the Hamilton County Sheriff's Office testified. (PCR III 63). The Sheriff explained that the investigation of the victim's murder began in Columbia County where she disappeared. (PCR III 64). Columbia County was working with the co-defendant. (PCR III 64). However, after the

victim's body was found in Hamilton County, the investigation was switched to Sheriff Reid's office. (PCR III 64).

Sheriff Reid then proceeded to Mississippi where the Defendant was still held in custody to begin the investigation. (PCR III 63-64). In Mississippi, Sheriff Reid told the Defendant's Mississippi attorney that the co-defendant was talking and he was willing to give the Defendant the same chance. (PCR III 65). The Mississippi attorney told Sheriff Reid that the Defendant was interested and would voluntarily return to Florida. (PCR III 65).

Sheriff Reid did not meet with the Defendant himself in Mississippi. (PCR III 65). The first time he spoke directly with the Defendant was at the jail in Florida after the Defendant had spoken to his Florida attorney, Mr. Africano. (PCR III 65-67). The Sheriff had explained the plea to Mr. Africano telling him that the Defendant could get life if he cooperated and proved that he was not the triggerman. (PCR III 66). Contrary to the Defendant, Sheriff Reid did not recall any condition regarding rape being a part of the deal. (PCR III 67). Mr. Africano spoke to the Defendant and told the Sheriff that the Defendant would take a polygraph examination to get the plea deal. (PCR III 67).

The polygraph examination was set on May 20 at the State

Attorney's Office in Live Oak, Florida. (PCR III 68). The only issue which was going to be tested was whether the Defendant was the triggerman in the murder. (PCR III 68). At the examination, the Defendant spoke to Mr. Africano, who then came to the police and said that the Defendant had a statement for them. (PCR III 68).

The Sheriff went to the conference room and the Defendant told him that he had raped the victim. (PCR III 69). According to Sheriff Reid, this was the first time that rape had been mentioned or discussed. (PCR III 69). The Sheriff went to tell the State Attorney. The Defendant then refused to take the polygraph exam. (PCR III 69). During this time the Defendant never asked for a written plea agreement. (PCR III 69-70).

According to Sheriff Reid, the key to the plea agreement was not the Defendant's cooperation, it was proving that he was not the triggerman in the murder. (PCR III 73).

Trial Attorney Taylor's Testimony

Clyde Taylor was the Defendant's attorney at trial. (PCR III 82). He took over after Mr. Africano withdrew from the case following the Defendant's refusal to take the polygraph examination. (PCR III 98).

Mr. Taylor was first questioned by post-conviction counsel

regarding a microphone found in the Defendant's cell. (PCR III 83). Mr. Taylor explained on direct and cross-examination that the Department of Corrections had placed a microphone in the Defendant's cell because of his previous escape in North Carolina and plans to escape in Mississippi. (PCR III 83, 128). The Defendant became aware of the microphone and brought his attorney to the prison to expose it. (PCR III 129). Mr. Taylor testified that when he came to the jail, he was held downstairs for 20-30 minutes and he believes that the microphone was removed at this time. (PCR III 129).

The matter was taken to the trial court and a hearing was held where law enforcement officers came and testified that the microphone was for security reasons, it was in the cell one week (but it did not work), there was no evidence that anyone overheard the Defendant's conversations with his attorney and there were no reports, tapes, etc. (PCR III 83, 131). Mr. Taylor asked for a continuance because of this issue but it was denied and the trial court ordered no further microphones. (PCR III 83-84, 131).

The Defendant became very upset about the microphone being removed before he could expose it, and he blamed his trial counsel for leaking the information to the police. (PCR III 84, 130). The Defendant became so enraged that he tried to attack

Mr. Taylor and had to be stunned by the stun belt he was wearing. (PCR III 84, 130).

After the attack, Mr. Taylor stated that he made a motion regarding the fact that the Defendant was not cooperating with him and that his behavior was affecting his representation. (PCR III 85). This motion led to Dr. Mhatre being appointed and a recommendation of medication for the Defendant. (PCR III 85-87). After the medication, Mr. Taylor indicated that the Defendant had some flare-ups but nothing like before. (PCR III 87).

In general, Mr. Taylor described his relationship with the Defendant as a roller coaster, and he later indicated that the Defendant was one of the 3-4 most difficult clients he ever represented.[2] (PCR III 86, 95). As to the specific incident of the stun belt, Mr. Taylor testified that while their relationship was affected, it was not gone. (PCR III 89). As to the cumulative effect of the problems with the Defendant these were brought to the trial court's attention, each one as they arose. (PCR III 90). However, despite the problems, trial counsel was always able to talk to the Defendant and get the relationship back on a reasonable track - never great, but

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[2]/ Furthermore, on cross-examination Mr. Taylor acknowledged that defendants he represents are often uncooperative and suspicious, particularly of court appointed attorneys. (PCR III 127-128).

reasonable. (PCR III 86).

Next, Mr. Taylor was questioned about his decision to put into evidence a letter written by the co-defendant which pointed the blame for the murder at the Defendant. (PCR III 90). Mr. Taylor indicated that he decided to put the letter into evidence as part of his overall trial strategy. (PCR III 91). He also indicated that he made special efforts to keep the Defendant apprised of the trial strategy because Defendant was such a difficult client. (PCR III 95). Mr. Taylor visited the Defendant daily during the trial to discuss strategy and the letter was consistent with that strategy. (PCR III 96).

The strategy in the Defendant's case was to show that the co-defendant was the leader, the one who was more evil, and the Defendant was only a follower who did not know what his co-defendant was going to do. (PCR III 91-92). However, Mr. Taylor felt that he had to be careful how he approached this theory because the defendants were being tried in the same proceeding with different juries. (PCR III 91). In this type of circumstance, Mr. Taylor indicated that you cannot simply argue that the other person did everything and point to the "empty chair". (PCR III 134). Instead, Mr. Taylor believed that the better tactic was to show that the Defendant was a follower under the dominion and control of the co-defendant. (PCR III

134). This type of argument had a two-fold benefit because it would also apply to the penalty phase. (PCR III 94, 134).

In proceeding under this theory, Mr. Taylor attempted to compare the Defendant to the co-defendant. (PCR III 93). The co-defendant was depicted as a person who would lie to get a cigarette in the yard and who would "dang sure" say anything to implicate the Defendant instead of himself. (PCR III 93). Mr. Taylor also used the testimony of Sheriff Reid, Mr. Mallory and Mr. Daniels, to show that the co-defendant was a liar, leader, planner, schemer and culprit. (PCR III 132).

In introducing the co-defendant's letter, Mr. Taylor pointed out that although it implicated the Defendant, it was not introduced in a vacuum. (PCR III 94). It came into evidence in the context of the other defense theory evidence showing that the co-defendant was lying to shift blame. (PCR III 94). And in this context, Mr. Taylor believed that the letter would be tactically useful to further demonstrate the co-defendant's role. (PCR III 94). Mr. Taylor testified that he did not believe that anyone would accept the co-defendant's self-serving claim that the Defendant was solely at fault given the evidence, the Sheriff's statements that the co-defendant was a liar, and the fact that the co-defendant was the person shooting at the police in Mississippi. (PCR III 132-133).

Mr. Taylor also spoke briefly to questions regarding whether his trial strategy involved a concession of guilt. Mr. Taylor testified that his theory did not involve a concession of guilt and he did not concede in either his opening or closing statement. (PCR III 131-132). He noted that as part of this overall strategy, he argued that the co-defendant was the primary actor and that the Defendant was under his control and dominion. (PCR III 92). Mr. Taylor argued to the jury that if the Defendant did anything wrong, it was only to help cover-up the co-defendant's actions after the fact and, although this would be accessory after the fact, that crime was not charged. (PCR III 92).

Mr. Taylor was next questioned about his discussions with Mr. Africano when he took over the case. (PCR III 97). According to Mr. Taylor, he had two conversations with Mr. Africano. (PCR III 97). In the first, there was only a brief conversation and they agreed to speak in more detail later. (PCR III 98). In the second, they discussed the pre-trial problems with the plea agreement and the polygraph. (PCR III 98). Mr. Africano told Mr. Taylor that he never intended to be on the case for a long time, and that he was just trying to help out. (PCR III 98). When the plea deal broke down, Mr. Africano could not continue because he had previous commitments as the school

board attorney. (PCR III 98). Mr. Taylor also noted that Mr. Africano never mentioned the Defendant wanting a written plea agreement as a condition for taking the polygraph test. (PCR III 99).

Next, Mr. Taylor was asked about feeling sick near the end of the trial which led to him asking for a continuance. (PCR III 99). Mr. Taylor testified that during the trial he experienced a problem where his heart began racing and he became lightheaded. (PCR III 99). This problem repeated itself after the trial and he was eventually diagnosed about a year later. (PCR III 99).

However, Mr. Taylor did not believe that the problem was caused by the trial, nor did it effect his subsequent performance in the trial. (PCR III 99-101). He saw a doctor after the incident, but after relaxing that night everything was fine (within 3 hours). (PCR III 100). Mr. Taylor said that he was ready to go the next morning and that the problem did not affect his trial strategy, closing arguments, etc. (PCR III 101). Mr. Taylor testified that he still made the motions, arguments and presented all witnesses that he would have otherwise made or presented. (PCR III 101).

Finally, Mr. Taylor was questioned about his effectiveness in the penalty phase. Mr. Taylor testified that the follower

theory was the principle defense in the penalty phase. (PCR III 102). The theory was supported by evidence introduced in the guilt phase and by the testimony of the Defendant's mother, Kay Wainwright, in the penalty phase. (PCR III 102).

Mr. Taylor admitted that he did experience substantial problems in handling the penalty phase. The Defendant refused to participate in it, refused to testify, and would not permit Mr. Taylor to go into certain areas of potential mitigation. (PCR III 102). Mr. Taylor was eventually able to convince the Defendant to allow him to put his mother on the stand.

Ms. Wainwright testified that the Defendant was a loner who was often by himself and that he would go off with older people for days. (PCR III 103). However, when Mr. Taylor started to question the Defendant's mother about him being sexually abused, the Defendant stopped his defense counsel from asking further questions. (PCR III 103). Mr. Taylor then told the trial court that he was being absolutely stopped by the Defendant and no further questions were asked of the mother. (PCR III 104).

Post-conviction counsel questioned Mr. Taylor extensively about psychological evaluations from Tarboro Clinic, the University of North Carolina, and Carolina Psychiatric Associates which were conducted when the Defendant was a minor. (PCR III 105, 108, 113). However, Mr. Taylor noted that for

every positive issue in the evaluations there was negative information that would have to be explained. (PCR III 123). The reports contained information which was detrimental to the defense because they discussed his aggressiveness, his conduct disorder and his lack of remorse. (PCR III 121). In evaluating the use of these reports, Mr. Taylor discussed them with both co-counsel and Dr. D'Errico, who examined the Defendant at the time of trial. (PCR III 121). Dr. D'Errico observed that the prior evaluations often varied and that his own evaluation was that the Defendant suffered from antisocial personality disorder. (PCR III 117-118). Mr. Taylor testified that this disorder was not something that he wanted to get into, as it is often more harmful than beneficial. (PCR III 118). In the end, after going through all of the evaluations with Dr. D'Errico, Mr. Taylor decided that the evaluations would do more harm than good and that the better tactic was to try to get the beneficial information in through a non-professional witness. (PCR III 118, 121).

Mr. Taylor explained that he decided to use the Defendant's mother because she could testify to the Defendant's childhood problems, head injuries, treatment and the family's frustration. (PCR III 123). However, she could not be cross-examined on the fact that the Defendant was a sociopath. Also, she was a

sympathetic witness which the prosecution would find difficult to aggressively cross-examine. (PCR III 121-124).

However, Mr. Taylor also testified that the Defendant did not want him to use even this limited source of mitigation. (PCR III 124). He had to negotiate with the Defendant to use his mother and was finally allowed to do so only under narrow circumstances. (PCR III 126). Mr. Taylor described the process as "walking on egg shells" because the Defendant would stop him whenever he went into mitigation where the Defendant did not want him to go. (PCR 126). Mr. Taylor explained that he went into as much information as possible with the mother and was able to introduce quite a bit because the prosecution was not objecting. (PCR III 124, 126). Even so, in the end, the penalty phase case was limited because the Defendant would not let Mr. Taylor go into certain areas which were potential mitigation. (PCR III 119).

Investigatory Daniels' Testimony

The next witness to testify was Mallory Daniels, an investigator with the Hamilton County Sheriff's Office. (PCR III 140). Mr. Daniels was present at the State Attorney's Office on May 20 for the Defendant's polygraph. (PCR III 140). Mr. Daniels was not in the room when the Defendant made his

statements about raping the victim. (PCR III 142). However, Mr. Daniel's testified that through Sheriff Reid he heard that the Defendant had admitted raping the victim and had refused to take the polygraph test. (PCR
III 141). Furthermore, Mr. Daniel's testified that there was no mention of a written agreement that day. (PCR III 141).

State Attorney Blair's Testimony

The final witness was Jerry Blair, the State Attorney of the Third Judicial Circuit, who tried the case. (PCR III 143). According to Mr. Blair, the State first began negotiating a deal with the co-defendant wherein he could receive life if he cooperated and took a polygraph showing that he was not the triggerman. (PCR III 144-145).

After the negotiations began with the co-defendant, the Defendant's attorney approached the State in Mississippi and said that the Defendant wanted a deal. (PCR III 145). It was Mr. Blair's understanding that the Defendant approached the State because he thought the co-defendant was implicating him. (PCR III 146).

When the co-defendant failed his polygraph test, the Defendant was brought to Florida and offered the same deal. (PCR III 146). The Defendant would have to cooperate and he would

have to pass a polygraph test proving that he was not the triggerman. (PCR III 146).

Upon his return to Florida, the Defendant was appointed Mr. Africano as his attorney. Mr. Blair testified that at the time Mr. Africano was the most experienced capital litigator in the Third Circuit defense bar. (PCR III 147). The deal was conveyed to Mr. Africano and the polygraph test was set for May 20 at the State Attorney's Office in Live Oak, Florida. (PCR III 147).

However, on May 20, Sheriff Reid came to Mr. Blair and told him that the Defendant had confessed to raping the victim. (PCR III 148). Sheriff Reid wanted to know if this revelation would effect the deal. (PCR III 148). Mr. Blair told the Sheriff that it would not effect the deal because the main issue was whether the Defendant was a triggerman in the murder. (PCR III 148). This information was communicated to defense counsel and then the Defendant refused to take the polygraph test. (PCR III 148).

According to Mr. Blair, the State's primary concern was identifying the person principally responsible for the victim's death, and the Defendant still could have received the plea deal, despite having raped the victim, if he had passed the polygraph test as to the murder. (PCR III 149). Furthermore, Mr. Blair testified that substantial assistance forms were available at the State Attorney's Office and one could have been

provided if requested. (PCR III 150). However, no one requested that the deal be put in writing. (PCR III 150).

SUMMARY OF THE ARGUMENT

First, the trial court properly summarily denied the Defendant's ineffective assistance claim based on an alleged failure to preserve an issue concerning late discovery as to DNA results. This issue is procedurally barred because it was raised on direct appeal. Additionally, trial counsel fully raised and preserved the issue. Finally, this Court found the issue to be without merit on direct appeal, so there would be no prejudice even if trial counsel was somehow found deficient.

Second, the trial court properly summarily denied the Defendant's claim that trial counsel was ineffective for not preserving issues involving the Defendant's statements and admissions to the police. However, this issue is also procedurally barred because it was raised on direct appeal. Additionally, trial counsel fully raised and preserved the issue. Finally, this Court found the issue to be without merit on direct appeal so there would be no prejudice even if trial counsel was somehow found deficient.

Third, the trial court properly summarily denied the Defendant's claim that trial counsel was ineffective for not preserving issues involving the introduction of collateral crime evidence at trial. However, as with the first two issues, this issue is procedurally barred because it was raised on direct

appeal. Additionally, trial counsel fully raised and preserved the issue. Finally, this Court found the issue to be without merit on direct appeal so there would be no prejudice even if trial counsel was somehow found deficient.

Fourth, the trial court properly denied the Defendant's claim of ineffective assistance based on trial counsel's handling of an issue involving a microphone in the Defendant's cell. The testimony at the evidentiary hearing and the record demonstrate that trial counsel properly raised, argued and preserved this issue. Moreover, the Defendant failed to demonstrate any prejudice.

Fifth, the Defendant claims that trial counsel was ineffective for failing to preserve several different issues. However, the trial court properly entered a summary denial as to these issues because the grounds were all cognizable on direct appeal, they do not amount to an error which warranted an objection by trial counsel, and the Defendant also failed to show that he was prejudiced by any of the errors.

Sixth, the trial court properly denied the Defendant's claim regarding trial counsel's handling of the penalty phase mitigation. The testimony at the evidentiary hearing established that trial counsel conducted an effective investigation of mitigation, and entered into a reasonable

strategy based on the expert evaluations and the limitations imposed by the Defendant. Thus, the Defendant failed to show deficient performance of counsel or prejudice.

Seventh, the trial court properly denied the Defendant's ineffective assistance of counsel claim as to pre-trial counsel Africano. The testimony at the evidentiary hearing established that Mr. Africano provided adequate representation during plea negotiations and that it was Defendant's own inability to meet the plea conditions which created the problem.

Eighth, the trial court properly found that trial counsel was not ineffective when he introduced a letter written by the co-defendant. The letter was part of the reasonable trial strategy of portraying the co-defendant as a deceitful manipulator who was dominating and controlling the Defendant.

ARGUMENT

STANDARD OF PROOF FOR INEFFECTIVE ASSISTANCE OF COUNSEL

The Defendant's appeal of the denial of his Motion for Post-Conviction Relief consists primarily of ineffective assistance claims. To prove a claim of ineffectiveness, a defendant must prove that counsel's performance was deficient, i.e., "that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed" by the Sixth Amendment. Strickland v. Washington, 466 U.S. 668, 687 (1984). A defendant must also demonstrate prejudice, i.e., "that counsel's errors were so serious as to deprive the defendant of a fair trial." Id. Both parts of this test must be met: "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." Id.; Gudinas v. State, 816 So.2d 1095, 1101 (Fla. 2002).

There is "a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Id. To meet the first part of the Strickland test, therefore, a defendant has the burden of proving that counsel's representation was unreasonable under prevailing professional norms and that the complained about conduct was not the result of a strategic decision. Id. at 688-689; Schwab v. State, 814

So.2d 402, 408 (Fla. 2002); Cherry v. State, 781 So.2d 1040, 1048 (Fla. 2000), cert. denied, 534 U.S. 878 (2001). Furthermore, "[a]ttorney errors come in an infinite variety and are as likely to be utterly harmless in a particular case as they are to be prejudicial." Strickland, 466 U.S. at 693. Therefore, to meet the second part of the Strickland test, a defendant must demonstrate "a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different." Id. at 694; Waterhouse v. State, 792 So.2d 1176, 1182 (Fla. 2001).

I. THE TRIAL COURT PROPERLY SUMMARILY DENIED THE DEFENDANT'S MOTION FOR POSTCONVICTION RELIEF AS TO HIS CLAIM THAT TRIAL COUNSEL WAS INEFFECTIVE IN REGARD TO THE ADDITIONAL DNA EVIDENCE PROVIDED AFTER OPENING STATEMENTS.

The Defendant first claims that his trial counsel was ineffective in the way he preserved and argued the issue which arose when the State presented the Defendant with additional discovery evidence after opening statements. The trial court summarily denied this issue because it had been raised on direct appeal and, as such, it is procedurally barred.

As an initial matter, the State would agree and argue that the resolution of this issue on direct appeal functions as a procedural barr to the present claim. The Defendant had the opportunity to fully raise the discovery, suppression issue on direct appeal and, thus, the substance of this claim is now procedurally barred. See Lopez v. Singletary, 634 So.2d 1054, 1056 (Fla. 1993).

However, in addition to this issue being procedurally barred, the Defendant has also failed to show any basis on which trial counsel can be found ineffective. The Defendant argues that trial counsel did not properly preserve the issue and that he failed to raise the issue of prosecutor misconduct or discovery violation. However, trial counsel did properly

preserve the issue through a written motion and extensive argument before the trial court. (R. 1092-1095, 2851-2870).

Furthermore, contrary to the Defendant's contention, trial counsel did argue that the State had committed a discovery violation by turning over the evidence after opening arguments. (R. 1094, para. 11, 2855). In that argument, trial counsel argued that he had been prejudiced by late discovery and that it should be excluded. (R. 2855). Furthermore, this Court reviewed the issue for a discovery violation and found that the trial court's decision to grant a 24 hour continuance was a proper remedy for a discovery violation. Wainwright, 704 So.2d at 515 n.6. Thus, the Defendant is incorrect when he argues that trial counsel was ineffective for not raising a discovery violation as to the late DNA evidence.

In making his argument on appeal, the Defendant seizes upon this Court's words in Wainwright where it said that the Defendant "does not allege that the State deliberately withheld evidence or committed some other discovery violation." Wainwright, 704 So.2d at 515. Based on this statement, the Defendant argues that if trial counsel had argued either prosecutorial misconduct or a discovery violation that the result would have been different on appeal. However, as demonstrated above, trial counsel did argue a discovery

violation and this Court did review the trial court's handling of the issue under Fla.R.Crim.P 3.220(n)(1), which controls discovery violations. Wainwright, 704 So.2d at 514-515. Furthermore, the record on appeal and the arguments made to the trial court do not reveal any prosecutorial misconduct. (R. 2851-2870). In fact, they demonstrate that trial counsel was aware that additional testing was being done and that the results were provided within an hour and half of their receipt by the State Attorney's Office. (R. 2856). Thus, the Defendant's focus on this language fails to demonstrate that trial counsel did not fully raise and preserve this issue.

As set forth in Strickland, 466 U.S. at 687, the Defendant must prove two separate factors to establish that trial counsel was ineffective. First, the Defendant has to demonstrate that trial counsel's performance was deficient and second, he must prove that the deficiency prejudiced his defense.

The State would contend that the Defendant has failed to show that trial counsel was deficient under the first Strickland requirement. As set forth above, trial counsel fully argued and preserved the issue concerning late disclosure of DNA evidence and, based on the preservation of the issue, this Court fully reviewed the issue on its merits. Accordingly, because trial counsel fully preserved this issue, his performance was that of

a reasonably competent attorney and the Defendant's claim is without merit.

Additionally, the State would also argue that the Defendant cannot demonstrate the prejudice prong of Strickland. Because this Court reviewed the DNA issue on its merits and found no reversible error, and because the Defendant has failed to show that any other steps by trial counsel would have altered this result, the Defendant cannot establish prejudice. Accordingly, the Defendant has failed to establish that his trial counsel was ineffective.

Therefore, based on the fact that this claim is procedurally barred and that the record before this Court conclusively refutes the Defendant's claim of ineffective assistance of trial counsel, the State would contend that the trial court properly entered a summary denial. Asay v. State, 769 So.2d 974, 982 (Fla. 2000); Freeman v. State, 761 So.2d 1055, 1061 (Fla. 2000).

II. THE TRIAL COURT DID NOT COMMIT REVERSIBLE ERROR IN SUMMARILY DENYING DEFENDANT'S CLAIM OF INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL AS TO PRESERVATION OF THE ISSUE REGARDING DEFENDANT'S STATEMENTS AND ADMISSIONS.

Next, the Defendant argues that the lower court should not have entered a summary denial of his ineffective assistance of counsel claim based on allegations that trial counsel did not properly preserved an issue revolving around the Defendant's May 10, 11 and 20 statements to Sheriff Reid. The trial court summarily denied this issue because it had been raised on direct appeal and, as such, it is procedurally barred.

As an initial matter, the State would agree and argue that the resolution of this issue on direct appeal functions as a procedural bar to the present claim. The Defendant raised the issue of these statements in the first ground of his appeal. Accordingly, because this issue was fully raised and argued on direct appeal, the substance of this claim is now procedurally barred. See Lopez, 634 So.2d at 1056.

However, even assuming *arguendo* that the issue is not barred, it was properly denied because the existing record shows it to be wholly without merit. The Defendant argues that trial counsel was not effective because he failed to preserve these issues for appellate review. However, the record rebuts this

assertion.

First, the Defendant did raise this issue and a lengthy hearing was held on it. (R. 2577-2606). Thus, the issue was preserved for appeal. The issue was then raised on appeal. This Court specifically addressed it in detail and found no error. Wainwright, 704 So.2d at 513-514.

Accordingly, the Defendant has failed to show ineffective assistance of trial counsel under each of the two Strickland requirements - deficient performance and prejudice. First, the State would contend that the Defendant has failed to show that trial counsel was deficient under the first Strickland requirement because trial counsel fully raised and preserved the issue through a motion in limine and argument before the trial court. Accordingly, because trial counsel fully preserved this issue, his performance was that of a reasonably competent attorney and the Defendant's claim is without merit.

Second, the State would also argue that the Defendant cannot demonstrate the prejudice prong of Strickland. Because this Court reviewed the admissibility crime issue on its merits and found no reversible error, and because the Defendant has failed to show that any other steps by trial counsel would have altered this result, the Defendant cannot establish prejudice. Accordingly, the Defendant has failed to establish that his

trial counsel was ineffective.

Therefore, based on the fact that the record before this Court conclusively refutes the Defendant's claim of ineffective assistance of trial counsel on this issue, the State would contend that the trial court properly entered a summary denial of this issue. Asay, 769 So.2d at 982; Freeman, 761 So.2d at 1061.

III. THE TRIAL COURT PROPERLY SUMMARILY DENIED THE DEFENDANT'S CLAIM THAT TRIAL COUNSEL WAS INEFFECTIVE REGARDING THE ISSUE OF COLLATERAL CRIME EVIDENCE BEING INTRODUCED AT TRIAL.

Third, the Defendant argues that the trial court erred in summarily denying his claim of ineffective assistance of trial counsel based on the introduction of collateral crime evidence at trial. Specifically, the Defendant argues that trial counsel failed to preserve issues regarding the introduction of the Defendant's crimes in Mississippi and North Carolina. The trial court summarily denied this issue because it had been raised on direct appeal and, as such, it is procedurally barred.

As an initial matter, the State would agree and argue that the resolution of this issue on direct appeal functions as a procedural bar to the present claim. The Defendant raised the issue of the collateral crimes which took place in Mississippi and North Carolina in ground four of his direct appeal. Accordingly, because this issue was fully raised and argued on direct appeal, the substance of this claim is now procedurally barred. See Lopez, 634 So.2d at 1056.

Surprisingly, the Defendant argues that this issue was not raised on direct appeal, and that even if it was, it was not addressed on its merits. These contentions are wholly incorrect. Ground four on appeal concerned "the introduction of

evidence of other crimes". Wainwright, 704 So.2d at 513 n.4. Furthermore, as argued in the Defendant's Initial Brief on direct appeal, "[t]his included everything from the defendant's initial escape from a North Carolina prison on April 24, 1994, until his capture in a shootout with Mississippi police four days later." Initial Brief of Appellant at 32 (Case no. SC86,022). Thus, the issue of the Defendant's crimes in other states was argued on direct appeal.

Moreover, this Court addressed the issue on the merits. The Defendant claims that this Court's opinion in Wainwright only addressed issues (1), (2), (7) and (9). While it is true that this Court only discussed these four claims in detail, this Court specifically noted that it found issues 3-6 and 8 to be without merit. Wainwright, 704 So.2d at 516 n.9. Thus, this Court did not determine that any procedural bar existed as to issue 4. Instead, this Court addressed it on the merits, and found that there was no merit to Defendant's claims of error regarding the introduction of crimes from Mississippi and North Carolina. Therefore, this issue was addressed on direct appeal and is procedurally barred.

However, in addition to this issue being procedurally barred, the Defendant has also failed to show any basis on which trial counsel can be found ineffective. The Defendant argues

that trial counsel did not properly preserve the issue. However, trial counsel did properly preserve the issue through a written motion in limine and extensive argument before the trial court. (R. 694-695, 1406-1428). Trial counsel extensively argued that the evidence regarding the crimes in North Carolina and Mississippi should not be introduced; however, the trial court simply disagreed with his arguments. (R. 1428). The issue was then raised on appeal in Defendant's fourth appellate ground, and it was found to be without merit by this Court.

Accordingly, the Defendant has failed to show ineffective assistance of trial counsel under either of the two Strickland requirements - deficient performance and prejudice. First, the State would contend that the Defendant has failed to show that trial counsel was deficient under the first Strickland requirement because the trial court did fully raise and preserve the issue through a motion in limine and argument before the trial court. Accordingly, because trial counsel fully preserved this issue, his performance was that of a reasonably competent attorney and the Defendant's claim is without merit.

Second, the State would also argue that the Defendant cannot demonstrate the prejudice prong of Strickland. Because this Court reviewed the collateral crime issue on its merits and found no reversible error, and because the Defendant has failed

to show that any other steps by trial counsel would have altered this result, the Defendant cannot establish prejudice. Accordingly, the Defendant has failed to establish that his trial counsel was ineffective.

Therefore, based on the fact that this claim is procedurally barred and that the record before this Court conclusively refutes the Defendant's claim of ineffective assistance of trial counsel, the State would contend that the trial court properly entered a summary denial. Asay, 769 So.2d at 982; Freeman, 761 So.2d at 1061.

IV. THE TRIAL COURT PROPERLY DENIED THE DEFENDANT'S INEFFECTIVE ASSISTANCE CLAIM BASED ON TRIAL COUNSEL'S HANDLING OF THE ISSUE INVOLVING A MICROPHONE IN THE DEFENDANT'S CELL.

Fourth, the Defendant argues that the trial court erred in denying his ineffective assistance of counsel claim based on problems which arose from the placement of a microphone in the Defendant's jail cell. The Defendant claims that the microphone incident resulted in ineffective assistance of counsel because it caused a breakdown of the attorney-client relationship.

This argument is contrary to the findings of the lower court based on the evidentiary hearing which it held as to this issue. The lower court found that no ineffectiveness was shown as to this claim because trial counsel fully raised the issue with the trial court, and he testified that although he had a difficult relationship with the Defendant (which was exacerbated by the microphone incident), "he spent more time with the Defendant and they got back on track." (PCR I 109).

These findings of the trial court are supported by uncontroverted testimony of trial counsel Taylor at the evidentiary hearing and the record from the trial. The record from the trial reveals that trial counsel did raise the issue and a detailed hearing was held in which the Defendant, two prosecutors, and a Lieutenant at the Clay County Jail testified.

(R. 2393-2409, 2733-2736). It was determined that a microphone was placed in the Defendant's cell for security concerns and to augment the already existing listening devices in the jail. The conversations of the Defendant were not recorded, the microphone was turned off when the Defendant was with his attorney, and the State Attorneys were not privy to any confidential attorney-client communications.

Furthermore, at the evidentiary hearing trial counsel testified that he fully raised the microphone issue with the trial court. (PCR III 83-84). He admitted that the incident increased existing frictions between him and his client, but said that he was able to get the relationship back on track. (PCR III 86-87, 89, 95). Additionally, trial counsel had the court appoint a mental health expert to assist in dealing with the Defendant and provide him medication. (PCR III 85-87). The Defendant refused to testify on this issue at the evidentiary hearing. Thus, the State would contend that the lower court's factual determinations are supported by the recorded.

On appeal, the Defendant counters that in addition to raising these issues in the way the trial counsel did, counsel should have also specifically made a motion for mistrial based on the cumulative effect of all the problems with the attorney-client relationship, that he should have argued that fundamental

error occurred because we cannot know for certain if attorney-client conversations were overheard, and trial counsel should have challenged ex parte communications to the trial judge about the microphone from the Lieutenant at the jail. The Defendant argues that trial counsel failed to preserve these issues for appeal and was ineffective in addressing them.

However, the record contradicts the Defendant's arguments. First, as to the attorney-client relationship, trial counsel testified that he did bring his concerns to the attention of the trial court. (PCR III 90). He took steps to provide mental health treatment and medication to improve the relationship. (PCR. 85, 87). Trial counsel also worked to, and did in fact, bring his relationship with the Defendant back on-track. (PCR III 86). Thus, the Defendant's claim are without merit because (a) the relationship was brought back into a workable form, (b) trial counsel did preserve the issue for appeal, and (c) the cumulative effect could have been raised whether a motion was made specifically addressing the cumulative effect or not.

Second, as to the allegation that we cannot know for certain if attorney-client communications were overheard, it is specifically refuted by the hearing at trial. The evidence specifically demonstrates that communications were not overheard or recorded. The Defendant accepts that this hearing took

place, but he argues that it is not possible to rely on the trial court's inquiries. This argument is without merit and it fails to demonstrate how trial counsel was ineffective when he raised the issue, but lost based on evidence provided at a hearing on the issue. This issue was raised and preserved, and it could have been raised on direct appeal if appellate counsel had determined it had potential merit.

Third, as to the claim regarding alleged ex parte communications between the jail and the trial judge regarding the microphone, this issue is also without merit. The Defendant calls this issue an ex parte communication. However, the jail was not a party to the case, which is a requirement of ex parte communication.[3] Furthermore, the trial judge did not initiate the discussion, and it was only mentioned to him in passing during lunch. (R. 2404). Moreover, the trial judge told the jail Lieutenant that it would be wise to remove it, and he fully disclosed his conversation at the hearing. (R. 2404). Thus, there was no ex parte communication or other error for trial counsel to object to.

Based on the forgoing arguments, the State would argue that the Defendant has not demonstrated that trial counsel was

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[3]/ Black's Law Dictionary (5th Edition) defines "ex parte" as, "On one side only; by or for one party; done for, in behalf of, or on the application of, one party only."

ineffective in anyway or rendered deficient performance under the first prong of Strickland. Additionally, the Defendant has also failed to show that any prejudice occurred under the second Strickland prong. As to the alleged breakdown of the attorney-client relationship, no prejudice can be demonstrated because the record refutes the claim that there was an irreversible breakdown. As to the claim that attorney-client conversations could be overheard, there is no demonstrable prejudice because the record establishes that no such conversations were overheard or recorded.

Finally, as to the alleged ex parte conversations, the Defendant cannot show prejudice because he cannot establish that the conversations were ex parte or that if trial counsel had preserved the issue, it would have altered the outcome of his case or appeal. There is no question that a microphone was placed in the Defendant's cell and it was removed. There is also no question that it did not record any conversations between the Defendant and his attorney. The fact that the jail Lieutenant mentioned the microphone in passing to the trial judge during lunch and the trial judge suggested taking it out of the Defendant's cell does not create reversible error, and the Defendant has failed to establish how this issue meets the second prong of Strickland. Accordingly, the trial court

properly denied this issue.

V. THE TRIAL COURT PROPERLY SUMMARILY DENIED THE DEFENDANT'S INEFFECTIVE ASSISTANCE CLAIMS REGARDING THE PRESERVATION OF ISSUES PERTAINING TO JURY INSTRUCTIONS, PROSECUTORIAL MISCONDUCT, AND IMPROPER AGGRAVATORS.

Fifth, the Defendant argues that the trial court erred in summarily denying his claim of ineffective assistance of trial counsel based on the issues pertaining to jury instructions, alleged prosecutorial misconduct and improper use of aggravators. The Defendant raises seven alleged errors which he claims defense counsel was ineffective for not objecting to or preserving for appellate review. However, as the lower court properly found in denying these claims, these issues are cognizable on direct appeal,[4] and because the Defendant failed to raise the issues on direct appeal they are now procedurally barred despite his attempts to disguise the issue in terms of an ineffective assistance claim. Downs v. State, 740 So.2d 506, 509 n.5 (Fla. 1999); Sireci v. State, 773 So.2d 34, 41 n.10 (Fla. 2000); Thompson v. State, 759 So.2d 650, 663 (Fla. 2000).

In addition to being procedurally barred, these claims are also without merit. Each of the errors raised by the Defendant is either not error or not prejudicial and, accordingly, the

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[4]/ See e.g., McDonald v. State, 743 So.2d 501, 503-504 (Fla. 1999); Kilgore v. State, 688 So.2d 895 (Fla. 1996), cert. denied, 522 U.S. 832 (1997).

lower court properly enter a summary denial.

First, the Defendant claims that trial counsel was ineffective for not objecting to the arguments made by the prosecutor in his penalty phase closing argument. The State Attorney Jerry Blair argued that he had a solemn obligation as State Attorney to argue on behalf of the people of Florida that death was the only proper penalty, and that the jurors should also approach their duty in the same solemn fashion. (R. 3687-3688). The Defendant claims that by referencing his position as State Attorney, Mr. Blair was improperly relying on his status as a basis for the death penalty.

The State would disagree. Mr. Blair's comment does not imply that the jury should vote for death because he, the State Attorney, says its appropriate. Rather, Mr. Blair argues that he sees the responsibility of seeking the death penalty as a serious one, and he is arguing that the jury should also see their duty as a serious one. Accordingly, Mr. Blair's argument was not error[5] and trial counsel cannot be ineffective for failing to raise an issue which is without merit. Cf. Lawrence v. State, 831 So.2d 121, 135 (Fla. 2002) (appellate counsel not

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[5]/ In a somewhat incongruous argument, the Defendant claims that the State Attorney's argument is fundamental error. However, if that was the case, trial counsel would not have had to object to preserve the error for appeal, which is the basis for Defendant's ineffective assistance claim.

ineffective for not raising nonmeritorious claim, citing Kokal v. Dugger, 718 So.2d 138, 142 (Fla. 1998)), cert. denied, 123 S.Ct. 1575 (2003).

Next, the Defendant argued that trial counsel was ineffective for failing to object to some of the aggravating circumstances relied on by the prosecution. The Defendant claims ineffective assistance because trial counsel did not object to the following aggravators - (a)previously convicted of another violent crime, (b) murder was committed to avoid arrest or effect escape, (c) for pecuniary gain and (d) heinous atrocious and cruel.

However, trial counsel did object to the pecuniary gain aggravator. (R. 3660-3661). Thus, that aggravator was properly preserved for appeal and trial counsel was not ineffective as to it. In regard to the three remaining claims, there was no error to preserve.

First, the Defendant argues that the trial court improperly applied the previously convicted of a violent crime aggravator because the contemporaneous convictions against the murder victim could not be used. Fla. Stat. 921.141(5)(b). However, the only prior violent felony which was found to be applicable by the trial court was the aggravated assault on the Mississippi State Trooper. (R. 1171). Thus, this aggravator was properly

applied in rendering his death sentence.

Next, the Defendant argues that trial counsel was ineffective as to the avoid arrest or effect escape aggravator. Fla. Stat. 921.141(5)(e). However, the trial court found that the murder was committed as part of the defendants' escape from a North Carolina prison and that the evidence proved beyond a reasonable doubt that it was committed to prevent the victim from identifying them. (R. 1172). Thus, this aggravator was proper applied and trial counsel was not ineffective for not contesting it.

The last aggravator that the Defendant raises is the heinous, atrocious and cruel aggravator. Fla. Stat. 921.141(5)(h). This Court has consistently held that "fear, emotional strain, and terror of the victim during the events leading up to the murder may make an otherwise quick death especially heinous, atrocious and cruel." Lynch v. State, 28 Fla. L. Weekly S23, S24 (Fla. Jan. 9, 2003) (quoting James v. State, 695 So.2d 1229, 1235 (Fla.), cert. denied, 522 U.S. 1000 (1997)); see also Francis v. State, 808 So.2d 110, 135 (Fla. 2001), cert. denied, 123 S.Ct. 696 (2002); Farina v. State, 801 So.2d 44, 53 (Fla. 2001), cert. denied, 536 U.S. 910 (2002). Moreover, the focus is on the victim's perceptions of the circumstances as opposed to those of the perpetrator. Lynch, 28

Fla. L. Weekly at S24; Farina, 801 So.2d at 53; Hitchcock v. State, 578 So.2d 685, 692 (Fla. 1990), cert. denied, 502 U.S. 912 (1991).

In the present case, the victim was given time to ponder her death, she begged for her life, she was sexually assaulted en route to the place where she was killed, and she was sexually assaulted again at the murder location. (R. 1172). There she also endured approximately thirty minutes of terror before being strangled and shot. (R. 1172). The Defendant described the victim's actions during strangulation as being like "a puppy when you hit it on the head." (R. 1173). Finally, the medical examiner testified that death by strangulation takes 4 minutes and unconsciousness would have taken 30 seconds. (R. 1173). Based on this evidence the victim's death involved not only a slow, painful process, it also was preceded by the "fear, emotional strain, and terror" described in Lynch. Thus, the heinous, atrocious and cruel aggravator was properly applied in this case and trial counsel was not ineffective for not objecting to it.

In addition to these claims the Defendant also argues that trial counsel was ineffective for not objecting to the prosecutor's closing arguments about the HAC aggravator. The Defendant cites the following passage as the objectionable one-

> In all probability, based on the evidence in this case, Carmen Gayheart was still alive in some fashion after the strangulation, and, hence that's why she was shot twice in the back of the head. But Carmen Gayheart was obviously not conscious, based on the testimony. So for Carmen Gayheart, the last thirty seconds of consciousness of her life was a realization on her part that she had breathed her last breath. One of the most horrifying deaths imaginable for just about anybody is to be strangled to death or to be deprived of oxygen and an ability to breath (sic). It is a horrifying, terrifying experience and it was a horrifying and terrifying, a cruel and heinous and atrocious experience for Carmen Gayheart.
>
> Not only do we have the strangulation, but have the evidence of Carmen Gayheart being told to lie face down. Carmen Gayheart was no fool. Carmen Gayheart was a nursing student. All of the evidence would indicate that she was a bright, intelligent young lady. Carmen Gayheart had to know what lay ahead. She knew why she was being told to lie down on the ground there. Again, this adds to her terror. This adds to the heinous, the atrocious and the cruel nature of this crime.

(R. 3696-3697).

The Defendant claims that trial counsel should have objected to this passage because it is a "golden rule" violation, in that it asks the jury to place themselves in the role of the victim. This argument is incorrect. See Doorbal v. State, 837 So.2d 940, 957 (Fla. 2003)("Golden rule" violated when prosecutor asks jury to imagine what it felt like to have a taser used on them). The prosecutor's argument describes the death in vivid detail, however, that does not make the argument a golden rule violation. The prosecutor did not ask the jury to imagine how they would feel if they were the victim or to imagine this

happening to a loved one. Those types of arguments would be improper. Instead, the prosecutor simply described the conditions of the victim's painful, frightening death, and that type of description, while vivid, is not a golden rule violation. Pagan v. State, 830 So.2d 792, 812-813 (Fla. 2002) (no golden rule violation where the prosecutor did not ask the jury to place themselves in the victim's position, to imagine the victim's pain and terror, or to imagine that their relative was the victim), pet. for cert. filed (3/10/03). Hence, trial counsel was not ineffective for not objecting to this meritless issue.

Lastly, the Defendant argues that trial counsel was ineffective for failing to object to the prosecutor's argument regarding the testimony of witness Gary Gunter. In that argument, the prosecutor said-

> Now, let's look at Gary Gunter. Again, why should you believe Gary Gunter? Gary Gunter is a career criminal, he's spent most of his life in prison. I submit to you that the reason that Gary Gunter is worthy of belief is that Gary Gunter is a dying man. Not only has he lived in prison most of his life, but in all probability he's going to die in prison. He's dying of AIDS. And Gary Gunter wants to leave one small final legacy of decency. He tried to do what was right for one time in his life.
>
> Do you remember the conversation that he had with Don Gutshall? He went to him and says, "Look, I'm dying. I'm not going to get anything out of this, but what they did to that girl was just not right." Gary Gunter was telling the truth when he said that Anthony Wainwright admitted that he had raped Carmen Gayheart.

(R. 3580).

The Defendant claims that this argument is improper because the prosecutor is expressing his personal opinion of the witness's credibility. However, this argument is without merit because the argument is not an expression of the prosecutor's personal opinion. A prosecutor cannot argue based on his personal opinion or facts not in the record. See Cisneros v. State, 678 So.2d 888, 890 (Fla. 4th DCA 1996). However, that is not what occurred in this case. In this case, the prosecutor quite properly argued, based on the facts surrounding the witness's testimony, that Mr. Gunter's statements were worthy of belief. Thus, again there was no error for trial counsel to object to and he was not ineffective. See Jones v. State, ___ So.2d ___, 28 Fla. L. Weekly S140, S144 (Fla. Feb. 13, 2003).

Finally, even if any of these grounds can somehow be construed to warrant an objection, the Defendant has still not demonstrated prejudice. The Defendant has failed to make any showing that an objection to any of these grounds would have altered the result in the penalty phase or on appeal. See Cherry, 781 So.2d at 1053-1054. Accordingly, this claim is without merit, as well as being procedurally barred, and the lower court properly entered a summary denial as to it.

VI. THE TRIAL COURT DID NOT COMMIT REVERSIBLE ERROR IN DENYING THE DEFENDANT'S INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM REGARDING TRIAL COUNSEL'S RELATIONSHIP WITH THE DEFENDANT, AND PRESENTATION OF MITIGATION IN THE PENALTY PHASE.

Sixth, the Defendant contends that the trial court erred in denying his claims regarding an alleged failure to maintain a proper attorney-client relationship and an alleged failure to ensure proper mental health evaluations and penalty phase mitigation. The State would contend that the Defendants claims are without merit and are refuted by the testimony of trial counsel at the post-conviction evidentiary hearing.

As to the issue of the attorney-client relationship, this has already been addressed to a great extent in issue IV, *supra*. The testimony at the evidentiary hearing and the lower court's post-conviction findings establish that although the relationship was a roller-coaster one, trial counsel made efforts which kept the relationship on-track. (PCR I 109, III 86). Thus, as set forth above this issue is without merit.

As to the claim that trial counsel was ineffective as to his preparation of possible mental health mitigation, this claim is also rebutted by the testimony from the evidentiary hearing. The

trial court found that trial counsel had a mental health expert

appointed, but that the evaluation of the expert, Dr. D'Errico, was not favorable and was consistent with the evaluations from his youth. (PCR I 110). In fact, trial counsel testified that Dr. D'Errico diagnosed the Defendant as a sociopath who exhibits an anti-social personality disorder.[6] (PCR III 118, 121). Additionally, he testified that the mental health evaluations from the Defendant's youth also discussed his aggressiveness and conduct disorder. (PCR III 121). Furthermore, trial counsel stated that he discussed the prior evaluations and Dr. D'Errico's current evaluation with Dr. D'Errico and they came to the conclusion that based on the diagnosis (anti-social personality disorder), this was not an avenue that would be beneficial to pursue. (PCR III 117-118). In Van Poyck v. State, 694 So.2d 686, 692 (Fla.), cert. denied, 522 U.S. 995 (1997), this Court found that Van Poyck's counsel was not ineffective for deciding not to present the testimony of his expert witness. In Van Poyck, as in the present case, the expert informed trial counsel that he believed the defendant to be a sociopath and asked not to be called as a witness because he would not be helpful. Id; see also Bottoson v. State, 674 So.2d 621, 624 (Fla.)(ineffective assistance did not occur where psychiatrists'

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[6]/ This condition involves symptoms such as lack of remorse and manipulative behavior which is often considered to be unfavorable and distasteful to juries.

testimony would not have supported mitigating circumstances), cert. denied, 519 U.S. 967 (1996). Based on this analysis, the lower court found that the Defendant did not demonstrate that Dr. D'Errico's evaluation was incorrect or that trial counsel's reliance on the evaluation was unreasonable.

Next, the lower court found that the Defendant failed to demonstrate that trial counsel should have introduced more mitigation during the penalty phase. (PCR I 110). The lower court found that the only evidence which the Defendant suggested that trial counsel should have introduced was the prior evaluations from when he was younger. (PCR I 110). However, the lower court properly noted that the Defendant actively prevented his trial counsel from pursuing this type of mitigation. (PCR I 110, III 102, 124-126). Moreover, the lower court properly pointed out that trial counsel made a tactical decision to pursue mitigation only through the mother as opposed to the written evaluations or experts. (PCR I 110).

Trial counsel testified at the evidentiary hearing that for every point of mitigation in the written evaluations, there was negative information which would have to be explained away. (PCR III 123). Furthermore, the evaluations took place when the Defendant was 15-16 years old so the relevance would be reduced. (PCR III 123). Additionally, trial counsel seemed concerned

that the use of expert mental health witnesses would open the door to unfavorable testimony about the Defendant’s anti-social personality disorder, and would allow the State a great deal of ammunition in cross-examination. (PCR III 121-123).

Trial counsel testified that he decided to approach mitigation through a non-expert, sympathetic witness. Trial counsel felt that he could avoid cross-examination problems by using a witness who could not testify about technical aspects, would be difficult for the State to beat up on, and yet could still talk about the Defendant’s behavior problems as a child, his head injuries, mental health treatment and the family’s frustration. (PCR III 123). Using this approach, trial counsel testified that the State only briefly cross-examined the mother, and he was able to get a lot of testimony into evidence because the State was not objecting. (PCR III 124). Furthermore, trial counsel was able persuade the Defendant to permit him to use the mother in mitigation. (PCR III 124-126). However, even this strategy was undermined by the Defendant who stopped the mother’s testimony. (PCR II 119; R. 3684-3685, 3708-3709).

The lower court properly found that this was not a case in which trial counsel failed to investigate, rather it was a case where trial counsel thoroughly examined the issue and made a strategic decision based, in part, on the limitations imposed by

his client. (PCR I 111); State v. Bolender, 503 So.2d 1247, 1250 (Fla.)("Strategic decisions do not constitute ineffective assistance if alternative courses of action have been considered and rejected."), cert. denied, 484 U.S. 873 (1987). Accordingly, the lower court properly found that trial counsel's representation in the penalty phase was within that a reasonably competent attorney under the first prong of Strickland. See also Asay, 769 So.2d at 985-988 (counsel not ineffective for foregoing problematic mental health mitigation and relying only on non-statutory mitigation through mother).

Additionally, the lower court found that the Defendant failed to demonstrate any prejudice under the second Strickland prong. The lower court wrote, "[a]t the evidentiary hearing the Defendant did not show that the statutory mental mitigators existed or that a sanity defense could have been presented." (PCR III 111). Furthermore, the mother's testimony established the "several nonstatutory mitigating circumstances" which the trial court found and considered. (PCR III 111). Therefore, the trial court properly found that "there is no reasonable likelihood that anything from the evidentiary hearing would have resulted in a life sentence." (PCR III 112); see Porter v. State, 788 So.2d 917, 925 (Fla.), cert. denied, 534 U.S. 1004 (2001).

Because the Defendant's allegations were rebutted by the testimony at the evidentiary hearing and because the lower court's findings were supported by this evidence, the trial court did not err in denying this claim.

The Defendant also raises a sub-issue of possible mental retardation based on the recent case of Atkins v. Virginia, 122 S.Ct. 2242, 2250 (2002). However, this issue is not properly before this Court because the Defendant did not raise it in the proceedings below. (PCR I 3-33). Furthermore, the only evidence produced at the evidentiary hearing (which arose in the context of the mental health mitigation argument) was that the Defendant was not mentally retarded. (PCR III 107). Thus, the lower court did not err in not addressing an issue which was not raised, and which was completely refuted by existing testimony.

VII. THE TRIAL COURT DID NOT COMMIT REVERSIBLE ERROR WHEN IT DENIED DEFENDANT'S CLAIM THAT INITIAL COUNSEL AFRICANO WAS INEFFECTIVE IN HIS REPRESENTATION OF THE DEFENDANT DURING PLEA NEGOTIATIONS AND THE POLYGRAPH TEST.

Seventh, the Defendant argues that his original counsel, Victor Africano, was ineffective in his pre-trial representation of the Defendant. Mr. Africano represented the Defendant while he sought a negotiated plea from the State. As set forth at the evidentiary hearing, the conditions of the plea were that the Defendant must fully cooperate with the police and he must pass a polygraph examination proving that he was not the person who actually killed the victim. (PCR III 66, 74, 146).

The Defendant argues that Mr. Africano was ineffective in that he failed to get the plea agreement reduced to writing, he allowed the Defendant to speak to Law Enforcement Officers outside of his presence and he failed to properly inform him and explain the plea agreement. The Defendant is incorrect in each of these arguments.

An evidentiary hearing was held on these issues, but Mr. Africano did not testify because he was terminally ill at the time of the hearing. (PCR I 112). However, the evidence which was introduced established that neither deficient performance of counsel, nor prejudice, occurred.

As to the first issue, putting the plea deal in writing, the Defendant has failed to show how trial counsel was ineffective. The Defendant's only contention is that if he had the deal in writing, he would have gone ahead and taken the polygraph test. This self-serving testimony of the Defendant was rejected by the lower court. Instead, the lower court accepted the testimony of Sheriff Reid and State Attorney Blair who both testified that the Defendant refused to take the polygraph after confessing that he raped the victim. (PCR I 112, III 68-73, 147-149). Moreover, the Defendant's claim is also rebutted by his confessions to Robert Murphy and Gary Gunter, who both testified that the Defendant confessed to an active role in the murder. (R. 2709-2710, 2742-2744). The Defendant's argument about having the plea agreement in writing is premised on his contention that he did not take an active role in the murder, that he would have passed the polygraph test, and that he was only prevented from obtaining the plea bargain by this attorney's deficiencies. Instead, the Defendant's confessions show that he did actively participate in murder, and that his true reason for not taking the polygraph test is that he knew he would fail.[7]

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[7]/ The Defendant points out on appeal that his co-defendant took a polygraph examination and failed; implying that it was the co-defendant who actually did the killing. However, at the

Additionally, the testimony at the evidentiary hearing established that written forms were available at the State Attorney's Office on the day of the polygraph examination and that if the Defendant had wanted the deal reduced to writing, it would have been done. (PCR III 150). However, as the evidence demonstrates, the problem did not arise from Mr. Africano not asking for a written plea bargain, rather it arose from the fact that the Defendant could not have met the terms of the bargain because he actively took part in the murder.

Secondly, the Defendant argues that Mr. Africano was ineffective for allowing him to speak to police while Mr. Africano was not present. However, this argument ignores the reality of the situation when the statements were made. First, Mr. Africano was present when the May 9th and May 20th statements were made. (PCR III 65-67, 75-76 (May 9th); PCR III 68-69 (May 20th)). Second, during that time frame, the Defendant was trying to secure a plea bargain and, as part of that deal, he was required to fully cooperate and freely give statements to the police. Thus, whether Mr. Africano was present or not, the Defendant would still have had to answer the police officer's

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murder two shots were fired from a .22 bolt action rifle, requiring the rifle to be reloaded before the second shot took place. From this the State asserted at the evidentiary hearing that each defendant took one shot and both were equally culpable. (PCR III 155).

questions in order to continue to proceed with the deal. Accordingly, the Defendant cannot show ineffective assistance or prejudice as to this point.

Finally, the Defendant contends that Mr. Africano did not fully explain the plea deal to him. However, this contention is also rebutted by the evidence. The evidence shows that the Defendant first had the deal explained to him in Mississippi, and then by Mr. Africano in Florida. In fact, his own testimony at the evidentiary hearing demonstrates that he understood he would have to cooperate and pass the polygraph test in order to receive the plea bargain. However, as discussed above, it was not a lack of understanding that undermined the deal, but the fact that the Defendant knew he could not pass the polygraph test.

Thus, because the Defendant cannot show that Mr. Africano's representation of him was substandard or that any of those alleged errors prejudiced him, the Defendant has failed to substantiate his claim of ineffective assistance. Therefore, the lower court properly denied this ground.

VIII. THE TRIAL COURT DID NOT COMMIT REVERSIBLE ERROR IN DENYING THE DEFENDANT'S CLAIM OF INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL BASED ON THE TACTICAL DECISION TO INTRODUCE A LETTER WRITTEN BY THE CO-DEFENDANT.

In the Defendant's eighth and final claim, he argues that the lower court erred in denying his ineffective assistance claim based on counsel's decision to introduce a letter written by the co-defendant. The Defendant argues that because the co-defendant's letter implicated the Defendant, he was, in effect, admitting guilt by introducing it. The Defendant also argued that it constituted a Bruton-type problem and that trial counsel should have sought the Defendant's consent before introducing it.

First, the decision to introduce the letter was not an admission of guilt. Trial counsel's theory of the case was to show that the co-defendant was the primary actor in the crimes; that he was a liar, leader, planner, schemer and culprit; and that the Defendant was under the co-defendant's dominion and control. (PCR III 91-94, 132-134). Trial counsel testified, and the lower court found, that the introduction of the letter was a strategic decision designed to further demonstrate that the co-defendant was a liar who would say anything to save his skin. (PCR I 113, III 91-93).

Furthermore, the introduction of the letter must also be viewed in context of the overall case. Trial counsel had introduced the testimony of Sheriff Reid and Mallory Daniels who already demonstrated that the co-defendant was liar, as well as the testimony showing that it was the co-defendant who shot at the State Trooper in Mississippi. (PCR III 132-133). In this context, it was trial counsel's opinion that co-defendant's letter would be seen as duplicitous and manipulative and thus furthering the theory that he was the primary culprit. (PCR III 132). Trial counsel specifically testified that it was never his theory to conceded guilt and that he found it inconceivable that anyone would have believed the co-defendant's statement that the Defendant was solely at fault. (PCR III 131-132). The lower court agreed and found that the decision was a reasonable, strategic one. (PCR I 113). See State v. Williams, 797 So.2d 1235, 1240 (Fla. 2001) ("[C]ounsel's strategy in this case 'amounted to a tactical argument well within the discretion of counsel, so obvious from the record that no evidentiary hearing was necessary.'") (quoting McNeal v. Wainwright, 722 So.2d 674, 676 (11th Cir. 1984)).

Second, the Defendant's claim that the introduction of the letter constitutes a Bruton-type violation is without merit. The Defendant is incorrect in asserting this argument because it

would not be a violation of Bruton v. United States, 391 U.S. 123 (1968) for the Defendant to introduce the statement of a co-defendant. A Bruton problem arises when the State introduces a statement of one co-defendant in a joint trial which implicates the other. See id. at 127-128. In such cases, the rule allows a co-defendant to prevent this type of potentially prejudicial evidence. However, the Bruton rule is designed to protect a defendant, not prevent him from pursuing a valid trial strategy.

In the present case, the Defendant argues that trial counsel should not have introduced the co-defendant's letter because Bruton would have prevented the State from doing so. This argument misses the point. The Defendant chose to introduce the statement in this case because it was perceived to be beneficial to his overall theory of the case. Thus, the issue is not one of Bruton. Rather it turns back to a question of trial strategy and, as set forth above, that strategy was a reasonable one.

Third, the Defendant argues that trial counsel should have obtained the Defendant's specific consent before introducing the letter. However, this claim is based on the Defendant's assertion that trial counsel was admitting guilt in introducing the letter. Although the law is clear that trial counsel should obtain the consent of his client before admitting guilt, that rule is not applicable here. The discussion above demonstrates

that trial counsel did not admit guilt in this case, thus there was no requirement to obtain specific consent.

Furthermore, the testimony at the hearing demonstrates that trial counsel took all reasonable steps to apprise his client about the strategy and introduction of evidence in support of that strategy. (PCR III 95-96). Trial counsel testified that he kept the Defendant apprised of what was going on and visited with him daily about strategy during the trial. (PCR III 95-96). According to trial counsel, the Defendant was well aware of the theory of the case and the letter was consistent with that theory. (PCR III 96). Furthermore, trial counsel said that because of the fact that the Defendant was one of the more difficult clients he had represented, he tried to put in extra effort in consulting with him. (PCR III 95). Thus, as the lower court found, trial counsel's actions were not unreasonable and did not result in ineffective assistance of counsel.

Finally, the Defendant failed to introduce any evidence which demonstrated that trial counsel's decision to introduce the letter resulted in any prejudice to him. The Defendant did not introduce any evidence which would prove that the letter had any effect other than the intended one, nor did the Defendant specifically show that the letter was otherwise harmful given the great weight of other evidence proving his guilt, including

the Defendant’s own confessions.

CONCLUSION

For all the reasons stated above, this Court should affirm the trial court’s order denying the Defendant postconviction relief.

Respectfully submitted,

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Undersigned counsel hereby certifies that a true and correct copy of the foregoing was mailed, postage prepaid, on this ____ day of May, 2003, to:

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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).

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Attorney for the State of Florida